Kidero & 4 others v Waititu & 4 others (Petition 18 & 20 of 2014 (Consolidated)) [2014] KESC 11 (KLR) (29 August 2014) (Judgment)

Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR

Neutral citation: [2014] KESC 11 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 18 & 20 OF 2014 (CONSOLIDATED)

KH RAWAL, DCJ & VP, WM MUTUNGA, CJ & P, PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

AUGUST 29, 2014

BETWEEN

EVANS ODHIAMBO KIDERO ..... 1ST APPELLANT

JONATHAN MUEKE ..... 2ND APPELLANT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) ..... 3RD APPELLANT

ISAAC HASSAN (RETURNING OFFICER OF THE NATIONAL TALLYING CENTRE) ..... 4TH APPELLANT

THE NAIROBI COUNTY RETURNING OFFICER ..... 5TH APPELLANT

AND

FERDINAND NDUNGU WAITITU ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY-GENERAL ..... 2ND RESPONDENT

THE DIVISIONAL COMMANDING OFFICER (DCIO), GIGIRI POLICE STATION ..... 3RD RESPONDENT

THE DIVISIONAL COMMANDING OFFICER (DCIO), KAYOLE POLICE DIVISION NAIROBI ..... 4TH RESPONDENT

THE INSPECTOR-GENERAL OF THE NATIONAL POLICE SERVICE ..... 5TH RESPONDENT

(Being an appeal from the Judgment and Order of the Court of Appeal sitting at Nairobi (G.B.M Kariuki, Warsame & Kiage JJ.A) delivered on the 13th May, 2014 in Nairobi Civil Appeal No. 324 of 2013)

Rules on timelines of filing and determining electoral disputes are non-negotiable

Reported by Teddy Musiga and Charles Mutua

Election Law *– election petitions – timeliness in filing election petitions – mandatory nature of timelines in election petitions – claim where an election appeal was filed 72 days after the date of the judgment of the trial court whereas electoral laws provided for filing of election appeals to the Court of Appeal within 30 days of that judgment – whether a certificate of delay under the Court of Appeal Rules was entertained in electoral disputes – Constitution of Kenya, 2010, article 87; Elections Act (cap 7) section 85A (a); Court of Appeal Rules (Cap 9 Sub Leg) Rule 82.*

Constitutional Law *- fundamental rights and freedoms - right to fair trial – remedies to breach of right to fair trial – whether an election could be annulled on the grounds of alleged breach of right to fair trial – Constitution of Kenya article 50.*

Brief facts

The matter had its origins in the High court, where the first respondent (Ferdinand Waititu) challenged the election of the first appellant (Evans Kidero). The petitioner at the High court (Ferdinand Waititu) based his petition on the main allegation that the election of the 1st appellant herein (respondent then) had not been conducted in accordance with the principles embodied in article 86 of the Constitution. The High court (by majority (and Warsame, J dissenting) upheld the election of the first appellant thereby dismissed the petition and made the determination that the election was conducted in accordance with the electoral principles set out in the Constitution. The petitioner being aggrieved by that decision moved to the Court of Appeal. However, the appeal was filed 72 days after the delivery of the trial court judgment notwithstanding provisions of section 85A of the Elections Act that provided that electoral appeals from the High Court to the Court of Appeal had to be filed within 30 days of the delivery of the High Court judgment.

In admitting and entertaining the appeal, the Court of Appeal opined on two major grounds that; firstly, section 85A (a) of the Elections Act being a statutory timeline, was not as mandatory as the timelines named in the Constitution itself; and so a court of law could extend the period within which an intending petitioner could lodge an appeal beyond the 30 day limit prescribed in the Elections Act. According to the appellate court, such an extension was proper in the interest of justice, especially where there had been delay in preparation for court proceedings. The court further held that Parliament could not have intended to shut out a litigant from filing an appeal as that would offend other constitutional provisions such as articles 10, 20 and 25(c). Secondly, that on the strength of rule 35 of the Election (Parliamentary and County Elections) Petition Rules, the Court of Appeal Rules were applicable in their totality to election petition appeals before the court; and so rule 82 (1) of the Court of Appeal Rules (which provided for the certificate of delay) could apply to extend the time for filing and election petition appeal beyond the 30 day limit prescribed by section 85A of the Elections Act.

The appellants herein (then respondents) were aggrieved by that decision and moved to the Supreme Court for a final determination.

Issues

i. Whether the Court of Appeal acted without jurisdiction by entertaining an appeal filed 72 days after the delivery of the trial court's decision.
ii. Whether the Court of Appeal could entertain and determine appeals filed out of time where the delay in filing those appeals emanated from judicial processes/ bureaucracies at the registries.
iii. Whether the Court of Appeal disregarded the doctrine of *stare decisis*, on the question of timeliness, on the issue of scrutiny, and on the burden and standard of proof by failing to apply binding decisions of the Supreme Court in contravention of article 163(7) of the Constitution.
iv. Whether an election could be nullified on the basis that a party did not get a fair trial before the trial court.

Held

1. The guiding principles to be taken into account by parties who sought to predicate their appeals upon article 163(4) (a) of the Constitution were:
    a. a court's jurisdiction was regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;
    b. the chain of courts in the constitutional set-up had the professional competence to adjudicate upon disputes coming up before them; and only cardinal issues of law or of jurisprudential moment deserved the further input of the Supreme Court;
    c. not all categories of appeals lay from the Court of Appeal to the Supreme Court under article 163(4)(a); under that head, only those appeals from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court;
    d. and under that same head, the lower court's determination of an issue which was the subject of further appeal, had to have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;
    e. an appeal within the ambit of article 163(4)(a) was one founded on cogent issues of constitutional controversy;
    f. with regard to election matters, not every petition-decision by the Court of Appeal was appealable to the Supreme Court; only those appeals arising from the decision of the Court of Appeal, in which questions of constitutional interpretation or application were at play, lay to the Supreme Court.
2. Article 163(4)(a) of the Constitution provided that appeals could lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution. The operative words (interpretation or application) carried different meanings. Interpretation of the Constitution involved revealing or clarifying the legal content, or meaning of constitutional provisions for purposes of resolving the dispute at hand. The basic reference point in constitutional interpretation was the text. On the other hand, application of the Constitution was a more dynamic notion. It entailed creatively interpreting the Constitution to eliminate ambiguities, vagueness and contradictions in furtherance of good governance. Quite often, it involved interpreting the Constitution in such a manner as to adapt it to changing circumstances in the community, with care not to usurp the role of the legislature.
3. The Constitution provided for the general principles of the electoral system; principles that stood alongside prescriptive norms. Where disputes arose with regard to the interpretation and application of such principles and norms in election petitions, the Supreme Court as the apex court could not gaze helplessly when moved by litigants.
4. The question of timeliness in filing election petitions, and whether the Court of Appeal erred in the interpretation of section 85A of the Elections Act vis-a-vis article 87(1) of the Constitution and the allegation that the appellate court elevated and applied a civil litigation rule (subsidiary legislation) to an election dispute, beyond and in breach of section 85A(a) and by extension, the Constitution itself were all pertinent constitutional controversies that invited the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution for a final interpretation or application of the Constitution.
5. Under section 85A (a), the 1st respondent ought to have filed an appeal within 30 days from the date of the judgment (September12, 2013) that would have been October 10, 2013. However, the appeal was filed on 22/11/2013) 72 days from the date of the judgment of the High Court.
6. The question of timeliness in filing and determining election petitions as set by the Constitution and the Elections Act, section 85A(a) were neither negotiable nor could they be extended by any court for whatever reason. Section 85A of the Elections Act was neither a legislative accident nor a routine legal

prescription. It was a product of a constitutional scheme that required electoral disputes to be settled in a timely fashion.

7. The Court of Appeal erred in law by choosing to depart from the legal principles established by itself and affirmed by the Supreme Court on the timeliness in resolving electoral disputes and without specifically distinguishing the earlier cases in accordance with the normal judicial practice.

8. The Court of Appeal's majority position even if founded upon notions of "justice and fairness" had overlooked clear imperatives of the law that were overriding. They overlooked the law of precedent, expressly declared in article 163(7) of the Constitution. They failed to recognize that section 85 A of the Elections Act was directly born of article 87 of the Constitution. They had not taken into account that the ideals of justice were by no means the preserve of the intending appellant and that they had to apply to the electorate as a whole. They failed to recognize that the overall integrity of the democratic system of governance was sealed on a platform of orderly process, of which the judiciary was the chief steward and in which the course of justice already charted by the superior courts was to be methodically nurtured.

9. The majority on the appellate bench held that rule 82(1) of the Court of Appeal Rules was applicable to the matter before them, with the effect of setting in motion the computation of time such as would have excluded the time taken by the High court in the preparation of the proceedings. If that rule were to be applied to election petition appeals, as the majority appellate judges held then it meant that an election petition appeal could be filed within as much as 60 days of the filing of the notice of appeal.

10. That rule provided in addition that the time taken to prepare the proceedings be excluded from the computation of the sixty days. That rule therefore, ousted the provisions of section 85A (a) of the Elections Act, regarding the time within which an appeal had to be filed. Such a rule if applicable defeated the object of efficient electoral dispute settlement under the Constitution. Further, an instrument of subsidiary legislation (Rule 82 of the Court of Appeal rules) could not override the provisions of an Act of Parliament (section 85A of Elections Act).

11. Accordingly, the instant petition was filed outside the mandatory time prescribed by section 85A of the Elections Act. The proceedings at the High Court were ready for collection on the October 9, 2013 notwithstanding the fact that the certificate of delay was issued on October 30, 2013. The petition of appeal ought to have been filed on or before the close of day on October 10, 2013. Therefore the appellate court erred in law by admitting and determining an incompetent appeal, the same having been filed out of the time prescribed by the peremptory provisions of section 85A (a) of the Elections Act as read with article 87(1) of the Constitution.

12. The majority judgment of the Court of Appeal annulling the election of the first appellant was declared a nullity for all purposes. And since no further issues of significant constitutional character had come up, there was no need to render an opinion in respect of other questions, upon their merits.

Concurring Opinion, N Ndungu, SCJ

13. The aspect of time, when filing an election petition was couched in mandatory language under articles 87 and 105 of the Constitution of Kenya, 2010. After declaration of the election results, the intended petitioner had the duty to file a petition within 28 days as required by the Constitution. Failure to do so rendered the petition nugatory. The petitioner in such a case required neither judgment nor proceedings from the Independent Electoral and Boundaries Commission. All the petitioner required was the actual declaration of election results by the returning officer (which he received on the polling day) as such the responsibility of actualizing the right to challenge the election results rested on the petitioner.

14. Article 50(1) of the Constitution guaranteed the right to a fair trial. The events that unfolded at the registry and the delay in the release of proceedings should not have compromised the 1st respondent's inalienable right to a fair trial. Thus the Supreme Court had to respond to the constitutional command

that every person was entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

15. Section 59 of the Interpretation & General Provisions Act, Cap 2 provided for the construction of power to extend time to the effect that where a statute prescribed a time for doing an act or taking a proceeding and power was given to a court or other authority to extend that time, then unless a contrary intention appeared, that power could be exercised by the court although the application for extension could not be made until after the expiration of the time prescribed.

16. Rule 82 of the Court of Appeal Rules that provided for extension of time was not necessarily in conflict with, or inferior to the Elections Act (section 85A) because section 59 of the Interpretation & General Provisions Act, Cap 2 provided a bridge between the Elections Act and the Court of Appeal Rules. The Elections Act prescribed time for doing an act but did not expressly state that the time could not be extended within the confines of section 59 and the Court of Appeal Rules. If Parliament had intended for the Court of Appeal Rules not to apply, it would have stated so. Therefore the Court of Appeal was right in admitting and hearing the 1st respondent's appeal in the circumstances.

17. The prerequisites of article 259 of the Constitution required the Constitution to be interpreted in a manner that permitted the development of the law. As such, regard to precedents of the Supreme Court could not bar lower courts from adhering to those progressive requirements. As an interwoven system of justice, the responsibility of every judge was to ensure that the mandated exercise of judicial authority was followed and that ultimately, justice was delivered within the confines of the Constitution.

18. Judgments of a court of final appeal stood on a different basis from those of subordinate courts. A departure therefore had to be a rare phenomenon justifiable only on the basis of consideration of the deepest sentiments of justice occasioned by a complete disassociation of the factual situation between the previous case and that being considered. It had to be apparent that the test of experience and passage of time had rendered the rule untenable of application in the circumstances then prevailing. The settlement of electoral law by the Supreme Court eliminated any difficulty in identifying the *rationes* set forth as binding precedent.

19. The Court of Appeal considered in great depth and in actual circumstance, the bounds of section 85A of the Elections Act *vis a vis* the Rules governing the court. That examination was well within the bounds of their power and the same could not be faulted for failure to abide by article 163(7) of the Constitution.

20. Under section 83 of the Elections Act, an election could only be declared void if that election did not substantially comply with the written law– the Constitution, the Elections Act and Regulations made thereunder. Where there was substantial compliance with the written law in an election, the irregularities had to indeed have affected the result of the election for that election to be invalidated. The emphasis then was not what happened subsequent to the declaration of the results, but what happened before and in the process of the election up and until the declaration of the result.

21. The principles to be considered before an election could be annulled were: first, if it was demonstrated that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such an election was not to be invalidated only on the ground of irregularities. Secondly, where, it was shown that the irregularities were of such a magnitude that they affected the election result, then such an election stood to be invalidated and thirdly, mere allegations of procedural or administrative irregularities and other errors occasioned by human imperfection were not enough, by and of themselves, to vitiate an election.

22. Under article 25(c) of the Constitution, the right to a fair trial could not be limited. However, it was an individual's right – a right in *personam* and the remedy for the violation of such a right could not be nullification of an election since an election reflected the views of the people expressed through the vote, not just rights of individuals and therefore courts had to be careful not to exercise their power in such a manner as to interfere with the peoples' expression in instances where the proven election

irregularities did not affect the election results. Therefore, the Court of Appeal erred in nullifying the 1st and 2nd appellant's election as a remedy for the violation of a fair trial.

23. Article 23(3) of the Constitution, 2010 laid out the remedies available for the enforcement of the Bill of Rights as declaratory orders, injunction, conservatory orders, declaration of invalidity of any law, order of compensation and judicial review. On the other hand, section 21 of the Supreme Court Act gave the Supreme Court general powers to make any orders or grant appropriate reliefs.
24. Whereas an order of retrial was the usual remedy granted for breach of fair trial, in the instant case, an order of retrial would not have been possible since the jurisdiction of an election court to hear and determine an election petition expired after six months of filing the petition.
25. The six months period of the High court and the Court of Appeal's power as an election court had expired. Under section 21 of the Supreme Court Act, the Supreme Court could remedy the denial of a fair trial by creating a window for the cross examination of the returning officer by the 1st respondent. In so doing, the court would have fully remedied the 1st respondent's denial of the right to fair hearing since he would have been able to challenge the evidence of the returning officer in the same way as he would have done had he been granted an opportunity by the High Court as the most appropriate remedy in the circumstances.
26. Costs followed the event and the awarding of costs to one successful party should not be seen as a punitive measure.

Appeal allowed.

Orders

i. *The decision of the Court of Appeal delivered on May 13, 2014 was annulled.*
ii. *The judgment of the High Court dated September 10, 2013 was reinstated.*
iii. *The Supreme Court reaffirmed the status of the 1st appellant as the duly elected Governor of Nairobi County.*
iv. *Parties to bear their own costs at the High Court, Court of Appeal and Supreme Court.*

Citations

Texts

Advocates Remuneration Order (2009) Paragraph 16

Statutes

Kenya

Constitution of Kenya, articles 1, 3, 25(c); 27; 38; 50(1); 81(e); 86; 87; 88(5); 163(4)(a); 163(7); 165; 180(4); 259(8) - (Interpreted)

Elections Act (cap 7) section 75, 80, 82, 83, 85A - (Interpreted)

Elections (Parliamentary and County Elections) Petition Rules, 2013 (cap 7 Sub Leg) rules 8(a); 10; 12(2)(a); 21; 33(2); 33(4); 36 - (Interpreted)

Court of Appeal Rules (2010) rule 82 - (Cited)

Interpretation and General Provisions Act (cap 2) section 31(b) - (Interpreted)

Statutory Instruments Act (Act No. 23 of 2013) section 13(a) - (Interpreted)

Cases

Kenya

1. ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & Others*** Supreme Court Petition No. 10 of 2013; [2014] eKLR
2. ***Mary Wambui Munene v. Peter Gichuki King'ara & Others*** **Supreme Court Petition No. 7 of 2014; [2014] eKLR**
3. **Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others (Munya 1 and Munya 2)**

4. **Raila Odinga & Others v. IEBC & Others**
5. **Ferdinand Waititu v. IEBC & Others**
6. **Wavinya Ndeti v. IEBC & Others**
7. **Nicholas Kiptoo Arap K. Salat v. IEBC & Others**
8. **Diamond Trust Kenya Ltd v. Daniel Mwema Mulwa**
9. **Erad Suppliers & General Contractors Limited v. National Cereals and Produce Board**
10. **Patrick Ngeta Kimanzi v. Marcus Mutua Muluvi & Others**
11. **Kakuta Maimai Hamisi v. Peris Pesi Tobiko & Others**
12. **Richard Ncharpi Leiyagu v. IEBC & Others**

Advocates Mentioned

1. **Mr. Nowrojee** – Senior Counsel for the 1st and 2nd appellants
2. **Prof. Tom Ojienda** – Senior Counsel for the 1st and 2nd appellants
3. **Mr. Oduol** – Counsel for the 1st and 2nd appellants
4. **Mr. Nyamodi** – Counsel for the 3rd, 4th, and 5th appellants
5. **Mr. Muite** – Senior Counsel for the 1st respondent
6. **Mr. Abdullahi** – Counsel for the 1st respondent
7. **Mr. Kinyanjui** – Counsel for the 1st respondent

JUDGMENT

A. Introduction

1. This is an appeal against the Judgment of the Court of Appeal sitting in Nairobi, delivered on 13th May, 2014 in Civil Appeal No. 324 of 2013, overruling the decision of the High Court sitting at Nairobi (Mwongo J.), in Election Petition No.1 of 2013.The Court of Appeal decision invalidated the election of the 1st and 2ndappellants as the duly-elected Governor and Deputy Governor of Nairobi County.

B. Background

(a) Proceedings in the High Court

2. The 1st appellant was declared the duly-elected Governor of Nairobi County following the gubernatorial elections held on 4th March, 2013. He received a total of 692, 483 votes. The 1st respondent, whocamesecond with a total of 617, 839 votes,subsequently filed Election Petition No. 1 of 2013 at the High Courtat Nairobi,dated 11th March, 2013,challenging the election of the 1st appellant.

3. The petition was filed before Judges of election Courts had been duly designated and gazetted;hence it was initially heard at the Constitutional Division of the High Court. In a Ruling dated 21st March, 2013 the High Court (M. Ngugi, J.) held that the petition was filed within time, and directed that it be determined in accordance with the Elections Act,2011 (Act No. 24 of 2011) and the Elections (Parliamentary and County Elections) Petition Rules, 2013.Upon gazettement of the Election Court Judges (Gazette Notice No. 5381 dated 19th April, 2013),Mwongo, J. was designated to hear and determine the matter.

4. The following issues were raised for determination by the Court:

   (i) whether the election for Nairobi County Governor was conducted in accordance with the principles laid down in the Constitution and the electoral law;

(ii) whether the results of the election for Nairobi County Governor were announced through a valid Form 36;

(iii) whether the 1st appellant was credited with highly inflated and non-existent votes;

(iv) whether the election for Nairobi County Governor was marred by electoral malpractices;

(v) whether the alleged electoral malpractices vitiated the election for Nairobi County Governor;

(vi) whetherthe 1st and 2nd appellants were validly elected as Governor and Deputy Governor respectively; and

(vii) who was to bear the costs of this Petition, and in what proportion.

5. During the course of trial, several Rulings were made including: a Ruling dated 26th June, 2013 limiting the cross-examination of the 5th appellant, the Returning Officer for Nairobi County; and one dated 9th July, 2013 dismissing the 1st respondent's request for scrutiny. In a Judgment dated 10th September, 2013, the trial Court dismissed the petition and confirmed the 1st appellant as the duly-elected Governor of Nairobi County.

(b) Proceedings in the Court of Appeal

6. Aggrieved by the decision of the High Court, the 1st respondent filed an appeal at the Court of Appeal.The Court of Appeal identified five issues in the cause for resolution, namely:

(i) whether the appeal was competent, in light of Section 85A of the Elections Act;

(ii) whether the denial or curtailment of cross-examination infringed the appellant's right to a fair trial;

(iii) whether the rejection of the appellant's plea for scrutiny and recount vitiated the Judgment;

(iv) whether the High Court committed errors of law; and

(v) whether an upper limit to costs should have been prescribed.

7. In its Judgment dated 13th May, 2014 the Court of Appeal, in a majority decision (G.B.M. Kariuki & Kiage, JJ.A, with Warsame, J.A dissenting), set aside the High Court decision and annulled the election of the 1st and 2nd appellants.

8. The Court of Appeal in its majority decision heldinter alia,that the 1st respondent herein had filed his appeal within time; and that the trial Judge improperly exercisedhis discretion when he curtailed the cross-examination of the Returning Officer for Nairobi County and upheld the election, despite contrary evidence from the Court-ordered scrutiny-reports.

9. In his dissenting opinion, Warsame, J.Aheld that election petitions are causes sui generis,and Rule 82 of the Court of Appeal Rules was not applicable in electoral matters. Therefore, the appeal was filedout of time and was incompetent. Warsame, J.A also found that,based on the scrutiny-report,there was no evidence to invalidate the election of the 1st appellant herein.

(c) Proceedings before the Supreme Court

10. Dissatisfied with the said Judgment, the 1st and 2nd appellants filed an appeal (Petition No. 18 of 2014) before this Court on 14th May, 2014. Together with the petition, the 1st and 2nd appellants filed Civil Application No. 21 of 2014,this beinga Notice of Motion under certificate of urgency. On the same

date, the Court heard the matter exparte, certified it urgent and granted interim orders,staying the Court of Appeal Judgment pendinginter partes hearing on 23rd May, 2014. On that date, the parties consented to have theinterimorders extended, and theapplication dispensed with, so as to expedite the hearing of the substantive appeal on 24th and 25th of June, 2014.

11. This final appeal was premised on the grounds that:

(i) the learned Judges of the Court of Appeal, in a majority decision, acted without jurisdiction when they entertained, heard and determined an incompetent appeal filed beyond the prescribed timelines, which was in breach of the provisions of Article 87(1) of the Constitution of Kenya, 2010 and Section 85A of the Elections Act;

(ii) the learned Judges of Appeal acted without jurisdiction in delivering the Judgment outside the timelines prescribed in the terms of Article 87(1) of the Constitution, and Section 85A of the Elections Act;

(iii) the learned Judges of Appeal in their majority decision,breached the provisions of Article 163(7) of the Constitution and Section 31 of the Interpretation and General Provisions Act (Cap.2, Laws of Kenya) in holding that Rule 82(1) of the Court of Appeal Rules, 2010, a subsidiary legislation, conferred upon the Court jurisdiction in election petitions, to override the Elections Act by excluding the time taken in preparing appeals from the time-allowance for filing appeals to the Court of Appeal under Section 85A of the Elections Act - in contradiction to the unambiguous decision of the Supreme Court in Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others S.C. Petition No. 10 of 2013; [2014] eKLR; in Mary Wambui Munene v. Peter Gichuki Kingara & 2 Others S.C. Petition No. 7 of 2014; [2014] eKLR; in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others S.C. Application No. 5 of 2014; [2014] eKLR; and in In the Matter for an Application for an Advisory Opinion, Advisory Opinion No. 2 of 2011;

(iv) the learned Judges of Appealin their majority decision, breached the provisions of Articles 81(e) and 86 of the Constitution, when they nullified the election of the 1st and 2nd appellants on grounds that the 1st respondent had not been accorded a fair hearing in the trial Court, when none of the grounds specified in the Constitution as grounds for nullifying elections were ever considered, or proved, in the Court of Appeal;

(v) the learned Judges of Appeal breached the 1st and 2nd appellants' inviolable right (Articles 50(1) and 25(c) of the Constitution)to have a dispute that can be resolved by the application of law decided in a fair hearing before a Court, when theyfailed to determine the 1st and 2nd appellant's Notice of Motion application dated 19th December, 2013 which sought to strike out the entire appeal, or Forms 35 and 36 which constituted new evidence not contained in the Record of Appeal, being included without leave of the Court;

(vi) the learned Judges of Appealacted in breach of their jurisdictional limits in election matters, which subsumed matters of law, but not of fact;

(vii) the learned Judges of Appeal in their majority decision,erred in holding that the right to scrutiny subsists as a carte blanche right, even where no basis has been established by the 1strespondent- contrary to Rules 33(2) and (4) of the Elections Petition Rules, which expressly provides that scrutiny can only be granted where the Court is satisfied that there is sufficient reason for it;

(viii) the learned Judges of Appeal in their majority decision erred in law and in fact, by deviating from the principles of the incidence of burden and standard of proof in election petitions,as set out in Raila Odinga & Others v. IEBC & Others;S.C. Petition No. 5 of 2013 case- in breach of the terms of Article 163(7) of the Constitution; and

(ix) the learned Judges of Appeal erred in law by considering matters of fact and evidence that were extraneous to their jurisdiction and, as such, contrary to the provisions of Article 87(1) of the Constitution as read with Section 85A of the Elections Act.

12. On 27th May, 2014, the 3rd appellant, the IEBC, filed a cross-appeal: The Independent and Boundaries Commission & 2 Others v. Ferdinand WaitituNdungu & 6 Others;S.C. Petition No. 20 of 2014. The grounds of the cross- appeal were thus stated:

(i) Competency of the Appeal:that the Court of Appeal found that the appeal had been filed out of time, but extended time contrary to the law.

(ii) Fair hearing:that the Court of Appeal erred in finding that the Election Court did not accord the 1st respondent a fair hearing.

(iii) Errors of law:that the Court of Appeal erred in law when it made findings on Forms 35 and 36; when it gave an unconstitutional remedy by setting aside the election on the ground of lack of fair hearing, being a ground not contemplated in law; when it disregarded the doctrine of stare decisis, by departing from its earlier decisions; and by prescribing a low threshold for applications for scrutiny and recount.

(iv) Costs:that by capping the costs payable to the successful parties, the learned Judges of Appeal erred,as the ceiling of costs recoverable by the successful parties bears no relationship to the amount actually spent by the successful parties in defending the election petition.

13. On 30th May, 2014, the IEBC filed an application seeking the consolidation of Petition No. 20 of 2014 and Petition No. 18 of 2014. On 4th June, 2014, the Supreme Court heard the application, certified it urgent and consolidated the two petitions which wereset for hearing on 24th and 25th of June, 2014.

14. Learned Senior Counsel Mr. Nowrojee and Prof. Tom Ojienda, and learned counsel Mr. Oduol appeared for the 1st and 2nd appellants; learned counsel Mr. Nyamodi appeared for the 3rd, 4th and 5thappellants,learned Senior Counsel Mr. Muite and Mr. Abdullahi, and learned counsel Mr. Kinyanjui appeared for the 1st respondent.The 2nd, 3rd, 4th and 5th respondents were not represented and did not take part in the proceedings.

C. The Parties' Respective Cases

(i) The 1st and 2nd Appellants

15. The 1st and 2ndappellants set out the issues for determination before this Court as: whether the majority decision of the Court of Appeal violates the provisions of Articles 1(2), 3(a), 25(c), 27, 50(1), 88(5), 180 (4), 163 (7) of the Constitution; and the provisions of Article 87(1) of the Constitution as read together with Section 85A of the Elections Act, and Rules 33(2) and 33(4) of the Elections Petition Rules.

(a) Jurisdiction

16. In support of his arguments, Mr. Nowrojee relied on the written submissions filed on 4th June, 2014 and 25th June, 2014. Counsel invoked the jurisdiction of this Court under Article 163(4)(a) of the Constitution, which allows for appeals as a matter of right, in cases involving the interpretation or application of the Constitution.

17. Counsel referred to this Court's decisions on jurisdiction, including:Hassan Ali Joho & Another v. Suleiman Said Shahbal & Others;S.C. Petition No. 10 of 2013; [2014] eKLR, where it was held thatthe test for evaluating the jurisdictional standing of this Court in handling an appeal, is whether the appeal raises a question of constitutional interpretation or application (paragraph 37); Erad Suppliers & General Contractors Limited v. National Cereals and Produce Board, S.C. Petition No. 5 of 2012; eKLR [2012](where this Court held that a question involving the interpretation or application of the Constitution, integrally linked to the main cause in a superior Court of first instance, is to be resolved in that forum in the first place before an appeal can be entertained in this Court); Gatirau Peter Munya v. Dickson Mwenda Kithinji& Others, S.C. Civil Application No. 5 of 2014; [2014]eKLR [Munya 1] (for the proposition that an appellant in an electoral dispute has to show that the issue before the Court took a trajectory of constitutional interpretation or application); and the Chief Justice's concurring opinion inGatirau Peter Munya v. Dickson Mwenda Kithinji & Others, S.C. Petition No. 2B of 2014; [2014]eKLR [Munya 2](wherehe set out the guiding principles obligating a Court to determine an appeal in terms of Article 163(4)(a) of the Constitution).

18. Learned Senior Counsel submitted that the appeal before this Court satisfied the parameters set out in Munya 2,relating to Article 163(4)(a) of the Constitution.He urged that the issues in this matter were cardinal issues of jurisprudential moment, because they involved the timely settlement of election disputes. Further, the appeal was founded on cogent issues of constitutional controversy which included: whether the Court of Appeal disregarded the principles of stare decisis,asset out in Article 163(7) of the Constitution,in determining the 1st respondent's appeal which was filed outside of the 30-day time-limit set by Section 85A of the Elections Act; and whether the Court of Appeal could contradict itself, and depart from its own earlier decision on time-limits.

19. Mr. Nowrojeesubmitted that the petitions at the trial Court and the Court of Appeal involved issues of interpretation and application of the Constitution. He agreed with this Court's holding in Munya 1,that the Elections Act and the Regulations thereunderare normative derivatives of the Constitution, and one cannot separate the two when interpreting thelatter.Mr. Nowrojee submitted that Munya 1 fell within the ambit of Article 163(4)(a) of the Constitution, and that the principles in Munya 1andMunya 2bind both the appellants and the respondents. He submitted that the effect of the respondents' objectionas to this Court's jurisdiction,contradicted the principles set out in Munya 1andMunya 2, and this was an abuse of Court process. Mr. Nowrojee submitted that the only way the 1st respondent could challenge this Court's jurisdiction was through a cross-appeal.

20. Counsel submittedthat the election Court had both interpreted and applied the Constitution, in instanceswhere:the 1st and 2ndappellants'election was challengedunder Articles 86,87(1) and (2), 88(5), 165(3)(a) and (e) of the Constitution and Sections 75 and 80 of the Elections Act; and where the Court interpreted Articles 1 and 38 of the Constitution,with regard to the sovereignty of the people's will, as beingcritical in the determination of election petitions. Counsel submitted that the Court of Appeal had also interpreted and applied constitutional provisions, albeit erroneously.

21. Counsel contested the 1st respondent's submission that timelines are mere technicalities, urging that such an argument was contrary to this Court's decisions. He submitted that the delay in filing the 1st

respondent's case had nullified its effect as a basis of jurisdiction for the relevant Court; andthat no Court can consent to jurisdiction where there is none, and any assumption of jurisdiction in those circumstances, amounted tosheer judicial innovation.

(b) Competency of the appeal

22. Prof.Ojienda submitted that the Court of Appeal had extended the 30-day timeline within which a party may appeal to that Court,in violation of Section 85A of the Elections Act. He urged that in so doing, the Appellate Court had disregarded the binding decisions of this Court; and that the Court of Appealhad contravened Articles 87(1) and 163(7) of the Constitution.

23. Counsel submitted that as the Judgment of the election Court was delivered on 10th September, 2013, an appeal to the Court of Appeal had to be filed by 10thOctober, 2013.He submitted that the appeal was filed on 22nd November, 2013;that is72 days after the delivery of the Judgment of the election Court.Thus the appeal, he urged, was incompetent.

24. Counsel cited this Court's decision in Joho,whichhad affirmed the Court of Appeal's Rulingin Ferdinand Waititu v. IEBC &8 Others, Civil Application No. 137 of 2013; [2013] eKLR,that the timelines set by the Constitution and the Elections Act were neither negotiable nor capable of being extended by the Court.Prof. Ojienda referred to the case ofMary Wambui Munene v. Peter Gichuki King'ara S.C. Petition No. 7 of 2014;[2014] eKLR, where this Court held that time, in principle and applicability, is a vital element in the constitutionally-set electoral process.

25. Counsel urged that Section 85A of the Elections Act is a mandatory provision which sets out the timelines for the exercise of the Court of Appeal's appellate jurisdiction.He submitted that the intention of Parliament was easily discernible from a literal reading of this statutory provision. Counsel also referred to this Court's decision in Munya 2,where it held that Section 85A of the Elections Act is neither a legislative accident nor a routine legal prescription, and it is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. He submitted that this provision is not a stand-alone item, and must be read together with other relevant provisions.

26. Counsel submitted thatin the Court of Appeal Judgment,a Judge on the majority side (Kiage,J.A) indeed, reaffirmed the principle of timeliness in resolving electoral disputes, and later in the Judgmentexpressed his doubts as to whether a Court can extend timelines;but he then remarked that a certificate of delay duly issued, is conclusive to grant an extension of time.

27. Counsel considered the majority position in the Appellate Court, with G.B.M Kariuki, J.Aholding that it had not beenParliament's intention to prejudice the "right of a citizen to access justice, or the right to appeal an election decision", where it was not through his fault that the period for appealing ran out. The learned Judge opined that Parliament could have expressly stated,had it so intended, that Section 85A(a) of the Elections Act overrides Rule 82 of the Court of Appeal Rules.But counsel submitted that the learned Judgehad later held that the two provisions (of the Act and the Rules) are symbiotic,with the Rule being applicable only where delay is attributable to the Court; and the Court then has a discretionto accommodate a certificate of delay consistent with the Court's time taken in availing the proceedings.

28. Counsel submitted that the effect of applying Rule 82 of the Court of Appeal Rules to election appeals at the Court of Appeal would be that an appellant would have 14 days from the date of the decision to lodge a Notice of Appeal;30 days from the date of the decision to apply for proceedings;and 60 days from the date of lodging the Notice of Appeal, to file a competent appeal. Further, the time taken during the preparation of the proceedings would be excluded in computing the 60-day timeline within which to lodge the appeal.

29. Counsel further submitted that the appellate Judges erred in relying on Rule 82 of the Court of Appeal Rules,to overrule the mandatory provisions of Section 85A(a) of the Elections Act, by holding that the time taken by the Registrar to prepare proceedings should be excluded in computing time for appealing to the Court of Appeal in election petitions. Counsel cited the case ofWavinya Ndeti v. IEBC & 4 Others, Civil Appeal No. 323 of 2013; P[2014] eKLR, in which the Court of Appeal declared Rule 82 of the Court of Appeal Rules ultra vires Section 85A(a) of the Elections Act.

30. Counsel submitted that while the appellant was not challenging the application of the Court of Appeal Rulesper se, the said Rules could only apply after due compliance with the Elections Act. He urged that according to Section 31(b) of the Interpretation and General Provisions Act, subsidiary legislation cannot confer, limit or expand a Court's jurisdiction.

The relevant provision thus reads:

> "Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—
>
> ...
>
> (b) no subsidiary legislation shall be inconsistent with the provisions of an Act;..."

31. Counsel submitted that Section 13(a) of the Statutory Instruments Act, 2013 (Act No. 23 of 2013)requires that statutory instruments, including Rules,shall be in accord with the provisions of the Constitution, the Act pursuant to which they are made,or other written law. It provides that:

> "The Committee shall, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument-
>
> (a) is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law..." [emphasis supplied].

32. Counsel submitted that an appeal in an election petition matter is a cause sui generis, as it is neither civil nor criminal;and that, to regard an election appeal as an ordinary civil appeal,is to argue against the terms of the Constitution. He urged that Article 87(1) of the Constitution mandated Parliament to enactlegislation and rules governing the sphere of electoral disputes.

33. Learned counsel, Mr. Oduolentered upon his submissions by underlining the need for predictability and certainty in the law,as espoused by the doctrine of stare decisis which had now been enshrined in the Constitution. He urged that to depart from precedent without justification, would bring the administration of justice into disrepute. Mr. Oduol submitted that to disregard a precedent set by the Supreme Court, was a violation of the Constitution,and was an illegality and impropriety surpassing an abuse of Court process.

34. Counsel submitted that there were contradictions between the Appellate Court's decisions of the past and this one, with regard to timelines; and that in the earlier cases at which Kiage, J.A in particular had been part of the Bench, it had been held that the timelines set by the Constitution and the Elections Act have a special materiality and are not for extending. Counsel referred to the following cases:Patrick Ngeta Kimanzi v. Marcus Mutua Muluvi & 2 Others, Civil Appeal No. 191 of 2013; [2014] eKLR; Kakuta Maimai Hamisiv. Peris Pesi Tobiko & 2 Others Civil Appeal No. 154 of 2013; [201] eKLR;Charles Kamuren v. Grace Jelagat Kipchoim & Others, Civil Appeal No. 159 of 2013; [2013]eKLR; Ferdinand Ndungu Waititu v. IEBC & Others, Civil Application No.

137 of 2013; [2013] eKLR;Wavinya Ndeti;and Nicholas Kiptoo Arap K. Salat v. IEBC & 6 Others, Civil Application No. 228 of 2013; [2013] eKLR.He submitted that these decisions showed that the Court of Appeal had applied double standards in this particular case, thus denying the appellant his legitimate expectation of equality before the law.Counsel urged that this Court, in both Joho and Mary Wambui, had upheld the principles of predictability, certainty and uniformity in the judicial resolution of disputes.

35. Prof. Ojiendaobserved that inKimanzi, the Court of Appeal (G.B.M Kariuki, Kiage & M'inoti JJ.A)had been alive to the peremptory design of Section 85A of the Elections Act, and Rule 35 of the Elections Petition Rules. He noted that in Hamisi, the Appellate Court (Karanja, Ouko & Kiage JJ.A.) had held that it lacked jurisdiction to hear an interlocutory appeal, and declined to venture into a consideration of merits of the appeal, since the result of such a venture would be a nullity. Counsel cited Nicholas Salat, in which Kiage, J.A observed that an appellant could not save an incompetent appeal, and that sympathy with an appellant on account of the importance of the subject-matter of the appeal, could not save an incompetent appeal.

36. Counsel submitted that the proceedings in question were ready on 9thOctober, 2013,in good time for the statutory timelines to be complied with. He argued that had the 1st respondent been prudent in the Court of Appeal, he would have known thatproceedings-processing time, as sought, was not necessary¾sincethe proceedings were ready.

37. Counsel requested this Court to take judicial notice of the fact that the Court of Appeal Judgment was delivered on 13th May, 2014 and the appellant secured the Record of Appeal in one day, filing the appeal in this Court on 14th May, 2014. Thus, he submitted, the 30-day timeline was sufficient for an appellant to get proceedings.

38. Prof. Ojienda further submitted that the Court of Appeal had delivered an incompetent Judgment, because the Judgment of the High Court was delivered on 10th September, 2013 and the last day for filing a competent appeal to the Court of Appeal was on 10th October, 2013; thus, by Section 85A(b) of the Elections Act, the last day for the delivery of the Appellate Court'sJudgment ought to have been 10th April, 2014. However, it was delivered on 13th May, 2013.In support of this argument, counsel relied on two Nigerian cases. InSenator John Akpanudoedehe & Others v. Godswill Obot Akpabio & Others, S.C. Nigeria Appeal No. 154 of 2012, the Supreme Court of Nigeria held that once the prescribed 180 days lapsed, the hearing fades away along with any right to fair hearing, and the Court had no jurisdiction to deliver the Judgment, as there is no live petition outstanding. The same Court, inChief Doctor Felix Amadi & Anor. v. Independent National Electoral Commission (INEC) & Others S.C. Nigeria Appeal No. 476 of 2011, held that there was no room for the exercise of discretion on allotted time and the Judgment has to be delivered within 60 days of the delivery of Judgment on appeal.

39. Counsel submitted that election petitions have to be determined within 6 months. He further submitted that in both Johoand Mary Wambui,this Court dealt with the entry-timelines to be adhered to, whereas theinstant case dealt with the exit-timelines, which must also be adhered to. Hesubmitted that the exit-timelines refer to the period within which a Court is to determine an election dispute. It was submitted that the High Court Judgment was delivered within the 6-month period, and the Court of Appeal had no jurisdiction once that timeline expired.

(c) Right to a fair hearing

40. Counsel submitted that the Appellate Court Judges had misdirected themselves on issues of fact, thereby breaching the right to a fair hearing under Articles 25(c) and 50(1) of the Constitution and, as a result, arriving at an erroneous decision.

41. Counsel referred to two European Court of Human Rights (ECHR) cases:Ruiz Torija v. Spain, Petition No. 18390/91; and Hiro Balani v. Spain Petition No. 18064/91, in which the ECHR held that where a Court fails to render reasoned Judgment, or fails to take into account submissions or evidence brought by parties, such a Court breaches the litigant's right to a fair hearing. Counsel submitted that the Appellate Court Judges breached the 1st and 2ndappellants' right to fair hearing by conditioning the Record of Appeal so as to advance the 1st respondent's case, andby failing to determine their Notice of Motion application of 19th December, 2013.

42. Counsel urged that the learned Appellate Court Judges had distorted the Record of Appeal when theyremarked upon issues which had already been settled at the trial Court, within the scope of the cross-examination of the Returning Officer for Nairobi County (RW1), Fiona Waithaka.

43. Learned counsel further urged that the Appellate Court had misdirected itself on issues of fact, when they dealt with the question whether Forms 35 were "filed documents", and thus, a basis upon which cross-examination could be allowed.Counsel submitted that during the cross-examination of FionaWaithaka,counsel for the 1st respondent sought to cross-examine the witness on constituency Form 36, of which she wasnot the maker.The forms in question had not been filed as part of the pleadings, asrequired under the Rules 12(2) and14(3) of the Elections Petitions Rules.Rule 12(2) providesthat:

> "A Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial.
>
> "(2) The affidavit under sub-rule (1) shall—
>
> (a) state the substance of the evidence;
>
> (b) be served on all parties to the election petition with sufficient copies filed in court; and
>
> (c) form part of the record of the trial and a deponent may be cross-examined by the respondents and re-examined by the petitioner on any contested issue."

Rule 14(3) provides that:

> "A respondent who has not filed a response as provided under this Rule shall not be allowed to appear or act as a party against the petition in any proceedings."

44. Counsel submitted that during this cross-examination at the trial Court, an objection was raised on the grounds that the blanket reliance on documents that the IEBC deposited with the Registrar of the High Court in accordance with Rule 21(b) of the Elections Petition Rules, neither amounted to pleadings, nor was it part of the trial record¾and would prejudice other parties.Rule 21(b) of the Elections Petition Rules requires the IEBC, as an administrative matter, to deliver the results of the election in question to the Registrar of the election Court.

45. Counsel submitted that the Appellate Court Judges erred when they failed to determine the 1st and 2nd appellants' application dated 19th December, 2013, seeking to strike out the 1st respondent's appeal, or in the alternative,no claim of irregularity or electoral malpractice had been made on record; for instance: the DVD recording of the oral version of the Judgment; and Forms 35 and 36 for all 17 constituencies where the 1st respondent had raised no allegations of irregularities or electoral malpractice. Counsel submitted that Kiage, J.Ahadproceeded to peruse the forms andto make factual conclusions which,in effect, violated the 1st and 2nd appellants' right to fair hearing.

46. Counsel submitted that Kiage, J.Ahad misdirected himself when he failed to identify the specificForms 35 and 36 that he had perused, or to state their relevance to the allegations raised by the 1st respondent at the trial Court. Counsel agreed with the dissenting opinion ofWarsame, J.A, who held that it was "not clear what documentswere perused by his fellow Judge", and this indicates that there was no basis for the Court to rely on such documents,in arriving at its decision.

47. Counsel submitted that G.B.M. Kariuki, J.A,had misdirected himself on fact, in certain instances in which he proceeded to find that the 5th appellant (the Returning Officer for Nairobi County) had made admissionsabout counterfoils, and about tampering with marked ballot papers; that St. Martin's Secondary school polling station was locked; that Pamela Wandeo, the election co-ordinator at Westlands, admitted that unused ballot papers were not kept in boxes and that, after the election, ballot papers were found in the Kitusuru and Ruai areas of Westlands; that there was evidence that election materials were found at Kayole and taken to Kayole Police Station; and thathis own perusal of the copy of Form 36 in the Record of Appeal showed it not to have been signed.

48. Counsel further submitted that G.B.M. Kariuki, J.Ahad placed excessive reliance on allegations pleaded by the 1st respondent, butwhich were already controverted; and that in this respect, the appellate Court misdirected itself, and erred in fact, when it arrived at conclusions contrary to this Court's prescriptions in the Munyacase.

49. Prof. Ojienda contested the 1strespondent's argument that an election petition is an extension of the electoral process, and that on that basis, he had been denied the right to a fair trial. Learned counsel urged that the authorities cited by the1st respondent in support of the said argument could only apply if there was a factual finding, and a denial of a right to a fair trial.He urged that the 1st respondent had not been denied the right to cross-examination.

(d) Scrutiny and recount

50. Counsel submitted that the Appellate Court had misinterpreted Section 82 of the Elections Act and Rule 33(4) of the Elections Petition Rules, when it substituted scrutiny and recount in a 'polling station'for scrutiny and recount in a'constituency'. He furtherurged that the appellate Judges' holding that subsequent requests for scrutiny and recount should have been allowed as a matter of course was a miscarriage of justice,as the 1st respondent had not laid a basis for such scrutiny.Learned counsel submitted that the Appellate Court Judges erred in law,when they held that the trial Judge had improperly exercised his discretion by not allowing scrutiny and recount in the sevenpolling stations featuring in the 1st respondent's pleadings.

51. Counsel submitted that the trial Judge had properly exercised his discretion under Section 82 of the Elections Act, in restricting scrutiny and recount to the specific allegations made, and to the polling stations in the pleadings of the 1st respondent. He submitted that Kiage, J.Awas in error, in holding that the requirement of 'sufficient basis' under Rule 33(2) of the Elections Petition Rules is "inconsistent

with Section 82 of the Elections Act", for fettering the election Court's discretion.Section 82 (1) of the Elections Act provides that:

"(1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine."

Rule 33 of the Elections Petitions Rules provides that:

"(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.

...

"(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of..."

52. Counsel submitted that at the trial Court, it was determined that parties could apply for scrutiny and recount at any stage. However, the only application made by the 1st respondentwas the one filed with the petition.Counsel cited Munya 2, in which this Court held that Section 82(1) of the Elections Act and Rule 33(4) of the Elections Petition Rules were not in conflict. He urged that the Appellate Court erred when it held that there wasa conflict between these two provisions, contrary to this Court's holding in Munya 2. Further, counsel submitted that scrutiny and recount is not an automatic right, and a party is required to apply for scrutiny for a particular polling station.He urged that the scrutiny report was as a result of the suo motudirection of the Court.

(e) Materiality test

53. Counsel submitted thatthe Court of Appeal misinterpreted Articles 81(e) and 86 of the Constitution,in nullifying the election of the 1st and 2nd appellants on the ground that the 1st respondent was not accorded a fair trial at the High Court.He submitted that these constitutional provisions clearly set out the threshold for nullifying an election.

54. It was counsel's submission that electoral irregularities and other discrepancies which did not have an effect on the final result, or did not violate the principles in Articles 81(e) and 86 of the Constitution, could not be the basis for nullifying an election.Counsel stated that, using the "magic-number test", the 1stappellant won by a margin of 74,644 votes.Heurged that where recount and re-tally did not change the outcome of the election, then the question of percentages had no relevance.Counsel alsosubmitted that the Court of Appeal Judges misinterpreted Section 83 of the Elections Act,engaged in judicial legislation, and disregarded the materiality doctrine which led them to wrong findings. Section 83 of the Elections Act provides that:

> "No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."

55. On the issue of materiality, counsel submitted that the trial Judge discounted constituencies with conflicting results, but held that the irregularities did not affect the results.

(f) Burden and standard of proof

56. Counsel submitted that the Court of Appeal had overlooked this Court's decision on the burden and standard of proof for election petitions, by engaging in judicial legislation. He submitted that the trial

Judge, unlike the Appellate Court, had been explicit in applying the burden of proof, as held in this Court's decisions in the Raila Odinga and the Johocases:mere allegation does not shift the burden of proof. It was urged that Kiage, J.A incorrectly attributed to the High Courtthe charge of having applied a "beyond-reasonable-doubt" standard in this case.

(g) Costs

57. Counsel submitted that, just as the Court of Appealhad questioned the election Court's decision to cap costs at 2.5 million shillings, this Court too should not limit the range of costs. Section 84 of the Elections Act provides that:

> "An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."

58. Counsel urged that Section 84 does not provide for the capping of costs, and that the same principle arises from Rule 36(1) of the Elections Petition Rules, which provide that:

> "The court shall, at the conclusion of an election petition, make an order specifying—
>
> (a) the total amount of costs payable; and
>
> (b) the persons by and to whom the costs shall be paid."

59. Counsel contended that the limitation of the scope of costs by the election Court violated the appellants' right to be heard on their bill of costs,as the taxing master's unfettered discretion under paragraph 16 of the Advocate's Remuneration Order, 2009 was taken away.

60. Counsel submitted that Kiage, J.Ahad erred when he held that the 1st and 2nd appellants' grievance would only be ripe for adjudication once a bill of costs was drawn, and the same taxed in a manner that violates the rights of the appellants. He submitted that since the capping of costs emanated from the Judgment of the election Court, Rule 36 of the Election Petitions Ruleshad lent itself to a mode of application that was unconstitutional.

61. Counselurged that although the capping of costs was intended to curb the practice of awarding large sums in costs, as a deterrent against unmeritorious election petitions, it was necessary to strike a balance with the deserts of the successful party claiming costs.

(ii) The 3rd, 4th and 5th Appellants' Case

62. Learned counsel, Mr. Nyamodi associated himself with the submissions of the 1st and 2nd appellants,with regard to this Court's jurisdiction to hear and determine this matter under the provisions of Article 163(4)(a)of the Constitution.Counsel cited the case of Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & Another,S.C.Petition No. 3 of 2012; [2012] eKLRin which this Court held that only appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.

63. Counsel further referred to this Court's decisions in Peter Oduor Ngoge v. Hon. Ole Kaparo & 4 OthersPetition No. 2 of 2012; [2012] eKLR(Ngoge) andMunya 2,in which the principle in earlier decisions was affirmed, that an appellant should demonstrate that the Court's reasoning and conclusions which led to the determination of the issue, did take a trajectory of constitutional interpretation or application.

64. Counsel presented the issues before this Court as follows: whether the appeal is competent, in light of Section 85A of the Elections Act; whether the denial or curtailment of cross-examination infringed

the appellant's right to a fair trial; whether the rejection of the appellant's plea for scrutiny and recount vitiated the Judgment; whether the High Court erred in law; and whether the costs should have been restricted in amount.

65. Counsel submitted that the main question before the Court was whether the appeal arises from a decision in which issues of interpretation or application of the Constitution were at play. He urged that the first ground of appeal entailed the application of Article 87(1) of the Constitution,because Section 85A of the Elections Act cannot be interpreted without applying this Article of the Constitution. It was also submitted that the second ground of appeal entailed the determination of the extent of the right to fair hearing as established by Article 50, and guaranteed by Article 25 of the Constitution.Similarly, learned counsel submitted that the third ground of appeal required the Court to interpret and apply the provisions of Articles 81(e) and 86 of the Constitution.

(a) Competency of the appeal

66. Learned counselsubmitted that the new constitutional dispensation had brought a paradigm-shift, with regard to timely resolution ofelection disputes. He referred to the obligation under Article 87 (1) of the Constitution,which gave effect to the enactment of Section 85A of the Elections Act, providing for timelines. Counsel referred to the holding in Raila Odinga,echoed by this Court in Munya 2,on the timely resolution of election disputes.

67. Counsel submitted that Section 85A of the Elections Act was enacted to give effect to Article 87(2) of the Constitution, with the aim of restricting the number, length and cost of petitions,thus complying with the constitutional command for the timely resolution of electoral disputes. He urged that since the Court of Appeal had found that the appeal was filed out of time,it ought to have vindicated the rule of timelines, as provided in the Constitution, and Elections Act. He urged that the Court of Appeal's finding (Kiage, J.A) rendered the appeal a nullity. Counsel cited this Court's decisions in: Joho which declared Section 76 of the Elections Act (which allowed election petitions to be filed in the High Court beyond the limit set by Article 87(2) of the Constitution) a nullity;Raila Odingawherethis Court held that parties have a duty to comply with their respective timelines;and Mary Wambui wherethis Court, applying its decision in Joho,allowed the appeal on the grounds that the petition had been filed out of time. He also relied onthe Appellate Court's decision in Ferdinand Ndung'u Waititu v. Independent Electoral & Boundaries Commission, IEBC & 8 Others, Civil Application No. 137 of 2013;[2013]eKLR. Learned counsel invoked this Court's decision in Raila Odinga, Mary Wambui, Joho and the Court of Appeal Ruling in Ferdinand Waititu, all proclaiming the principle that timelines as set by the Constitution and the Elections Act, are neither negotiable, nor can they be lightly extended by any Court.

68. Counsel submitted that the foregoing decisions of this Courtare binding upon the Court of Appeal, by dint of Article 163(7) of the Constitution and the incorporated common law principle of stare decisis.On this basis, counsel urged that the majority decision of the Court of Appeal was misguided and injudicious,as timelines constituted the very threshold of validity in Kenya's current law of electoral dispute-settlement. Electoral dispute settlement, counsel submitted, had been recognized by the Indian Supreme Court inJyoti Basu & Others v. Debi Ghosal & Others [1982] AIR 983; [1982] SCR (3) 318, as a special genre of contested matters within the scheme of the Constitution and the law.Heurged that the Appellate Court had misdirected itself in hearing and determining an appeal that was filed out of time, noting that the High Court Judgment was delivered on 10th September, 2013; the Notice of Appeal filed on 12th September, 2013; and going by the provisions of Section 85A of the Elections Act, the 1st respondent ought to have filed his appeal by 10th October, 2013;yet the substantive appeal was

filed on 22nd November, 2013 - [way out of time] It was counsel's submission that such shortfalls in adherence to required timelines could not be corrected by issuing a certificate of delay.

69. Counsel submitted that the Appellate Court had disregarded the operative hierarchy of laws, by ranking Rule 82 of the Court of Appeal Rules above Article 87(1) of the Constitution and Section 85A(a) of the Elections Act;and he invoked the High Court decision in Diamond Trust Kenya Ltd v. Daniel Mwema Mulwa MilimaniHCCC No. 70 of 2002,in which it was held that Kenya has a three-tier hierarchy of laws: the Constitution which is supreme, the Acts of Parliament, followed by subsidiary legislation at the bottom of the pile.

70. Counsel urged the Court to vindicate the established constitutional principles, by correcting such an unmeritorious interpretation of the Constitution. He submitted that the extension of time for filing an appeal, thereby granting the jurisdiction to entertain an election petition, amounted to 'judicial craft and innovation',a designexpressly disapproved in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others,S.C.Application No. 2 of 2011;[2012] eKLR.

(b) Fair hearing

71. Counsel submitted that the Appellate Court erred in law in holding that the 1st respondent was denied a fair hearing by the decision of the election Court to curtail his scope of cross-examination of the County Returning Officer. He urged that the Appellate Court had overlooked the sui generis aspect of election petitions which justified a perception unlike that in ordinary civil proceedings.

72. Counsel submitted that it was an error for the Appellate Court to hold that the 1st respondent was entitled to indiscriminately cross-examine the appellants herein,on the Forms 35 and 36 filed under Rule 21(b) of the Elections PetitionRules. He argued that the Appellate Court had erred in holding theseforms to be evidence,and in placing the burden of proving the petition on the appellants, in violation of the appellants' right to fair hearing under Article 50(2)(a) of the Constitution, Section 107 of the Elections Act, and Rules 8(a), 10(1)(f), 10(2)(b) and 12(2)(a) of the Elections Petition Rules.

73. Counsel posited that in a criminal case, every accused person has the right to fair trial, including the right to be informed of the charge, with sufficient detail to warrant an answer, under Article 50(2)(b) of the Constitution. And in parallel fashion, the requirements of Rules 8(a), 10(1)(f), 10(2)(b) and 12(2)(a) of the Elections Petition Rules secure this right, by requiring a petitioner to set out in detail all the particulars of his or her allegations, so as to accorda respondentsufficient notice for an appropriate response. Counsel referred to this Court's decision inRaila Odinga,which recognized that the petitioner's pleadings should guide the conduct of an election petition, and any examination and cross-examination therein.

74. On the basis of the foregoing principles, it was urged, the election Court had properly restricted the 1st respondent's scope of cross-examination on the Forms 35 and 36, since it had a duty to protect the appellants' right to a fair hearing under Article 50(2)(c) of the Constitution. Counsel submitted that while the 3rd appellant had filed the Forms 35 and 36 in accordance with Rule 21(b) of the Elections Petition Rules, the Court should have appreciated that these documents, which run to tens of thousands of pages, are prepared by many different electoral officers, and thus there should have been advance notice by the petitioner in his pleadings as to which documents he would rely on, so as to give the respondents an opportunity to file written responses upon which they could be cross-examined.

(c) Stare decisis

75. Counsel submittedthat the Appellate Court's decision that the provisions of Rule 82 of the Court of Appeal Rules rendered competent an appeal that had been filed outside the timelines set out in

Section 85A of the Elections Act, was contrary to previous decisions of the same Court, in the cases of Ferdinand Waititu Ndung'u,Wavinya Ndeti and Patrick Kimanzi¾which decisions the Court of Appeal was bound to follow. The Court, therefore, erred in departing from these decisions.

76. Counsel submitted that whereas in appropriate circumstances the Court of Appeal is free to depart from its previous decisions, such circumstances of exception had not been established. Thus, counsel urged, the Appellate Court'sdeparture from its previous decisions was misconceived, and founded on no justification. In support of this argument counsel cited several cases:Munya 2; Young v. Bristol Aeroplane Co. Ltd,[1944] KB 718; AbuChiaba Mohamed v. Mohamed Bwana Bakari & 2 Others, Civil Appeal No. 238 of 2003; [2005] eKLR;Dodhia v. National & Grindlays Bank Limited And Another,[1970] EA 195;Jacinta Wanjala Mwatela v. I.E.B.C. & 3 Others,Election Petition No. 2 of 2013; [2013] eKLR;Cassell& Co. Ltd v. Broome & Another,[1972] AC 1072;Rift Valley Sports Club v. Patrick James Ocholla,Civil Appeal No. 273 of 2003;[2005] eKLR; and Jasbir Singh Rai and 3 Others v. TheEstate of Tarlochan Singh Rai and 4 Others; S.C. Petition No. 4 of 2012;[2013] eKLR.

(d) Scrutiny and recount

77. Counsel submitted that the Appellate Court had erred in law by prescribing a distinctly low threshold for grant of orders of scrutiny and recount,especially by maintaining that the trial Court should have ordered for scrutiny on bare request by the 1st respondent,when he had laidno basis for such an application. Counsel submitted that the grant of orders of scrutiny and recountis subject to the discretion of the election Court. The word 'may' as used in Section 82 of the Elections Act, counsel urged, connotes the discretionary element, and is to be exercised judicially;so the Court of Appeal should not interfere with the election Court's exercise of discretion in matters before it, especially factual matters such as scrutiny. He relied on this Court's decision inMunya 2,and theAppellate Court'sown decision inRichard Ncharpi Leiyagu v. Independent Electoral Boundaries Commission & 2 Others; Civil Appeal No. 18 of 2013; [2013]eKLR - which affirmed this position.

78. Counsel submitted that an application for scrutiny must have an expressed basis, though the election Court hada discretion to order for scrutiny suo motu.Counsel exemplified this argument with the following authorities: Philip Ogutu Osorev.Michael Oringo & 2 Others,Election Petition No.5 of 2013 [2013] eKLR;Meitamei Lempaka v. Lemanken Aramat &2 Others,Election Petition No 2. of 2013; [2013] eKLR;andMunya 2; and he urgedthat the Court is to be satisfied that there is sufficient cause to require an examination of the ballots.

(e) Forms 35 and 36

79. Counsel submitted that the Appellate Court erred in law by holding that the 1st respondent could use theForms 35 and 36 provided by the IEBC to the election Court pursuant to Rule 21 of the Elections Petition Rules, for cross- examination. He submitted that these forms are supplied to aid the election Court in those instances in which the Court needs to exercise a discretion to order for scrutiny and recount of votes, under Section 82 of the Elections Act.

80. Counsel submitted that,whereas the IEBC delivered the Forms 35 and 36 to the Registrar of the High Court, pursuant to an obligation imposed under Rule 21 of the Elections Petition Rules,such materials are not evidence for the following reasons: if it were the intention of this Rule that these materials be evidence in the trial, then the Rule would have provided that the materials were to be delivered to all parties to an election petition, just as Rule 9(b) as read with Rules 13(1) and (2), and Rule 15(2) of theElectionsPetition Rules imposessuch an obligation upon the appellants and respondents in an election petition. The fact that Rule 21 of the Elections Petition Rules does not place a similar

obligation on IEBC, it was urged, proves that the IEBC's materials are not evidence; and it is relevant in this regard, that no fees are paid upon delivery of these materials.

81. It was submitted that if it was the intention of the 1st respondent to rely onthe said Forms in support of his petition, then he ought to have complied with the provisions of Section 107 of the Evidence Act (Cap. 80, Laws of Kenya),and produced these forms himself;and having failed to comply with this requirement, the 1st respondent could not introduce the Forms during cross-examination, in support of allegations in his Petition. Counsel submitted that the Court of Appeal erred when it considered the contents of the said Forms, and drew adverse conclusions from their content. Counsel relied on this Court's decision inMunya 2,and submitted that the learned Judges of Appeal erred in law when they drew adverse inferences from the said Forms,therebyexceeding their jurisdiction under Section 85A of the Elections Act.

(f) Unconstitutional remedy

82. Counsel submitted that the Appellate Court had engaged in judicial legislation, contrary to Articles 81 (e) and 86 of the Constitution, by institutingnewgrounds for setting aside an election.He submitted that the appropriate relief would have been to remit the matter back to the High Court, with such directions as may be appropriate to render the hearing lawful.

(g) Costs

83. Counsel submitted that the Appellate Court failed to exercise its discretion judicially, by awarding costs against a party not guilty of any misconduct, contrary to principles such as are elucidated in a persuasive authority, Kierson v. Joseph L Thompson & Sons Ltd [1913] 1 KB 587.

84. Learned counsel urged it to be trite law that costs follow the outcome of a trial. However, in this case in which the appeal was allowed due to a perceived "fault on the part of the election Court", and not of the respondents at the Appellate Court,it was urged, it was punitive for the Court to condemn the said respondents to pay costs.

(iii) 1st Respondent's Case

(a) Jurisdiction

85. With regard to jurisdiction, learned counsel,Mr. Abdullahisubmitted that the appellants were seeking to re-open the entire electoral dispute in order to render constitutional the declaration of the 1st appellant as Nairobi County Governor.It was counsel's contention that this Court has no original jurisdiction to hear an election dispute on appeal in gubernatorial elections, or to order scrutiny of Forms 35and 36.

86. Learned counsel submitted that, of the nine grounds of appeal enumerated by the appellants, only two-and-a-half meet the admissibility test set by this Court; and in his opinion,this Court had jurisdiction to determine only the following questions:

. half of ground 3 – whether the majority decision delivered by the Court of Appeal violates the provisions of Article 87(1) of the Constitution of Kenya as read together with the provision of Section 85A of the Elections Act;

· ground 4 – whether the majority decision violates the provisions of Article 87(1) of the Constitution as read together with the provision of Rule 33(2) and (4) of the Elections Petition Rules; and

· ground 5 – whether the majority decision violates the provisions of Article 27(1) of the Constitution.

It is only these grounds, counsel urged, that meet the admissibility test of Article 163(4)(a) of the Constitution. He argued that the Court had no jurisdiction in respect of the rest of the grounds put forward by the 1st appellant.

87. It was submitted that the 1st appellant's grounds of appeal were based onSection 85A of the Elections Act, a statutory provision,which the High Court and the Court of Appeal have the jurisdiction and competency to decide upon. Counselcontested the 1stappellant's claim of a breach of Article 87(1) of the Constitution in the grounds of appeal, and submitted that such reference to Article 87(1)neither confers jurisdiction upon this Court, nor transforms it into a constitutional question. Counsel urged that every time the 1stappellant failed to link his grounds of appeal to the Constitution, he routinely perceived Article 87(1) as a fall-back position.

88. Counsel submitted that by appealing the entire Judgment of the Court of Appeal, the 1st appellant had misapprehended the restricted jurisdiction of this Court. He urged that the issues raisedeven if weighty,did not fall under Article 163(4)(a) of the Constitution.He urged that such issues should have come before this Court under Article 163(4)(b). He submitted that this Court should not disturb the decision of the Court of Appeal, insofar as it determined issues pertaining to Section 85A of the Elections Act. Mr. Abdullahiurged that by the test established inthis Court's decision in Ngoge,this Court had usurped the power of the Appellate Court to determine a question as to the interpretation of the Constitution.

89. Counsel questioned the Court's decision in Munya 1, urging that while it had fortified electoral jurisprudence, the decision concurrently undermined the jurisprudence already laid down by the Court. He quoted paragraph 77 of Munya1 in whichthe Court,making reference to the Elections Act and Regulations, held these to benormative derivatives of the Constitution itself. Counsel found fault with the concurring opinion of the Chief Justice in the Munya 2 case, in particular as regards guiding principle (v) (paragraph 244), where the Chief Justice reaffirmed Munya 1'sconcept of the Elections Act and Regulations being normative derivatives of the Constitution.

90. Learned counsel submitted that in adopting the "normative-derivative test", this Court had created a different jurisdiction with regard to elections. He contended that in practical terms, all statutesare normative derivatives of the Constitution, and so the Court ought not to elevate election statutes to a special status. Counsel contended that the two Munya decisions of this Court stood in conflict with our earlier decisions inNgoge and Erad.

91. Mr. Abdullahi contended thatMunya 2implied that every time a party invoked Article 87(1)(a) of the Constitution, a constitutional issue was involved¾and therefore the Supreme Court had jurisdiction over the matter. But in his view, it was improper to elevate Section 85A of the Elections Act into a 'super-provision', falling within the ambit of a constitutional question. Counsel submitted that this Court's 'normative-derivative' test had lowered the standards of access,and would open the floodgates, allowing every matter to be admitted to this Court.

(b) Fair hearing – the right to cross-examination

92. Counsel submitted that the main question before the Court of Appeal was whether the 1st respondent had been accorded a fair trial. He contested the 1st appellant's submission that because 'fair hearing' is not one of the grounds identified in Articles 81 or 86 of the Constitution, the Court of Appeal erred in nullifying the election. Counsel submitted that the 'electoral system' referred to in Articles 81 and 86

of the Constitution is a long process that "begins with voter registration,and ends with the Judgment of this Court."

93. Counsel contended that the 1st respondent had been denied his right to fair hearing by the High Court,on account of bias on the part of the trial Judge. He submitted that the trial Judge,by curtailing the cross-examination of the 1st appellant's star witness, Fiona Nduku Waithaka (RW1),in effect denied the cross-examination of the witness, and thereby deprived the 1st respondent of fair trial as required under Articles 25(c) and 50(1) of the Constitution. Counsel argued that the issue on which the case hang in the trial Court was rendered unavailable by the trial Judge,and that this infringed on the right to cross-examine,and was a breach of the 1st respondent's constitutional and fundamental rights.

94. In support of his argument that the right to cross-examine is a fundamental right which cannot be derogated from, counsel invoked Article 25(c) of the Constitution. Healso relied upon the analysis by the Appellate Court (Kiage, J.A), and on persuasive authority from other jurisdictions to support his argument. He cited the Supreme Court of the Philippines cases of Emilio de la Paz Jr., & Others v. Hon. Intermediate Appellate Court & Others, G.R. No. 71537 (September 17, 1987), in which it was held that the right to cross-examine is a fundamental right; and Harry L. Go, Tonny Ngo, Jerry Ngo and Jane Go v. The People of the Philippines and Highdone Company Ltd. et. al, G.R. No. 185527 (July 18, 2012), in which it was held that witness testimony with the attendant face-to-face confrontation was of special importance. It was submitted that in Crawford v. Washington, 541 U.S. 36 (2004) the U.S. Supreme Court had held that the right to cross-examine was constitutionally enshrined as part of fair trial; and that the Nigerian Court of Appeal,inChief Raphael Onwuka v. Lukuman Owolewa, (CA/10/99) IIorin Division,held that denial of the right to cross-examine amounts to denial of fair hearing. Counsel submitted that every common law jurisdiction has held that where a party is denied the right to cross-examine, there has been a denial of fair trial.

95. Counsel referred to the majority Judgment of the Court of Appeal which faulted the trial Judge's perceived dividing-line between the Elections Petition Rules, on the one hand, and the Evidence Act, on the other; and which held that the curtailment of cross-examination amounted to breach of the right to a fair trial. Learned counsel urged that the High Court: (i) was determined to limit the scope of cross-examination; (ii) created 'safe zones' of evidence which nobody could touch; (iii) did not want evidence to be unearthed during cross-examination; and (iv) "edited" the evidence by controlling the scope of cross-examination.

(c) Competency of the appeal

96. Counsel submitted that the majority decision of the Court of Appeal did not violate Article 87(1) of the Constitution, as the Court of Appeal had found that when Parliament enacted Section 85A of the Elections Act (by virtue of Article 87(1) of the Constitution)it was not with the intention of curtailing the very right of appeal that it was providing for. Kiage, J.Ahad held that the Court should not adopt an interpretation of the provision that would lock a party out of an appeal. Counsel urged that Article 259(8) of the Constitution places a dichotomy between timelines imposed by the Constitution itself, and situations in which timelines are not imposed, and for which an Act is required to impose timeline. Article 259 (8) of the Constitution provides that:

> "If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises."

97. Counsel submitted that the proper construction of Section 85A of the Elections Act, as adopted by the majority decision of the Court of Appeal, was in tandem with Article 259(8) of the Constitution, which provides that if a timeline for performing a required act is not prescribed in the Constitution,

it should be done "without unreasonable delay". Counsel urged that Section 85A of the Elections Act cannot override Article 259(8), regarding obligatory timelines. He submitted that Section 85A contradicted the Constitution, and invited the Court to annul it.

98. In determining the timeliness of the 1st respondent's appeal, the Appellate Court relied on Rule 82 of the Court of Appeal Rules. Counsel urged this Court to adopt the majority holding of the Appellate Court (G.B.M. Kariuki, J.A), that Parliament intended the Court of Appeal Rules to be applied in their totality, to appeals from the election Court.In coming to this conclusion, the Court of Appeal held that the meaning of Section 85A of the Elections Act,vis-à-vis Rule 82 of the Court Rules, should be discerned by considering Articles 10, 20, 25(c), 38, 48, 50, 87(1)(e) and 87(1) of the Constitution which confer rights upon litigants.

99. Learned Senior Counsel,Mr. Muite submitted that Rule 35 of the Election Petition Ruleshad imported the Court of Appeal Rules in their entirety,for the determination of election petitions. He submitted that it was on this basis that the majority of the Appellate Court came to the conclusion that in prescribing the 30-day period, the drafters of Section 85A of the Elections Act "intended to exclude the time taken to prepare the proceedings"¾and hence the relevance of a certificate of delay, where the proceedings came forth belatedly.

100. Counsel submitted that with regard to the 30-day limit set out in Section 85A of the Elections Act, this Court should frame two issues: whether the Supreme Court has the jurisdiction to adjudicate upon the issue oftimely filing of a petition in the Court of Appeal; and if the Court decides that it has jurisdiction to entertain the issue of time, whether it will exercise this jurisdiction in favour of the 1st appellant in this matter. Counsel urged that even if this Court assumes jurisdiction on this matter,it does not follow that it has to exercise it in favour of the 1st appellant. He further argued that this Court hada discretion to exercise its jurisdiction in terms of Article 163(3) of the Constitution. He urged that it was not enough to demonstrate that a matter raises a constitutional issue, to activate the Supreme Court's jurisdiction.

101. In support of his argument on the exercise of discretion by this Court, Mr. Muite referred tothe Johocase, in which it was held that the determination that a particular matter bears an issue or issues of constitutional controversy falls within the Court's discretion (paragraph 52), and that Courts have a discretion in ascertaining the justice of each case (paragraph 49). Counsel submitted that this Court retains the discretion to admit a matter even where a constitutional issue is involved, and that, not every constitutional matter requires this Court's intervention.

102. Mr. Muite, however, was not in agreementwith his co-counsel, Mr. Abdullahi on one issue, and urged that this Court's decision in Munya 2 is not a reversal of the jurisprudence of theearlier Lawrence Nduttu, Erad, Ngoge and Johocases. He submitted that inMunya 2, this Court had elucidatedits jurisdiction in electoral matters, and reaffirmed the jurisprudence crystallized in Erad, Lawrence Nduttu, Joho and S.K. Macharia.

103. With regard to the 30-day time limit, counsel submitted the issue simply involved the interpretation of a Section in an Act of Parliament¾Section 85A of Elections Act. He submitted that this case was different from earlier decisions of this Court: Joho–which was an application to strike out the petition because it was out of time; Mary Wambui– where the appellant sought to strike out the appeal; and Wavinya Ndeti – which was an application to strike out the appeal as having been filed out of time. Counsel submitted that in the instant case, the Court of Appeal had raised the issue of the timeliness for appeal, and asked the parties to address the Court on the same.

104. Counsel further submitted that while Rule 84 of the Court of Appeal Rules allows a party to file an application to strike out a notice of appeal or a petition of appeal, neither the 1st nor the 3rd appellant filed one. He urged that because they failed to raise the issue at the Court of Appeal, they waived their right to challenge the motion, and cannot be heard on this issue at this Court. He further submitted that no party suffered any prejudice as a result of the "belated" filing.

105. Counsel submitted that the Appellate Court had correctly calculated the 30 days to exclude the time taken by the High Court to prepare the proceedings. He urged that in this case, the 1st respondent was relying on a third party (the High Court) to prepare the proceedings, and he should not be locked out because of a delay occasioned not through his fault.

106. Counsel contented that Parliament did not prescribe consequences for the non-compliance with the 30-day time-frame. He posited that this meant that they left it up to the Courts' discretion to determine what the consequences of non-compliance would be. He submitted that the Appellate Court had relied on appropriate cases from other jurisdictions, to support their holding that Courts should avoid a mechanical approach as regards timelines: the English case of Soneji & Anorv. R, [2005] UKHL 49 (21 July 2005); the Ugandan case of Sitenda Sebala v. Sam K. Njuba and the Electoral Commission (Election Petition No. 26 of 2007); and the Irish case of Gillen v. The Commissioner of and Garda Siochana & Ors [2012] IESC 3 (26 January 2012).

107. Counsel submitted that the Appellate Court was competent to determine the issue of timeliness. He referred to the persuasive authority inHousen v. Nikolaisen, [2002] SCC 33 where the Supreme Court of Canada held that appellate Court Judges are not smarter than Judges of lower Courts, and therefore a Court should uphold the decision of a lower Court unless the trial Judge has made a palpable error leading to a wrong result. He argued that this holding is similar to this Court's findings in Joho and Erad, where it was held that the hierarchy of Courts has the competency to make certain decisions;he urged that the Court of Appeal had the competency to interpret an Act of Parliament.

(d) Scrutiny and recount

108. Learned counsel, Mr. Kinyanjui submitted thatMunya 2 (paragraph 153) had succinctly laid down the principles for scrutiny, and that the Court of Appeal did not misapply these principles in the majority decision. He argued that the trial Judge erred in denying scrutiny, yet the 1st respondent had laid the foundation for scrutiny: there were two differing Form 36's; the 1st appellant's County Form 36 "EOK7" (Petition of Appeal Vol. 1 at page 293) did not contain the number of registered voters in Nairobi County, was not signed by the Returning Officer, and did not show the number of registered votes for Embakasi West. He submitted that this Court had held inJohothat such information was essential as part of the content of Form 36, and was material to the integrity of an election. Counsel contended that under the principles set out inJoho,the 1st appellant's Form 36 is invalid, and so he was not validly declared the winner of the Nairobi County gubernatorial election.

109. Counsel further submitted that although the trial Court had ordered for partial scrutiny and recount suo motu, it could have gone further and ordered a full scrutiny and recount,because the partial scrutiny revealed that out of seventeen counties, only four had accurate results.

110. Counsel urged that the election Court Registrar's first report confirmed that there was no Form 35 in one of the boxes at the St. Mary's Primary School Polling Station (page 53, paragraph 123). He raised a conjecture as to how many other boxes not scrutinized would have revealed similar defects.

111. Counsel extolled the majority decision of G.B.M. Kariuki, J.Awho remarked that by declining to allow scrutiny and recount when the 1st respondent had made a case for it, and by restricting the cross-

examination of the Returning Officer, the trial Court was not in a position to verify whether the 1st appellant was validly elected (paragraph 97).

(e) Burden of Proof

112. Counsel submitted that the trial Court unfairly shifted the burden of proof to the 1st respondent. He contended that the moment the 1st respondent gave evidence that election materials were found strewn in Kayole and Kitusuru by a nun (who was not called as a witness), the burden of proof shifted to the IEBC. He submitted that the moment the 1st respondent impugned the 1st appellant's Form 36, and showed that it bore discrepancies, the burden shifted to the IEBC. He also urged that where there were two Forms 36, the burden shifted to the IEBC to explain their existence.

(f) Consideration of facts by the Court of Appeal

113. Mr. Kinyanjui submitted that the Court of Appeal had not delved into matters of fact, as contended by the 1st appellant. With regard to the status of a Court- ordered scrutiny report, counsel asked whether this is a factual document, or a document of legal character. Counsel's position was that because a scrutiny report is an outflow of Section 82 of the Elections Act and Rule 33 of the Elections Petition Rules, it takes on a legal character and is a judicial document. He submitted that the scrutiny reports transmuted from factual to legal documents, and therefore when the Appellate Court dealt with them, they were not handling issues of fact.

114. Counsel further submitted that when the Court-ordered scrutiny reports revealed errors and discrepancies, it was not possible for the Court of Appeal to turn a blind eye to these discrepancies, especially when the 1st scrutiny report revealed that, of the 17 constituencies, only 4 had accurate results (page 3988 of Petition of Appeal Vol. B9). Counsel submitted that the 2nd scrutiny report revealed discrepancies,for instance: at St. Mary's polling station, there were more votes cast than the number of registered voters (4510 votes cast/4059 registered voters); the number of registered voters in Ngong Forest Primary School polling station was indicated as 2683 in one column, and then as 1837 in another column; and polling stations Nos. 11, 12 and 14 were missing. He urged that it was incumbent upon the Court of Appeal to make findings based on such reports.

115. Mr. Kinyanjui submitted that the Court of Appeal, in considering the unsigned Forms 35, were not delving into facts. He submitted that Rule 21(b) of the Elections Petition Rules requires the IEBC to hand over Forms 35 and 36 to the election Court. These Forms, he argued, formed the basis of the scrutiny report, and the 1st respondent was entitled to cross-examine on them, and the Court of Appeal properly made reference to them.

116. With regard to the unsigned Forms 35, counsel argued that Rule 87(1)(k) of the Court of Appeal Rules states that when a party files a Record of Appeal, he may file other documents as may be necessary for the proper determination of the appeal.

Rule 87(1)(k) provides that:

> "For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents—
>
> ...

(k) 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:

Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal."

117. Learned counsel argued that the Court of Appeal could not determine the appeal without making reference to these documents. He urged that the Court of Appeal, although itlooked at the evidence, did not recalibrate or recalculate the evidence, and therefore remained within the bounds laid out by this Court in the Munya 2 case.

118. Counsel submitted that where Article 86 of the Constitution demands that the conduct of an election be accurate, verifiable and transparent, and where a scrutiny report reveals that this is not the case, the Appellate Court would be within its mandate to delve into the scrutiny reports, and to making findings based on these reports.

D. ISSUES FOR DETERMINATION

119. From the pleadings, and the written and oral submissions of the parties, the following issues arise for determination:

(i) whether the Supreme Court has jurisdiction to hear and determine the appeal hereinunder Article 163(4)(a) of the Constitution;

(ii) whether the Judges of the Court of Appeal heard and determined an incompetent appeal, contrary to Article 87(1) of the Constitution and Section 85A of the Elections Act;

(iii) whether the Judges of the Court of Appeal, in their majority decision,erred in law in considering matters of fact and evidence contrary to Article 87(1) of the Constitution and Section 85A of the Elections Act;

(iv) whether the Judges of the Court of Appeal, in their majority decision,disregarded the doctrine of stare decisis, by failing to apply binding decisions of the Supreme Court in contravention of Article 163(7) of the Constitution;

(v) whether the Judges of the Court of Appeal, in their majority decision,erred in holding that the 1st respondent's right to a fair trial under Articles 25(c) and 50 of the Constitutionhad beendenied,when the High Court curtailed the cross-examination of the 5th appellant;

(vi) whether the Judges of the Court of Appeal, in their majority decision,acted contrary to Articles 81(e) and 86 of the Constitution by nullifying the 1st and 2nd appellants election on the ground that the 1st respondent was not accorded the right to fair hearing;

(vii) whether the Court of Appealmisinterpreted and misapplied Section 82(1) of Elections Act,vis-à-vis Rule 33(2) and (4) of the Elections Petition Rules, regarding scrutiny and recount of votes;

(viii) whether the Judges of the Court of Appeal in their majority decision, erred with regard to the burden and standard of proof applied at the High Court;and

(ix) whether the election Court and the Court of Appeal misinterpreted Section 84 of the Elections Act and Rule 36 of the Elections Petition Rules, in imposing an upper limit to costs.

E. ANALYSIS

(a) Whether the Court has jurisdiction to hear and determine the Appeal herein under Article 163(4) (a) of the Constitution

120. We have, at the outset,the task of disposing of the question as to whether this Court has jurisdiction to entertain the appeal. This task would not have been necessary, were it not for the fact that both Senior Counsel Messrs. Muite and Abdullahi,for the first respondent, briskly disputed the Court's jurisdiction to entertain the appeal. The gist of Counsel's argument, in our perception, was that Section 85A of the Elections Act upon which the appeal is anchored, is a bare statutory provision entailing no question of constitutional import. Mr. Abdullahi in his submissions, just fell short of asserting that the Supreme Court of Kenya has no jurisdiction over electoral petitions, other that an election petition challenging the election of a President;which would carry the effect that the Court of Appeal is the final appellate Court in election petitions, other than a Presidential-election petition. But, perhaps guided by litigation-intuition, and being aware that he has himself urged election petitions before this Court, Mr. Abdullahi elected to apportion the constitutional issues in this appeal. Thus, on anissues-scale of ten, learned counsel carved out and assigned two-and-a-half issues to the Constitution. It is these two-and-a-half that this Court was supposed to adjudicate upon, while leaving all the others untouched.

121. Article 163 (4) (a) of the Constitution provides as follows:

> "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."

122. Learned counsel for the 1st respondent argued robustly against the admission and determination of this appeal, on grounds that it did not raise any issue of constitutional interpretation or application,such as merits the exercise of this Court's powers under Article 163(4)(a). In his view, legislation enacted by Parliament pursuant to Article 87(1), does not confer jurisdiction upon this Court, and neither does it transform an issue into a constitutional dispute, since there are numbers of constitutional provisions that all confer upon Parliament the mandate to enact laws for the implementation of certain aspects of the Constitution. He urged that a differing position would open floodgates for litigants, such as might reverse the essence of relevant precedent, as established in recent decisions of the Court.

123. In counsel's view, Section 85A is a barestatutory provision and the mere mention of Article 87(1) in a petition doesn't transmute the dispute into a constitutional issue. He urged that Article 163(7), on proper interpretation, only provides a "regulatory scheme of operations" for the Judiciary, but does not embody attributes of a constitutional nature.Counsel urged that even though the issues raised by the appellant were weighty, the same could only be canvassed under Article 163(4)(b), on condition that the Court of Appeal, or this Court has certified the matter to be oneof general public importance.

124. Counsel urged that,whether there has been a breach of Section 85A of the Elections Act, is a statutory question pure and simple, and not a constitutional one; and that by entertaining this appeal, the Court would be usurping the powers of the Court of Appeal to make final determinations on a matter of statutory interpretation, in breach of this very Court's decision in the Ngoge case¾especially as both the High Court and the Court of Appeal have made a determination on the same.

125. Counsel took issue with a finding of this Court in Munya 1, that the Elections Act, and the Regulations thereunder are 'normative derivatives' of the Constitution,and as such, allowing no possibility for a Court of which they are seized, to disengage from the Constitution. Learned counsel perceived it as inconceivable that only election laws are normative derivatives of the Constitution, and not other laws,which too have a foundation in the Constitution. Mr. Abdullahi urged that by "the normative-derivative test", this Court had expanded its jurisdiction beyond the constitutional scope,posing a real danger that there will be no limit to the type and number of appeal matters flowing into the Supreme Court.

126. Learned Senior Counsel Mr. Nowrojee,by contrast, submitted that the Court has jurisdiction in this case, as it satisfies the terms of Article 163(4)(a): the appeal had been brought as a matter of right,and it involves interpretation and application of the Constitution. He submitted that issues of application and interpretation of the Constitution were at the very core of the petition in the High Court, the Court of Appeal, and now before this Court.

127. Learned counsel cited several decisions of this Court which have clarified the frontiers of Article 163(4)(a) of the Constitution. He referred to the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others, S. C. Petition No. 10 of 2013(2014) eKLR (the test for admitting appeals to the Supreme Court is whether the dispute progressed through the normal appellate processes at the superior Courts); Erad Suppliers & General Contractors Ltd v. National Cereals and Produce Board, S. C. Petition No. 5 of 2012 (a question integrally linked to a main cause before a superior Court is first to be resolved at that forum before appeal to the Supreme Court); Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,S. C. Application No. 5 of 2014(Munya 1) (all the appellant needs to demonstrate for an appeal to be admitted under Article 163(4)(a), is that the reasoning and conclusions of the Court took a trajectory of constitutional interpretation or application); and the concurring opinion of Mutunga CJ in Gatirau Peter v. Dickson Mwenda Kithinji & 2 Others,S. C. Petition No. 2B of 2014(Munya 2B)¾on the emerging parameters on admission of appeals to the Supreme Court under Article 163(4)(a).

128. Counsel submitted that the appeal merits hearing, as all the principles laid in Munya 2B had been satisfied: the cause raises cardinal issues seeking the interpretation and application of Article 87(1), in respect of timely settlement of electoral disputes; the issues bear potent jurisprudential questions including whether all Courts are bound by the Supreme Court's decisions under Article 163(7) of the Constitution. Mr. Nowrojee contested Mr. Abdullahi's argument to the effect that "all laws were normative derivatives of the Constitution." Mr. Nowrojee submitted that his colleague had either taken this Court's statement out of context, or had not appreciated its meaning. Counsel submitted that where a specific constitutional provision sets out a general principle, and then commands Parliament to make a law giving effect to that principle, the resultant law becomes "a normative derivative" of that constitutional principle. It is in this context that the Court's statement in Munya 1had to be understood.

129. Learned Senior Counsel Mr. Muite,in departure from his co-counsel, did not think that the Munya case had in any way undermined the Court's earlier decisions on its jurisdiction. Save, in Mr. Muite's submission, that not every matter in which the Constitution has been invoked, deserves the attention of this Court: and thus, even if the Court were to find that it had jurisdiction, then such jurisdiction should be exercised in favour of the first respondent, taking into account the circumstances of this particular case.

130. Since its inception, this Court has consistently pronounced itself on the nature, scope, extent and limits of its jurisdiction under Article 163(4)(a) of the Constitution (see Re IIEC; Peter Oduor Ngoge;

Lawrance Ndutu; Erad Suppliers; Hassan Ali Joho; Munya 1& 2). In each of those decisions, the Court has considered different angles of the jurisdictional question. In his concurring opinion in Munya 2, Mutunga, CJ& P analysed the various facets of the Court's pronouncements into 'guiding principles', to be taken into account byappellants who seek to predicate their appeals upon Article 163(4)(a) of the Constitution. Such guiding principles are hereby restated with appropriate elaboration as is consistent with the terms of this Court's other decisions:

(i) a Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;

(ii) the chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them; and only cardinal issues of law or of jurisprudential moment deserve the further input of the Supreme Court;

(iii) not all categories of appeals lie from the Court of Appeal to the Supreme Court under Article 163(4)(a); under this head, only those appeals from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court;

(iv) and under that same head, the lower Court's determination of an issue which is the subject of further appeal, must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;

(v) an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;

(vi) with regard to election matters, not every petition-decision by the Court of Appeal is appealable to the Supreme Court;only those appeals arising from the decision of the Court of Appeal in which questions of constitutional interpretation or application were at play, lie to the Supreme Court.

131. We have considered Mr. Abdullahi's submissions, and have formed certain distinct impressions. We find no basis of merit upon which learned counsel suggested we should depart from our decisions in the Munyacase. To ask this Court,so nonchalantly in the course of submissions,to depart from a statement of principle formally taken in a judicial setting, amounts, with respect, to an abuse of the process of Court.

132. Of the principle set out in Munya 1,as to the electoral statute and regulations as direct emanations of the relevant constitutional principle, we find no basis to learned counsel's dubiety. In that case we had thus held (paragraph 77):

> "While we agree with [learned counsel] 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"[emphasis supplied].

133. This crisp observation was in response to an argument by counsel, to the effect that the petition of appeal in question did not raise any issues of constitutional controversy, since it was largely impugning the interpretation and application of the statutory and regulatory provisions of the Elections Act.The

true constitutional significance of the said statutory and regulatory provisions was properly set in context in this Court's decision (paragraph 79):

> "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....has the responsibility to hear the parties and to interpret the Constitution as appropriate" [emphasis supplied].

134. Learned counsel, Mr. Abdullahi's argument that,"all laws are normative derivatives of the Constitution",while by no means illogical, had in our view taken an abstract point out of the context of the real dispute being redressed within the judicial system. If the Constitution is equated to Kelsen's grundnorm in the hierarchy of norms, then it follows that all laws are "normative derivatives" of the Constitution,as they derive their validity therefrom. And since the Constitution vests the legislative authority in Parliament, then all laws that the latter enacts "derive from the Constitution".

135. However, the Constitution itself, for its meaningful implementation, and with definite socio-political goods accruing to the people, has duly empowered the judicial system¾and this Supreme Court¾ to establish operational beacons. Such is the role this Court has played in settling disputes, a typical example in this regard being,Inthe Matter of the Principle of Gender Representation in the National Assembly and the Senate,Sup. Ct. Advisory Opinion Appl. No. 2 of 2012, in which the Court, considering the Attorney-General's reference on the proper effect of Article 81 (b) of the Constitution, thus expounded the critical questions of principle which learned counsel in the instant case should take into account (paragraph 54):

> "Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favor of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

136. The Court's statement in Munya 1is to be perceived in the context of the foregoing passage, which sought to unlock the frontiers of Article 81(b) of the Constitution, as read with other provisions of the Constitution. The Court was advancing and applying the interpretative schema of the Constitution, in the light of its transformative character. In this regard, plain abstract theory founded upon the Kelsenian grundnorm, rested upon a secondary pedestal.

137. Chapter Seven of the Constitution is entitled "Representation of the People"and bears the sub-title "Electoral System and Process",with further sub-title "General Principles of the Electoral System."Articles 81, 82, 83, 84, 85, 86 and 87 all fall under this Chapter. It is plain to us that most of the provisions in these Articles are rendered in the form of principles¾some general, and others not so general. And, thus expressed, it is unavoidable that most of these principles are not self-executing: which fact moves the judicial forum to centre-stage, as regards interpretation and application.

138. These principles cannot crystallize into deliverables of public goods, such as those in the nature of governance and elections, without further legislative action.

Thus,Article 82 (1) (d) provides as follows:

> "Parliament shall enact legislation to provide for¾
>
> .....
>
> (c) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections
>
> (2) Legislation required by clause (1) (d) shall ensure that voting at every election is¾
>
> (a) simple;
>
> (b) transparent and;
>
> (c) takes into account the special needs of¾
>
> (i) persons with disabilities and;
>
> (ii) other persons or groups with special needs."

Article 87 (1) for its part, provides that:

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

Article 105 (1) of the Constitution provides that:

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

Sub-Article (3) of the said Article provides that:

> "Parliament shall enact legislation to give full effect to this Article."

139. Such a context of interpretation has informed the decisions of this Court. As an instance, in Fredrick Otieno Outa v. Jared Odoyo Okello & 4 othersS.C. No. 10 of 2014,the Court stated as follows(paragraph 55):

> "In adopting this view, we would observe that the Elections Act, 2011 enacts in substantive form the constitutional principle of securing for the Kenyan people a representative democracy, in which the mandate of leadership is attained through popular elective politics, based on the ideals of free and fair election. The realization of this goal is partly attainable through universal franchise, expressed in a voting exercise guided by appropriate

legislation,that is derived from the premises and values embodied in Articles 38, 81 and 86 of the Constitution. Thus, it is for certain, that electoral contestations will involve constitutional interpretation or application."

140. There is yet another issue regarding the frontiers of Article 163(4) (a) of the Constitution, which has not been accorded adequate attention by counsel,as they urge their clients' cases on the basis of its terms. The provision thus reads:

> "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..."

141. The operative words are "interpretation or application". Do these wordshave the same meaning? In our perception, these terms do not mean one and the same thing. Otherwise, the drafters would have simply opted to use either of them. As it is, the Supreme Court will not infrequently be called upon either to interpret or to apply the Constitution. It emerges from the comparative lesson that judicial approaches in different jurisdictions, do not accord the expressions "constitutionalinterpretation",and"constitutional application"the same meaning.

142. For our purposes, interpretation of the Constitution involves revealing orclarifying the legal content, or meaning of constitutional provisions, for purposes of resolving the dispute at hand (call it the hermeneutic aspect).The basic reference-point in constitutional interpretation is the text. Application of the Constitution is a more dynamic notion. It comes into play when the provision of the Constitution remains in some vital respects (even after the jural process of content-ascertainment) indeterminate, or ambiguous, or vague, or contradictory.In other instances, a constitutional text may be quite clear on paper, but when applied to a dispute, it leads to absurd consequences. In such a situation constitutional application ceases to be a simple exercise in interpretative syllogism. It takes on the character of "creative interpretation" (see Jeffrey Goldsworthy,German Law Journal, Vol.14 No.08, pp. 1279-1295(August 2013)), or what some American theorists have called "constitutional construction" (see Randy E. Barnet, Interpretation and Construction, 34 Harv. J.L and Pub. Policy65 (2010)).

143. Constitutional application, therefore, entails creatively interpreting the constitution to eliminate ambiguities, vagueness and contradictions, in furtherance of good governance. Quite often, this exercise involves interpreting the Constitution in such a manner as to adapt it to changing circumstances in the community, with the care not to usurp the role of the legislature. This is what is meant when the Constitution is said to be "a living document". A Constitution is, thus, to be interpreted both according to its text, and creatively as well, to breath life into it(see Jakab,"Judicial Reasoning in Constitutional Courts",German Law Journal; Vol.14, No. 08, pp. 1215-1272 (August 2013)).

144. It follows that Article 163(4) (a) of the Constitution confers upon the Supreme Court a role of constitutional interpretation and application, which cannot be performed through a bare apportionment of judicial tasks, as learned Senior Counsel, Mr. Abdullahi suggests. It is not feasible in electoral disputes, in respect of which the Constitution dedicates a whole chapter to "general principles" of the electoral system ¾principles thatstand alongside prescriptive norms.Where disputes arise with regard to the interpretation and application of such principles and norms in election petitions, this Court, Kenya's apex Court,cannot gaze helplessly when moved by a litigant.Not so long

ago, in Aramat v. Lempaka &Others (Petition No.5 of 2014), this Court was categorical about the nature of its jurisdiction. At paragraph 107 of the majority Judgment, the Court stated:

> "The Constitution's paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its declared principles. The Court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, such questions as come up in the course of dispute settlement..., especially those related to governance, are intrinsically issues importing the obligation to interpret or apply the Constitution¾and consequently, issues falling squarely within the Supreme Court's Mandate under Article 163(4) (a), as well as within the juridical mandate of the Court as prescribed in Article 259 (1) (c) of the Constitution, and in Section 3(c) of the Supreme Court Act, 2011..."

145. Is the appeal before this Court grounded upon issues of cogent constitutional controversy? Is the controversy one to be resolved through a final interpretation or application of the Constitution by this Court?

146. The appellants assert that the Court of Appeal acted without jurisdiction, in considering an appeal filed in breach of the mandatory timelines under Article 87(1) of the Constitution and Section 85A of the Elections Act. It is also the appellants plea that the Court of Appeal arrived at the conclusions it made, in disregard of the precedents already established by this Court, in violation of Article 163(7) of the Constitution. Both in their written and oral submissions, the appellants pose the question whether the Court of Appeal can depart from principles established in its own previous decisions. It is also contended by the appellants, that the election of the Governor of Nairobi County was nullified by the Court of Appeal,without specifying how the said elections were conducted in breach, if at all, of the electoral principles enunciated in Articles 81(e) and 86 of the Constitution. In ground 5, the 1st appellant pleads a violation by the Court of appeal of his right to a fair trial, enshrined in Articles 25(c) and 50(1) of the Constitution. Grounds 6 and 9 of the petition of appeal are to the effect that the Court of Appeal exceeded its jurisdiction, contrary to Section 85A of the Elections Act, which restricts appeals to that Court to matters of law only.

147. This appeal has its origins in the High Court, where the first respondent herein had challenged the election of the first appellant herein. The petitioner (first respondent herein) based his petition on the provisions of Articles 86, 87(2) 88(5), and 165(3) of the Constitution, and Sections 75 and 80 of the Elections Act. The main claim in that petition was that the election of the first appellant herein had not been conducted in accordance with the principles embodied in Article 86 of the Constitution. The petitioner moved to the Court of Appeal having been aggrieved by the High Court's decision dismissing his petition.

148. Did the Appellate Court's determination of the issues now on appeal, take a trajectory of constitutional application or interpretation, for the appeal to merit hearing before this Court. In Munya 1, the Court stated that:

> "
>
> 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."

149. In Lawrence Nduttu, this Court held that under Article 163(4)(a) of the Constitution, the appeal had to originate from a case wherein an appellant was seeking to challenge the interpretation or application of the Constitution which the Appellate Court applied to dispose of the matter,at that forum. The Court had this to say (paragraph 28):

> "... 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)"

150. In Joho, this Court again clarified the test to be applied in determining whether an appeal was to be entertained under Article 163(4) (a) of the Constitution. The Court stated (paragraph 37):

> "...the test that remains to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises the question of Constitutional interpretation or application and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal a contemplated under Article 163(4)(a)."

151. Are the appellants in this case challenging the interpretation or application of the Constitution which the Court of Appeal adopted to dispose of the matter, in annulling the Judgment and orders of the High Court? To answer this question, one must review the Judgment of the Court of appeal which the appellants now impugn.

152. Kiage J.A (at page 22) delineated the first issue for determination as "Whether the appeal is competent in light of Section 85A of the Elections Act". At page 23 of his Judgment, the learned Judge recognizes that Section 85A is a legislative enactment in compliance with Article 87(1) of the Constitution, on mechanisms for timely settling of electoral disputes. The learned Judge went ahead to distinguish between timelines in the Constitution, and in the Elections Act, holding that Section 85A had no intention to 'curtail or render illusory the right of appeal, an integral element of access to justice and the right to fair hearing under our constitutional order'(page 39).

153. Furthermore, having found that the adjudication of electoral disputes bears a constitutional and statutory provenance, the learned Judge remarked that if a Court were to carry out trial proceedings without regard to principles of fair trial, the Judgment would be vitiated. On this precise foundation, the majority (with Warsame, J.A dissenting) allowed the appeal, thus annulling the Judgment of the High Court which had upheld the election of the 1st appellant, as having been conducted in accordance with the principles laid down in the Constitution and the electoral law.

154. Also featuring in the learned Judge's reasoning (page 65)is Article 86(a) and (b) (on principles of electoral conduct), which the learned Judge declared to be binding upon the IEBC and its officials.

155. In the Judgment of G.B.M Kariuki J.A, the following constitutional issues were articulated, and findings made. The learned Judge opines (p.12) that the Bill of Rights, especially the right of access to justice, applies to appeals lodged at the Court of Appeal. The Judge then cites (p.13) Article 87(1), on the mandate imposed on Parliament to enact legislation to ensure timely settlement of electoral disputes. He finds the Elections Act and the Regulations made thereunder, as the antidote to the then

systemic lethargy in the settlement of electoral disputes. In the learned Judge's view, Parliament could not have intended to impede a citizen's right of access to justice, or the right to appeal against an election decision, where inadvertently the period for filing such an appeal had lapsed. To find meaning for Section 85A of the Act, the Judge held that one has to be guided by Articles 10, 20, 25(c), 38, 50, 87(e) and (l) of the Constitution (see p. 15, page 145 of Vol. A of record of appeal).

156. The learned Judge further held that an interpretation of Section 85A(a) that disallows appeals for no fault of the appellant, should be construed as a "violation of the Constitution and an infringement of the Bill of Rights"; and that Rule 82 of the Court of Appeal Rules provides the cure to the potential injustice and prejudice to constitutional rights.

157. It is clear to us that the appellants are challenging the reasoning and conclusions of the majority decision of the Court of Appeal, regarding the question of timelines in election petitions. They come to this Court seeking a vindication of their cause, because they believe that the appellate Court erred in its interpretation of Section 85A of the Elections Act vis à vis Article 87(1) of the Constitution. They believe that the timelines set out for the filing of election petitions in the Elections Act are in accord with the constitutional command in Article 87(1). They contend that this Court has already established binding precedent on this question. They contest the attempt by the Court of Appeal to elevate and apply a civil-litigation rule (subsidiary legislation) to an election dispute, beyond and in breach of Section 85A and, by extension, the Constitution itself. These are,in our view, pertinent constitutional controversies.

158. This appeal stands on all fours with the other election-petition appeals such as Munya, Johoand others, which this Court has admitted and determined under Article 163(4)(a) of the Constitution. Accordingly, we have no trepidation in holding that this Court has jurisdiction to entertain it. In broader context, our position is well depicted in the words of Chief Justice Marshall of the U.S.A, in Cohens v. Virginia, 19 U.S. 264 (1821):

> "It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."

159. Did the Appellate Court admit, hear and determine an incompetent appeal contrary to Section 85A(a) of the Election Act as read with Article 87(1) of the Constitution?

160. The Judgment of the High Court was delivered on 10th September, 2013. (See page 132 Vol. B1). The 1st respondent filed at the Court of Appeal a Notice of Appeal against the Judgment and orders of Mwongo J on 12th September, 2013.

161. Under Section 85A(a), the 1st respondent ought to have filed an appeal within30 days from the date of Judgment in the High Court, that is on 10th of October, 2013. This was however not to be, as the subsequent events now show. On 11th September, a day after the High Court's Judgment, the 1st respondent's advocates wrote to the Deputy Registrar of the High Court of Kenya requesting typed proceedings in the matter. The Deputy Registrar responded the following day, informing the 1st respondent's advocates that they would be notified to collect the proceedings once typing of the

same was completed. On 9th October, 2013, certified proceedings were ready for collection (see pages 28-30 vol. B1).

162. The 1st respondent has met the claim of belated appeal on his part by invoking a "certificate of delay" which was in his possession. The content of the said certificate of delay runs as follows:

> "1. An application for proceedings was lodged in Court on 11/9/2013;
>
> "2. Certified copies of proceedings were not ready until 9/10/2013;
>
> "3. Certified copies of the proceedings and ruling were ready on 9/10/2013;
>
> "4. The certificate of delay was prepared and ready for collection on 30/10/2013;
>
> "5. Number of days taken: 49days."

163. Armed with a certificate of delay, the 1st respondent then lodged his memorandum of appeal at the Court of Appeal registry on 22nd November, 2013¾being 23 days from the date of issue of the certificate of delay.

164. Section 85A of the Elections Act, under which the 1st respondent's appeal to the Court of Appeal was to be admitted, provides as follows:

> "An appeal from the High Court in an election petition concerning membership of the National Assembly, Senator 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 to the Court of Appeal."

165. It was the appellants' argument that the appeal was filed after a record 72 days from the date of the Judgment of the High Court. According to the appellants, the mandatory provision of Section 85A (a) of the Elections Act was not adhered to, in contravention of the underpinning constitutional principle of timely resolution of electoral disputes,embodied in Article 87(1). The Appeal was, therefore, incompetent in law. It was urged that the Court of Appeal acted without jurisdiction, by determining an incompetent appeal, the same having been filed outside the mandatory statutory timeline.In canvassing this contention, learned Senior Counsel, Prof. Ojienda submitted that this Court has held that Courts do not have a discretion to extend mandatory timelines set out in the Elections Act.

166. Counsel cited a number of authorities including the Joho case, in which this Court affirmed the Court of Appeal's pronouncement in Ferdinand Waititu v. Independent Electoral and Boundaries Commission & 8 OthersCivil Appeal No. 137 of 2013- that the timelines set by the Constitution and the Elections Act are neither negotiable nor extendable by any Court; Mary Wambui Munene v. Peter Gichuki Kingara & 2 OthersS.C Petition No. 7 of 2014- in which this Court was categorical as to the imperatives of timelines demanded by the Constitution, in the settlement of electoral disputes; and Munya 2- in which this Court declared the constitutional basis of Section 85A of the Elections Act, stating that it was "neither a legislative accident nor, a routine legal prescription". Counsel invited this Court to consider and affirm the pronouncements by Warsame J.A in his dissenting Judgment at the Court of Appeal.

167. Learned Senior Counsel, Mr. Muite submitted that the appeal was competent, as the Court had to take into account and exclude the time taken in the preparation of the proceedings. Counsel urged

that the first respondent herein did not merit penalty for a delay occasionedby the High Court in the preparation of the proceedings, as evidenced by the certificate of delay. Counsel asked the Court to consider the provisions of Articles 50, 159 and 259 of the Constitution of Kenya,which in his view, ruled out a strict application of Section 85A of the Elections Act ¾ as it would violate the 1st respondent's right of access to justice under Article 25 of the Constitution.Mr. Muite urged us to affirm themajority decision which in his view, was the correct reflection of the legal position.

168. There are two critical questions to be answered at this stage, namely:

(a) What is the legal effect of the provisions of Article 85A(a) of the Elections Act on election-petition appeals?

(b) To what extent, if at all, are the Court of Appeal Rules in general, and Rule 82(1) in particular, applicable to electoral disputes before the Court?

169. In answer to question (a), it is an eminently relevant point that, long before this Court had pronounced itself on the question of timelines in election petitions other than in a Presidential-election petition, the Court of Appeal had already considered the question, and delivered authoritative decisions of merit. Two of these cases are outstanding. In an illuminating declaration of legal principle (which found favour in this Court), the Court of Appeal in Ferdinand Waititu v. Independent Electoral and Boundaries Commission, (IEBC) & Others, Civil Appeal No. 137 of 2013 (Mwera, Musinga and Kiage JJA), stated as follows:

> "...These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Elections Petition Rules be amended to bring about mechanisms of expediting trials..."

170. In Patrick Ngeta Kimanzi v. Marcus Mutua Muluvi &2 Others, Nairobi C.A No.191 of 2013 [2014] eKLR;the Court of Appeal(Kariuki, Kiage and M'Inoti JJA) was again categorical, that the provisions of Section 85Aof the Elections Act, setting out timelines for the filing and determinationof election petitions, were peremptory and non-negotiable.

The learned Judges of Appeal had the following to say:

> "The ruling and order appealed from in Machakos Election Petition No. 8 of 2013 was delivered on 17.6.2013. The appellant filed the appeal on 12.08.2013. The period for lodging appeal expired in July 2013 and clearly the appeal was filed out of time. In Maitha vs. Said and Another, (1999) 2 E.A 181, this Court held that s.23(4) A of the National Assembly and Presidential Elections Act, which like s.85 A of the Elections Act stipulated the period within which an appeal from the decision of the election court should be filed, was mandatory and that upon the lapse of the stipulated time, the right of appeal automatically lapsed..."

171. Warsame J.A, in an extensively reasoned dissent in the matter at hand, revisited these cases,acknowledging their merits. The learned Judge thus remarked:

> "Having so found, what is the time within which an appeal from the decision of the High Court is to be filed and determined? The answer to this question is to be found at Section

85A(a) which is worded in very clear terms, that an appeal from an election petition 'shall' be...filed within thirty days of the decision of the High Court.

"The word 'shall' used in Section 85A(a) of the Elections Act connotesan emphatic intention, an expression of strong assertion or command, a duty rather than a wish, required to perform a function in a discretionary manner. In my understanding, the use of words shall and filed within 30 days of the decision of the High Court confer a mandatory sense that the drafters typically intended, and that courts typically must uphold. It means the filing of an appeal from the decision of the High Court is to be done within 30 days. In other words, the filing is to be done within the period, not exceeding or beyond the 30 days from the date when the decisionis rendered."

172. Such a position is entirely consistent with a number of precedents which have been laid by this Court. In Hassan Ali Joho &Another v. Suleiman Said Shahbal &2 Others, S.C Petition No. 10 of 2013 [2014] eKLR,this Court cited withapproval the declaration of legal principle by the Court of Appeal in the Ferdinand Waititu case (quoted above).The Court stated that adherence to the imperatives of time, as decreed by the Constitution, is a vital element in the operation of a democratic system based upon electoral expression.

173. In Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others SC Petition No. 7 of 2014,this Court while annulling the proceedings of the High Court and Court of Appeal in an election petition that had been filed outside the time-frame prescribed in Article 87(2) of the Constitution, stated as follows:

"....Time as a principle, is comprehensively addressed throughthe attribute of accuracy, and emphasized by Article 87(1) of the Constitution, as well as other provisions of the law. Time in principle and applicability, is a vital element in the electoral process set by the Constitution. This Court's decision in Joho was guided by this consideration. For purposes of this case, we apply the precedent in Joho, taking into account that the issue in question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion."

174. In Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others SC Petition No. 2B of 2014,this Court clearly established the constitutional genealogy of Section 85A of the Elections Act, when it declared that the same was "neither a legislative accident nor a routine legal prescription."Section 85A, the Court affirmed, "is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion."

175. In spite of these clear and unambiguous enunciations of legal principle, by boththe Court of Appeal and the Supreme Court, regarding the legal effect of Section 85A(a) of the Elections Act, the majority decision of the Appellate Court in this matter not only admitted a petition of appeal whichhad been filed in contravention of the mandatory provisions of the law but, on the basis of the appeal, annulled the election of the first appellant herein.

176. The learned Judges on the majority side predicated their decisionon two generic inferences: firstly, that Section 85A(a) of the Elections Act being a statutory timeline, was not as mandatory as the timelines named in the Constitution itself; and so a Court of law could extend the period within which an intending petitioner will lodge an appeal beyond the 30-day limit prescribed in the Act. Such an extension, the learned Justices of Appeal reasoned, was proper in the interestsof justice, especially where there had been delay in the preparation of Court proceedings. Parliament, the learned Justices

opined, could not have intended to shut out a litigantfrom filing an appeal, as this would offend other provisions of the Constitution, especially Articles 10, 20 and 25(c).

177. Secondly, that on the strength of Rule 35 of the Election (Parliamentary and County Elections) Petition Rules, the Court of Appeal Rules are applicable in their totality to election petitionappeals before the Court;and so, Rule 82 (1) of the Court of Appeal Rules could apply to extend the time for filing of an election petition appeal beyond the 30-day limit prescribed by section 85A of the Elections Act.

178. In both respects, we are of the opinion that the learned Judges of Appeal, with respect, fundamentally erred in law. In the first instance, the learned Judges, upon unspecified grounds, chose to depart from the legal principles established by the Appellate Court itself, and affirmed by this Court, regarding timelines, and without specificallydistinguishing the earlier cases in accordance with normal judicial practice. The declaration of legal principle in Ferdinand Waititu, for example,was dismissed out of hand,with bare personal doubts signalled as the cause, in the following passage:

> "As a declaration of principle, I believe we were correct in asserting the importance, inviolability even, of the timelines in the Constitution and the Elections Act. As to whether in fact, the same cannot be extended by any Court, for whatever reason as we expressed ourselves, I must admit to some doubts upon further reflection. It is to be remembered that the view we expressed was in fact broad principle or probably orbiter since the only issue that was for determination before us was whether we could entertain appeals from interlocutory decisions of the High Court."

179. Such was a fundamental departure, on the basis of mere doubt, not only from the specific enunciation of the legal position in the case in which the learned Judge had participated, but from all the other decisions by the Court of Appeal on a similar question. Of more concern to us is the fact that, the principle from which the learned Judge was declaring a departure, had indeed been affirmed by this Court, in Hassan Ali Joho &Another v. Suleiman Said Shahbal &2 Others, S.C Petition no. 10 of 2013 [2014] eKLR.What this Court has affirmed as being a settled statement of thelaw, can neither be broadprinciple,nor orbiter,before other superior Courts. We now reaffirm the legal principles established by the Court of Appeal in earlier cases, regarding the mandatory nature of the statutory timelines.

180. It is clear to us that the Court of Appeal's majority position, even if founded upon notions of "justice and fairness", had overlooked clear imperatives of the law that are overriding. The learned Judges had overlooked the law of precedent, expressly declared in Article 163 (7) of the Constitution. They did not recognize that Section 85A of the Elections Act is directly born of Article 87 of the Constitution. They had not taken into account the fact that ideals of justice are by no means the preserve of the intending appellant, and that they must enure to the electorate as a whole. The learned Judges perhaps failed to recognize that the overall integrity of the democratic system of governance is sealed on a platform of orderly process, of which the Judiciary is the chief steward, and in which the course of justice already charted by the superior Courts is to be methodically nurtured.

181. The foregoing principles are well reflected in still further decisionsof the Court of Appeal itself. In Basil Criticos v. Independent Electoral and boundaries Commission &2 Others [2014] eKLR, the words of Okwengu JA are illuminating in this regard (paragraph 12):

> "Thus under section 85A of the Elections Act, the right to a hearing in regard to an appealfrom an election petition is tied to the timelines provided in that Act. In this way the right to a hearing is appropriately balanced withthe public interest of expeditious disposal of

electoral disputes. This is as it should be, for one party may have brought an appeal, but the outcome affects the interest of the public whose right to representation is in limbo during the pendency of the appeal."

182. This leads us to the question regarding the applicability of the Court of Appeal Rules,in relation to the election petition appeals beforethe Appellate Court. The majority on the Appellate Court Bench held that Rule 82 (1) of the Court of Appeal Rules was applicableto the matter before them, with the effect of setting in motion the computation of time such as would exclude the time taken by the High Court in the preparation of the proceedings.

Rule 35 of the Election Petition Rules stipulates that:

> "An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules"

Rule 82(1) of the Court of Appeal Rules stipulates that:

> "Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-
>
> (a) a memorandum of appeal, in quadruplicate;
>
> (b) the record appeal, in quadruplicate;
>
> (c) the prescribed fee; and
>
> (d) security for the costs of the appeal:
>
> Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy."

183. If this Rule were to apply to election petition appeals, as the majority decisionheld it does, it means an election petition appealcan be filed within as much as 60 days of the filing of the Notice of Appeal. The Rule provides in addition, that the time taken to prepare the proceedings be excluded from the computation of the sixty days. This Rule, therefore, ousts the provisions of Section 85A(a) of the Elections Act, regarding the time within which an appeal must be filed.Such a rule if applicable, it is clear to us, would defeat the object of efficient electoral-dispute settlement under the Constitution.

184. However, the Court of Appeal concluded that Rule 82(1) of the Court of Appeal Rules was applicable to electoral appeal matters before that Court, in the words of the learned Judge, G.B.M.Kariuki, JA:

> "If Parliament intended that Rule 82 should be overriddenby S. 85 A(a), Parliament could have expressly so stated. It did not. The Court of Appeal Rules were applied wholesale to appeals from the Election Court. That was not purposeless. Admittedly, the Court's judicial function [is] to interpret the law in a manner that ensures that the intention of the Legislature is given effect... because Parliament could never have intended a conflict between the Constitution ....and the Elections Act that regulates the conduct of the electoral process."

185. The same position emerges from the Judgment of Kiage, JA:

> "There is neither ouster nor replacement of the Court of Appeal Rules. They certainly are not supplanted. What we have is an affirmationand restatement of their application. They are controlling."

186. Such a position cannot, in our view, be sustained: for it flies in the face of the time-hallowed principle of"the hierarchy of norms." It is well recognized that an instrument of subsidiary legislation cannot override the provisions of an Act of Parliament. This position is clear from the terms of Section 31 (b) of the Interpretation and General Provisions Act(Cap. 2, Laws of Kenya), which provides:

> "Where an Act of parliament confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intentionappears, have effect with reference to the making of the subsidiary legislation-
>
> (c) no subsidiary legislation shall be inconsistent with the provisions of an Act."

187. Indeed, judicially, the special status of the divers elements of the electoral law had already been affirmed by the Court of Appeal in the Ferdinand Waititucase (cited above), as follows:

> "The Elections Act and the Rules made thereunder constitute a complete code thatgoverns the filing, prosecution and the determinationof election petitions in Kenya. That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Article 87 (1) and 105(2) and (3) of the Constitution is null and void."

188. This Court incorporated precisely such a perception in its recent Judgment in Fredrick Otieno Outa v. Jared Odoyo Okello & 4 OthersS.C. No. 10 of 2014,when it thus held (paragraph 77):

> "On this account, it makes in our perception, eminent sense that the ordinary rules of procedure, in their full tenor and effect, tend to be ill-suited to theeffectuation of substantive aspects of the Elections Act and the Rules made thereunder.It is clear to us, for instance, that Rule 35 of the Elections Petition Rules, in so far as it makes the Court of Appeal Rules applicableto appeals in election-dispute matters, is to be construed only as a supplement to¾and not a substitute to- the provisions of the Elections Act. We would state, for the avoidance of doubt, that the importation of the Court of Appeal Rules into the conduct of electoral appeals via Rule 35 of the Election Petition Rules, cannot oust the clear provisions of Section 85A of the Elections Act."

189. We would agree with the perception of Warsame JA, regarding the applicability or otherwise of Rule 82 of the Court of Appeal Rules, to election-petition appeals. The learned Judge in his opinion, thus stated (pp. 29-30 of the Judgment):

> "Can Rule 82 of the Court of Appeal Rules, 2010 whichprovides for the certificate of delay, defeat the statutory provisions contained in section 85A of the Elections Act? The answer to this question must be in the negative...Section 85 is the legal foundation and all the rules must be interpreted in a manner that will not displace it....Therefore the Elections Act is the parent Act. It has all the and structures for the filing of the petition which is provided for in the Constitution....The time for lodging and determination of appeals in election disputes is found at section 85A of the Constitution, and a party who (sic) does not comply cannot find refuge in therules of this Court. It is not tenable to elevate the rules of procedure of the Court above a statutory provision..."

190. The interplay between electoral dispute-settlement timelines, and other types of dispute-settlement procedures, is a jurisprudential issue that has been experienced in other jurisdictions as well. In Ferdinand Frampton and Others v. Ian Pinard and Others Claim Nos. DOMHCV 2005/0149, the High Court in of the Commonwealth of Dominica held that a petitionermust do everything to lodge his or her petition within the stipulated time, and that an election Court has no power to extend the time prescribed by statute unless such power is expressly conferred upon it. The Court pronounced itself as follows:

> "The rationale...is that provisions for the litigation of election petitions are a matter of substantive law, and, like the Statute of Limitation, cannot be dispensed withby the Court. The statutory time limits provide a rigid time table to ensure that everything that is necessary is done, in a timely manner, to bring these petitions to trial because of the public interest requires it..."

191. In Ezechiel Joseph v. Alvina Reynolds HCVAP2012/0014 the Caribbean Court of Appeal at St. Lucia was faced withseveral questions,inter alia: whether the Civil Procedure Rules 2000 of 1967 applied in part, or as a whole, to proceedings under the Elections Act; and whether a petitioner, upon giving good reason, could rely on any provision of the Civil Procedure Rules, 2000 to move the Courtfor an extension of the time prescribed for doing specific acts. The learned Judge, Sir Hugh Rawlins stated as follows:

> "In keeping with the strict approach, our Courts have generally insisted that the provisions in elections legislation must be strictly complied withbecause the paramount public interest is that election challenges should be determinedas quickly as possible so that the assembly and the electors should know their rights at the earliest possible time...The election Court has no power to extend time or allow amendments filed out of time unless election legislation so provides" (emphasis supplied).

192. In the matter before us, it is for certain that the petition of appeal before the Court of Appeal was filed well outside the mandatory time prescribed by Section 85A of the Elections Act. It is also an established fact that the proceedings at the High Court were ready for collection on 9th of October 2013. A certificate of delay was issued on 30th October 2013notwithstanding the fact that the proceedings had been ready for collection on 9th of October. The petition of appeal ought to have been filed on or before the close of day on 10th October 2013.Instead, the appeal was not filed untilthe 22nd of November 2013.

193. The first respondent herein has been portrayed as an innocent man in this entire saga. The Court was invited to regard him as a victim of the High Court's lethargy or inefficiency; an intending appellant without fault, who would otherwise have lodged his appeal within the timelines prescribed by Section 85A (a) of the Elections Act. Other than the letter written to the Deputy Registrar of the High Court by 1st respondent's counsel, inquiring about the proceedings, we were not informed of what else the respondent did to follow up on the same. The proceedings were ready on 9th October 2013. Yet the respondent collected the same on 30th of October 2013. Was the respondent conscious about the provisions of Section 85A of the Elections Act?

194. Let us assume, for purposes of argument, that all along, the respondent was intent on beating the statutory deadline. Towards this end, he would have diligently collected the proceedings on the 9th of October 2013, and proceeded to prepare and lodge his appeal in the Court of Appeal, before close of day on 10th of October 2013. It was robustly submitted by Senior Counsel Mr. Muite, that the delay in the preparation of the proceedings ought to be taken into account in the computation of time.

But even if the Court were to accede to such a request, the latest the respondent ought to have filed the appeal would have been the 10th of November 2013, being the thirtieth day as from the date the proceedings were available. What did the respondent do? He filed his appeal on the 22nd of November 2013. So all along, the respondent's conscience does not appear to have been pricked by the provisions of Section 85A of the Elections Act.

195. Was it impossible for the first respondent herein, through counsel, to take all initiatives to lodge an appeal in the Court of Appeal before close of day on 10thOctober 2013? We don't think so, given the high stakes involved in the matter.

196. Consequently, and in view of our appraisal of the law, we hold that the learned Judges of Appeal erred in law by admitting, and determining an incompetent appeal- the same having been filed out of the time prescribed by the peremptory provisions of Section 85A (a) of the Elections Act as read withArticle 87 (1) of the Constitution. In so doing, the Court of Appeal acted withoutjurisdiction. In the circumstances, the majority Judgment annulling the election of the first appellant herein is a nullity for all purposes.

197. This Court has noted the occurrence of delay in the preparation of proceedings at the High Court, and would restate the position it has taken in election cases.Courts of law should not be the ones to stand in the way of the expeditious disposal of electoral disputes,in a manner that gives fulfilment to the terms of the Constitution and the law. We hereby direct the Chief Registrar of the Judiciary to take appropriate action within her mandate under the Constitution, to ensure that inordinate delays do not occur.

198. As the threshold question of jurisdiction disposes of this matter, and no further issues of significant constitutional character have come up, we see no need to render an opinion in respect of other questions, upon their merits.

F. THE CONCURRING OPINION OF NJOKI NDUNGU, SCJ

199. I have read the decision of the majority and while I concur with the final decision and orders in this matter, I am of a different opinion from that of the majority particularly regarding the issue of incompetence of the case before the Court of Appeal. While my view on this issue mirrors that of the Court of Appeal in its majority decision, I employ a different analysis informed by the attendant circumstances, exceptional to the case before the Court.

200. The substance of this concurring opinion is threefold: first, to enrich the issue as to whether the Supreme Court had jurisdiction to hear and determine the appeal herein under Article 163(4)(a) of the Constitution. Whereas I largely concur with the majority that indeed this Court has jurisdiction to determine this appeal, I wish distinguish my reasoning in addressing the important argument by senior Counsel Ahmednassir Abdullahi contesting the holding that "the Elections Act, 2011 and the regulations thereunder are normative constitutional derivatives." Counsel's argument was that this Court could not isolate the Elections Act, 2011 and the regulations thereunder because "all laws are normative constitutional derivatives." The second premise will be to address the question as to whether the Judges of the Court of Appeal heard and determined an incompetent appeal contrary to Article 87(1) of the Constitution and Section 85A of the Elections Act, 2011. Finally, I will address the following four issues which in my opinion, go to the heart of the appeal: whether the Judges of the Court of Appeal, in the majority decision (G.B.M Kariuki, P.O Kiage JJA, with M. Warsame JA, dissenting):

i) disregarded the doctrine of stare decisis, by failing to apply binding decisions of the Supreme Court in Contravention of Article 163(7) of the Constitution;

ii) erred in holding that the 1st respondent's right to a fair trial, under Article 25(c) and 50 of the Constitution had been denied when the High Court curtailed the cross-examination of the 5th appellant;

iii) acted contrary to Articles 81(e) and 86 of the Constitution by nullifying the 1st and 2nd appellants election on the ground that the 1st respondent was not accorded the right to a fair hearing;

iv) erred in capping of costs in election petition matters.

I. Whether the Supreme Court had jurisdiction to hear and determine the appeal herein under Article 163(4)(a) of the Constitution.

201. Senior counsel Ahmednassir faulted the Court's finding in the Munya 1 case declaring the Elections Act, 2011 and the regulations thereunder as 'normative derivatives' of the Constitution. Counsel's contention was that this was akin to elevating election laws above other laws in the country, despite the fact, that all other laws are rooted in the Constitution. Counsel went further and questioned the Court's decision to hear election appeals as an unfounded expansion of its jurisdiction.

202. Indeed, all statutes revolve around constitutional law and any law, as declared under Article 2(4) of the Constitution, is subject to the Constitution's legal force and must be consistent with it, or be at risk of invalidation. In dealing with issues of constitutional significance, the approach cannot be to focus on the substantive provisions of the Constitution while disregarding the statutes that flesh the constitutional skeleton. The Fifth Schedule to the Constitution lays out the legislation to be enacted by Parliament within five years of its promulgation. Section 7 of the Sixth Schedule in turn provides that all law in force immediately before the effective date continues to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. In essence, the Constitution mandates the purification of all pre-constitutional laws as well as the enactment of laws requisite to ensure that its proper enforcement is realized. In turn, the direct call to every entity or individual not to disengage from the Constitution is to be found in Article 2(1) and further elaborated under Article 10(1) of the Constitution, which state as follows:

> Article 2(1)
>
> "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."
>
> Article 10(1)
>
> "The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions"

203. The Constitution dictates the parameters of the formation of government. This call is drawn systematically from the opening provisions of the Constitution under Article 1, and expounded under Chapter Seven (The Representation of the People), Chapter Eight (The Legislature), Chapter Nine (The Executive) and Chapter Ten (The Judiciary). The proper establishment of government and the interlocking functions of each structure to check the powers of the other ensure that the sovereignty of the people is properly guarded and that power and authority are constitutionally exercised. This view

was aptly captured by this Court in Aramat v. Lempaka and Others, Sup. Ct, Petition No. 5 of 2014, at paragraphs 74 and 75:

> "Efficient and dependable plays and interplays of governance entities, is a fundamental principle underlying Kenya's democratic Constitution of 2010. The vital primary agencies of discharge of the public mandate, must each function within a disciplined time-frame, if they are not to hold up the functioning of a different public agency, with the effect of occasioning immobility in one or more of the governance-units. Only through efficient and responsive functioning, can these agencies operate in synergy, so as to bear out the people's sovereign expression as declared in Article 1(1) and (2), thus:
>
> "(1) All sovereign power belongs to the people of Kenya....
>
> "(2) The people may exercise their sovereign power either directly or through their democratically elected representatives."
>
> "From the principle set out in the foregoing paragraph, the legitimacy of a challenge to electoral outcomes speaks for itself: it is an avenue for ascertaining the mode of conveying the people's expression of their right of franchise."

204. Conventional legal orientation continues to insist that the Constitution of Kenya be interpreted in a way that constrains its actual enforcement. While embracing the transformational aspect of constitutional governance may take some time, it is vital to understand that the engagement of the Constitution in the Kenyan State as now constituted with the people at the centre of power, can only be anything but conventional. The principles and values in the Constitution expand the Constitution's texture and illustrate the innate spirit of constitutional democratic governance covering not just one aspect of the State (such as elections) but every fibre of its composition, including the body politic. Upon this realization, the task of the Judiciary is to respond to the realities of constitutional change and to interpret that which the Constitution and legislation requires to be interpreted. Certain laws such as the Elections Act, 2011 affect the very foundation of our republican-democratic functionality, engaging various principles of democratic governance under the Constitution - in particular Articles 81 and 86 - and in this respect, may attract the Supreme Court's broader powers of settlement of constitutional controversies. Similarly, there are many other laws such as the Public Finance Management Act – a legislative offspring of Articles 201, 225, 226 and 227 - or the County Government Act - which derives its legitimacy from Article 200, whose application may involve an interpretation of the Constitution as envisaged under Article 163(4)(a). The determination as to whether the interpretation of a provision in any law meets the criteria set, hence bringing it under the jurisdiction of this Court, is to be made on a case-by-case basis. I, however, find it imperative to emphasize that all laws legislated by Parliament operate on the same scale, with none being superior to the other and none assuming a sub-constitutional status giving it a superior status. The Elections Act therefore cannot be said to have a higher standing or constitutional relationship, than other statute enacted by the Legislature.

205. Senior Counsel Ahmednassir's fear in the seeming sub-constitutionalisation of the Elections Act, 2011 and the regulations thereunder cannot be termed as unfounded. Counsel's view has found great argument in the world of constitutional law scholarship, [see: (Ira C. Lupu, Statutes Revolving In Constitutional Law Orbits, Virginia Law Review, 1993, Volume 79), (Ernest A. Young, The Constitution Outside The Constitution, Yale Law Journal, 2007-2008) and Frank Michelman, Constitutional Authorship By The People, Notre Dame Law Review, 1998-1999)]. It is apparent, that discourse concerning the exceptionality of the Kenyan Constitution as far its scope and grip is concerned, is necessary. As elaborated by the majority, any legislation enacted by Parliament pursuant

to Articles 82 and 87 of the Constitution must transform the principles therein into concrete normative goods for the realization of the aspirations therein. Perhaps Senior Counsel's discomfort is borne out of the fact that since Article 10 infuses the national values and principles into the entire spectrum of constitutional engagement: legislative, judicial and public policy (namely, by the executive), then all laws passed by Parliament ought to adhere and concretize these principles. That indeed is the position. The realisation that the Constitution is the supreme law ought to be accompanied by the recognition that the people's right to franchise and every other practice touching on this process ought not to disengage from the Constitution. As a consequence, this Court's duty in hearing election appeals is to ensure that this command is not negated. More directly, election causes are, although not singularly so, causes of a specialized-constitutional nature but equally so all Acts of Parliament are- in the sense of Article 10, the Fifth Schedule and section 7 of the Sixth Schedule to the Constitution - normative constitutional derivatives.

II. Whether the Judges of the Court of Appeal, heard and determined an incompetent appeal contrary to Article 87(1) of the Constitution and Section 85A of the Elections Act.

206. Let me clarify from the outset, that I am of the opinion that the principle of timeliness is critical to the process of electoral dispute settlement. I am fully convinced and in no way deviate from the principles laid by this Court in the Joho, Mary Wambui, Lisamula and Aramat decisions. These considered and conscientious decisions of this Court elaborated the central aspect of time in electoral dispute settlement. However, none of these cases bore the special circumstance of the exterior factors' effect upon a litigant's ability to lodge an election claim or appeal on time: certainly not when the exterior factor is the judicial process itself. This single exceptional circumstance distinguishes the instant case from others and is the basis upon which my consideration of this issue is anchored.

207. Section 85A of the Elections Act, 2011 provides:

> "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."

208. It is clear from the record, that M/S J. Harrison Kinyanjui Advocates representing the 1st respondent, sought proceedings from the Deputy Registrar of the High Court by a letter dated 11th September, 2013. This letter was sent a day after the delivery of the judgment of the High Court on 10th September, 2013. It is obvious from the letter that the proceedings were required for the purposes of lodging an appeal before the Court of Appeal. In the letter requesting proceedings, Counsel indicated that the requisite fee for preparing them had already been paid. By a letter dated 12th September, 2013, the Deputy Registrar responded, notifying Counsel that a certified copy of the judgment would be issued upon payment of the requisite fee of Kshs. 3, 180 and that the typed proceedings would follow by way of notification. This letter was received by M/S Kinyanjui on 16th September, 2013. The last page of the typed proceedings indicates that they were ready on 9th October, 2013, but there is no written notification or communication, on record, from the Deputy Registrar's office to the Advocate stating that the documents were ready and asking for the documents to be collected.

209. This set of occurrences raises some red flags: first, the fact that even within the strict requirements of the post-constitutional electoral dispute settlement scheme, the intended appellant had to prompt the Court for the certified copy of the judgment and the typed proceedings. Secondly, that the

typed proceedings were to be issued at the convenience of the registry with no specific reference to a timeframe. Bearing in mind the statutory imperatives laid out by Section 85A of the Elections Act, 2011, the judicial process ought to have been aligned to facilitate the lodging of the appeal within the mandated timelines. In this instance however, the delay was caused by bureaucracy in the registry process. The fact that any delay was caused by an entity beyond the litigant's control, warrants further consideration.

210. The electoral dispute resolution mechanism calls for institutionalized efficiency, an aspect which was clearly absent during the period between the delivery of judgment by the High Court and the filing of the appeal in this matter. The Constitution signals the need to reform the electoral dispute litigation approach - it addresses the time taken to hear and determine election disputes by requiring that causes be filed within a specified timeframe and determined within another specified timeframe. The strictness of timely settlement of electoral disputes required by the Constitution and by Statute was severely compromised by lethargy in judicial procedure in this case.

211. Registry ineptitude and procrastination is a colossal impediment to justice, an aspect which ought to have been cured by the reforms in the Judiciary following the adoption of the Constitution of Kenya, 2010. This inefficiency sadly, is still at large, and in this instance compromised the competence of the appeal. I agree with the majority decision in the Court of Appeal, when they state that the time taken to prepare the proceedings, in fact, terminated the appeal before it was even lodged; the judicial system ate into the grace period afforded to the concerned litigant to prepare and lodge an appeal. Such injustice should not be tolerated. Indeed, this Court has previously intervened to correct such injustice under similar circumstances, in the matter of Hassan Nyanje Charo v. Katib Mwashetani Sup. Ct. Application No. 15 of 2014, (the Charo case).

212. In the Charo case, this Court considered an application to file an appeal beyond the time prescribed under Rule 33(1) of the Supreme Court Rules, 2012. The Court (Ibrahim, Ojwang, SCJJ) took a position that where an applicant seeks to file his appeal after the lapse of time provided in the Rules, the Court has to balance the public interest consideration of timeliness in electoral dispute resolution and the individual right of access to justice. The Charo case bears some subtle similarity to the 1st respondent's predicament before the Court of Appeal. Hassan Nyanje Charo filed an election petition at the Election Court in Mombasa, contesting the elections results for Lunga Lunga constituency. The Election Court nullified the election of Khatib Mwashetani, the 1st respondent as Member of National Assembly, and ordered a fresh election. The 1st respondent appealed to the Court of Appeal in Malindi seeking to have the Judgment of the Election Court set aside.On 27th November 2013, the Court of Appeal allowed the appeal thus overturning the judgment of the Election Court. The Court reserved the reasons for its decision to 27th December, 2013 which however were not given till the 23rd January, 2014. Being aggrieved by the appellate Court's decision, Mr. Nyanje filed an application under certificate of urgency in the Court of Appeal dated 2nd December, 2013 seeking certification of the matter as one involving issues of general public importance. On 20th December, 2013 the Court of Appeal certified the application urgent, and fixed it for hearing on 30th January, 2014. The matter proceeded by way of written submissions. The ruling scheduled for 4th March, 2014 was not delivered. As a result, the applicant filed an application for extension of time to file an appeal under Article 163(4)(a) of the Constitution before this Court. This Court was informed that a request for judgment, Order and proceedings had been made to the Court of Appeal to enable the applicant lodge the appeal but those proceedings were not ready by the time this Court gave its ruling on the application for extension of time. Since the judgment of the Court of Appeal had been deferred, the 30 day period to file an appeal to this Court had lapsed at no fault of the applicant by the time the same was delivery on 23rd January, 2014.

213. This Court was cognizant of the fact that the delay in the prosecution of the case prejudiced the certainty of political representation of the people of Lunga Lunga Constituency; however the blame for the delay was attributable to the Court processes of generating proceedings, which prejudiced the applicant's right of access to justice. The Court noted from the record that the Applicant had written to the Court of Appeal requesting proceedings on 29th January, 2014, a fact that could have cast doubt as to whether the intended appellant had exercised any due diligence owing to the fact that there was nothing on record to show that the applicant had done any further follow-up. This notwithstanding, the Court ruled that the applicant had exercised the requisite due diligence. At paragraph 28, the Court held:

> "Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not. We find that though prejudice to the representation of the people of Lunga Lunga Constituency will persist, it is due to no fault on the part of the applicant." [Emphasis added]

214. At paragraphs 33 and 34, the Court went further:

> "Here is a case in which an applicant has exercised all due diligence, so as to move a Court of justice, in a situation of grievance on electoral issues. But the mechanisms of the Judiciary itself have shut the door to his knocks thereon. Today he comes before this Court, praying for an open window through which he can lodge his complaint, in the shape of enlarged time, during which one of the superior Courts will have availed to him the requisite appeal papers." [Emphasis added]
>
> "As the sluggish motion of the judicial machinery enjoys no constitutional privilege, as against the specific guarantees of the Bill of Rights, the inevitable decision in this matter, is one that favours the suitor's claim." [Emphasis added]

215. The aspect of time, when filing an election petition, is couched in mandatory language as the same goes to the jurisdiction of the Court to entertain a claim. The same is also based on a constitutional timeline under Articles 87 and 105. After the declaration of the election results, the intended petitioner has a duty to file a petition within the strict 28 days required by the Constitution. Failure to do so renders the petition nugatory. The petitioner in such a case requires neither judgment nor proceedings from the Independent Electoral and Boundaries Commission. All the petitioner requires is the actual declaration of the election results by the returning officer (which he receives on the polling day) and the issuance of the winner with a certificate in Form 38. As such, the responsibility of actualizing the right to challenge the election results rests on the petitioner. This was captured quite aptly by the Court in the Aramat case, at paragraph 76:

> "The Court, as a device of sanctification of the people's electoral determination, is not an unregulated forum, where so critical a dispute can linger for indeterminate periods of time. Thus, the Supreme Court, in asserting the authority of the Constitution, underlines the element of the immanent time-constraint, in the resolution of electoral disputes, throughout the judicial system. The ultimate principle is: while citizens are at liberty to contest electoral outcomes, they will proceed within prescribed timelines, and in this way help to sustain the due functioning of other constitutional processes".

216. However, if the litigant's right to the judicial process in the framework of the right of access to justice is in any way compromised, the entire Constitution is in turn compromised. In the matter currently

before us, as was the case in Lunga Lunga, the right of access to justice, extends beyond the parties in this case unto the electorate of Nairobi County. The examination of their right to vote by the Court, with tremendous respect, ought not to be hinged on the administrative turns of the judicial process. The administrative judicial system must ensure that the proceedings, judgment and any other requirements that an intended appellant may need to lodge their claim within the strictest timelines is provided to them and in the most efficient way. Courts of law cannot be the guardians of the Constitution and at the same time stand in the way of the realization of the fundamental rights of the individual, particularly that of access to justice. Had the proceedings in this matter been issued by the Deputy Registrar of the High Court immediately after delivery of judgment, my mind would have been settled with the way of the majority decision in this matter. The lapse in the registry process however does not allow me to agree. With profound respect to my brothers and sister Judges, I do believe that responsibility of this Court is to set straight the processes that guarantee the rights of litigants to enable them to approach our judicial institutions unhindered, albeit regulated, and in a way that does not compromise any of their rights; the matter that is before us today, requires such an intervention.

217. Is this Court powerless, as suggested by counsel for the Appellant, in the exceptional circumstances where a litigant is disadvantaged by factors outside his or her control? The history of electoral dispute settlement in Kenya negates any argument that the Court is powerless in such circumstances. For many years, the courts were part of the problems impeding electoral justice, where potential petitioners were unable to serve their powerful opponents, or where they did, files would mysteriously disappear or reappear after the required filing deadlines had already passed. These issues are well documented in several reports by the International Commission of Jurists (Kenya) and other election monitoring groups, where they list the judicial system in this country, in the past, as having committed several electoral injustices including "courts insisting that Petitions must be personally signed by the Petitioner; where the Court held that a petition must be served personally upon the Respondent, such as the controversial case of Mwai Kibaki v. Daniel Toroitich Arap Moi, Civil Appeal No. 172 of 1999 as consolidated with Civil Appeal No. 173 of 1999; or courts requiring high security for costs to the detriment of those who are unable to raise this amount; or courts taking inordinate amount of time to dispose Petitions; or unreasonable delays, resulting in ineffectual decisions and dismissal of petitions on grounds of technicality".

218. And therefore a case such as the one before us, begs the question, are these misadventures and misapplications in our past - eradicated by our transformative Constitution, or are they still lurking menacingly, within the corridors of justice? If the latter is the case, then should a judicial officer down his or her tools mechanically, citing procedural technicality in the face of administrative unfairness? I respectfully think not. The entire judicial machinery including its administrative arm ought to respond to the impetus of judicial authority, which, aside from emanating from the people of Kenya, imposes certain guiding principles, under Article 159 (2): that justice shall be done to all, irrespective of status; justice shall not be delayed, justice shall be administered without undue regard to procedural technicalities and the purpose and principles of the Constitution shall be protected and promoted. These principles manage the exercise of judicial authority and indeed call upon all Judges to exercise managerial judging to suit the demands of Kenya's transforming charter. This duty is exercised in the discretionary powers of the Court to extend statutory timelines where a convincing case, geared towards the protection of fundamental rights and freedoms is made out.

219. The concept of managerial judging has been employed in other jurisdictions including India and the United States [see: (Robert Moog, Delays in the Indian Courts: Why the Judges Don't Take Control, The Justice System Journal, Vol. 16, No. 1 (1992), pp. 19-36)]. This concept allowed Justices in the United States to apply the doctrine of unique (exceptional) circumstances which had been applied to accord litigants the full protection of the law for many years, until its controversial reversal recently

by the US Supreme Court. I am aware that the statutory timelines provided by statute are critical, however where vital aspects of the Bill of Rights including the constitutional rights of access to justice and fair hearing as embodied in our Constitution are compromised, then a Court ought to give these aspects full consideration. In other jurisdictions, the Courts over the years have not ignored the effect of intervening circumstances upon a litigant's right of access to justice and fair hearing.

220. This regulatory role was recognised by Rawal, DCJ and Vice President in her concurring opinion in Anami Silverse Lisamula v. The Independent Electoral and Boundaries Commission and Two Others, Sup. Ct. Petition No. 9 of 2014, (the Lisamula case) at paragraph 137:

> "The special nature of the Supreme Court has been succinctly elaborated by Harry H. Wellington in his book, Interpreting the Constitution (Universal Law Publishing Co. 2008) (at page 144). The Supreme Court adjudicates disputes, but it is the regulatory effect of its adjudication that is the Court's raison d'etre. This Court's highest duty to interpret the Constitution, as demanded by the Constitution itself, must be taken as a mechanism to crystallize the law, and set the Republic, through the Constitution, on the path of maturation. Justice Cardozo in his book, The Nature of the Judicial Process (Universal Law Publishing Co., 2011) (at page 14), elaborates the attendant features to interpretation. He recognizes that "codes and statutes do not render the Judge superfluous, nor his work perfunctory and mechanical". Rather, interpretation means that there are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated, if not avoided. Interpretation, and especially one undertaken by a Court in its appellate form, and steered towards constitutional application and interpretation, is not just a search for meaning. It is an exercise requisite to completing the anchoring pillars of constitutional governance....."

221. The more imperative consideration is that of the Bill of Rights under the Constitution. Articles 19 and 20 of the Constitution are instructive. Article 19(1) and (2) provides:

(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

(2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

Article 20 (3) and (4) provides:

"(3) In applying a provision of the Bill of Rights, a court shall:

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom." [Emphasis added]

"(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote:

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights."

Article 50(1) guarantees every citizen the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if

> appropriate, another independent and impartial tribunal or body. The right to fair hearing encompasses that of fair trial, which is a non-derogable right protected under Article 25(c): the enjoyment of this right cannot be curtailed by any other Article in the Constitution. The events unfolding at the registry and the delay in the release of proceedings should not compromise the 1st respondent's inalienable right to fair hearing. Thus this Court ought to respond to the constitutional command that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom [Article. 20(2)] in allowing the 1st respondent the opportunity to realize his unlimited right to fair hearing.

222. At this juncture it is important to differentiate a timeline that is spelt out within the Constitution and one that is based on statutory fiat as elaborately argued by senior Counsel Paul Muite. An interpretation of Statute, unlike that of the Constitution, calls for an assessment of the intention of Parliament when making a particular law or regulation. In the instant matter, it is incomprehensible to me that Parliament could have intended to lock out a litigant from the right to appeal, merely on the basis of inability to file an appeal on time due to the late receipt of vital court documents, such as proceedings, from a third party. Indeed, the provision in the Elections Act, 2011 signifies the intention of Parliament to facilitate the right of appeal, which right had not been provided for in the Constitution. The construction and meaning of that intention of the Legislature must therefore be read into the words of the relevant law.

223. Section 85A of the Elections Act, 2011 is a statutory provision unlike Articles 25, 50 and 87(2) of the Constitution. Section 85 requires that an appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor be filed within thirty days of the decision of the High Court. I am of the considered opinion, that the construction of the term "decision" must be facilitative in order to assist the affected party, and ought to encapsulate all the prerequisite documents, emanating from the High Court necessary for lodging an appeal before the Court of Appeal. Proceedings ought, in the circumstances, to be construed as forming part of the decision of the High Court, such that time starts running from when the Petitioner has all tools necessary to file his appeal. This interpretation allows every party an opportunity to present their case (to be heard) and therefore guided by the Constitution under Articles 19 and 20. In this instance, even after the High Court delivered its Judgment, this singular document was not enough to satisfy the requirements of lodging an appeal. As is common practice, the letter requesting proceedings was done on time and the certificate of delay was thereafter issued as the sanitiser, as it is customary, of the time lapse between the delivery of Judgment and the filing of the appeal. The same must have been pegged upon the instruction of Rule 82(1) of the Court of Appeal Rules. I would agree with Kiage, J.A for the majority that the certificate of delay issued by the High Court legitimized the 1st respondent's calm and eventual decision to lodge the appeal after the release of the proceedings.

224. Can this Court, the ultimate custodian of the Constitution and the aspirations of the Kenyan people, abdicate its mandate as commanded by Article 19 and 20? Article 85A of the Elections Act, 2011 cannot be applied in a manner to negate a litigant's unlimited right to fair trial. Certainly, the provisions of the Constitution in Articles 25 and 50 are superior to the provisions of the Elections Act, 2011 which Act therefore must conform to the dictates of the Constitution. This Court ought to adopt an interpretation that promotes the spirit and purport of the Bill of Rights as well as that which most favours the 1st respondent's right to fair hearing.

225. In concluding this issue, I am of the opinion that the Court of Appeal Rules [rule 82] relied on in the Majority decision are not necessarily in conflict with, or inferior to, Elections Act, 2011. The provisions

of the Interpretation and General Provisions Act, CAP 2 which is defined as an 'Act of Parliament to make the provision in regard to the construction, application and interpretation of written law, to make certain general provisions with regard to such law and for other like purpose. [excepting the Constitution]', reads as follows:

> "Section 59. Construction of power to extend time.
>
> Where in a written law a time is prescribed for doing an act or taking a proceeding and power is given to a court or other authority to extend that time, then unless a contrary intention appears, the power may be exercised by the court of other authority although the application for extension is not made until after the expiration of the time prescribed."
>
> Section 59, therefore, provides a bridge between the Elections Act and the Court of Appeal Rules. The Elections Act prescribes a time for doing an act but does not expressly state that that time may not be extended within the confines of Section 59 and the Court of Appeal Rules. This lends credence to the words of GBM Kariuki JA, where in the Majority of the Court of Appeal, he stated that if Parliament had intended for the Court of Appeal Rules not to apply, it would have stated so. I agree with his finding.

226. In light of the foregoing, I am of the opinion that it was proper for the Court of Appeal to admit and hear the 1st respondent's appeal in the circumstances. It is clear that the Court of Appeal was in furtherance of the constitutional imperatives of access to justice and fair hearing when it opened its doors to the 1st respondent. Prior to the passing of the Constitution in the year 2010, the problem of delay in concluding election matters was facilitated by the rules of service, proceedings and the duration taken to deliver the judgments. While most of these impediments have now been cleared, the registry processes with respect to proceedings remain unaddressed. There is urgent need to reform these administrative processes, including the application of appropriate sanctions upon errant officers working in the Registry, where need be, to respond to the dictates of Articles 25, 50, 87(2) of the Constitution and Section 85A of the Elections Act, 2011. This is a matter of utmost urgency.

III. Whether the Court of Appeal disregarded the doctrine of stare decisis, by failing to apply binding decisions of the Supreme Court in Contravention of Article 163(7) of the Constitution;

227. Counsel for the Appellant submitted that in arriving at its determination, the Court of Appeal breached the doctrine of precedent in three instances: on the question of timelines, on the issue of scrutiny, and on the burden and standard of proof.

(a) Timelines

228. It was submitted that the Court of Appeal, in its majority decision breached the provisions of Article 163(7) of the Constitution and Section 31 of the Interpretation and General Provisions Act (Cap 2) of the Laws of Kenya in holding that Rule 82(1) of the Court of Appeal Rules, 2010 conferred upon the Court of Appeal jurisdiction to hear an election appeal filed beyond the requisite timelines as per Section 85A of the Elections Act, 2011. Counsel argued that this holding elevated Rule 82(1) of the Court of Appeal Rules beyond Section 85A of the Elections Act, 2011. In addition, it was argued that this holding was in contrast with the unambiguous holdings of the Supreme Court with regard to timelines in: Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Sup Ct. Petition No. 10 of 2013 (the Joho case) (at paragraph 75); Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others, Sup Ct. Petition No. 7 of 2013 (the Mary Wambui case) (at paragraphs 87 and 88); Gatirau Peter Munya v. Dickson Mwenda Kithinji& 2 others, Sup Ct. Application No 5 of 2014 (at paragraph

77) and Re the Speaker of the Senate & Another v. Attorney General & 4 Others, Sup Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR, (the Senate case) (at paragraph 30).

229. It was argued that in the cited cases, the Supreme Court made a number of binding principles: The Court - described the complete code governing the filing, prosecution and determination of election petitions in Kenya to be the Constitution, the Elections Act and the Rules made pursuant to the Act; affirmed that "time" was a vital element in the electoral process limiting the jurisdiction of the Court to its confines; held that any statutory provision or rule of procedure contradicting or detracting from the expressed spirit of time in accordance with Article 87(1)of the Constitution is null and void. Lastly, that the Supreme Court dissuaded lower Courts from being ingenious or crafty in interpreting the intention of parliament where the wording of legislation was clear and devoid of ambiguity.

230. Counsel pointed out that Kiage JA, in his lead opinion determined that the Court of Appeal had discretion to extend the time set out in Section 85A of the Elections Act, 2011 departing from the holding of this Court in relation to timelines in election petitions. It was argued that this holding effectively endorsed a distinct jurisdiction from that conferred by Section 85A of the Elections Act, 2011 to be conferred on the Court of Appeal by way of subsidiary legislation. In this respect, Kiage JA, in his separate but leading opinion held:

> The Elections Act itself does not provide for the procedure and manner in which such appeals are to be filed, however. I do not see this as an accidental slip or omission, less still as an invitation to some kind of procedural free-for-all. One cannot, for example, write a letter to the Court stating his grievances against the High Court judgment and so view himself an appellant. He cannot file a Petition of Appeal or a bare Memorandum of Appeal and consider himself compliant with Section 85A of the Elections Act. He must perforce file his appeal by lodging all the items requisite under Rule 81 of the Court of Appeal Rules. Nothing less will do. This perfectly reasonable conclusion finds expression in Rule 35 of the Elections Petition Rules, 2013 which I see as a wholesale and necessary importation of the Court of Appeal Rules without qualification and without the faintest suggestion that the Rules of Court have been ousted or modified.....
>
> It seems to me that the thirty-day period is premised on an assumption that an appellant will not be hindered or prevented by factors outside his control in obtaining the documents requisite for his filing of the appeal, particularly the documents that constitute a record of appeal ...
>
> It seems clear to me that so long as proceedings are bespoken by an appellant within the time specified by this Rule and the request is in writing and duly copied to the opposite side, a certificate of delay duly issued is conclusive. It ensures that when reckoning the days, be they the sixty past notice of appeal for all appeals generally, or any shorter period as may be specified by a special Act of Parliament, the days so certified are excluded, as indeed they must....."

231. Counsel cited the case of Ferdinand Waititu v. Independent Electoral and Boundaries Commission (IEBC) & 8 Others, Civil Appeal No. 137 of 2013 (the Ferdinand Waititu case), affirmed by this Court in the Joho case to underline that the Court of Appeal should not have moved away from the holding of this Court with regard to timelines. In this case, the Court of Appeal held that:

> "To meet that constitutional requirement, parliament enacted the Elections Act....
>
> These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we

> may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Election Petition Rules be amended to bring about mechanisms of expediting trials.
>
> The Elections Act and the Rules made there under constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya....."

232. Counsel further cited the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others Sup Ct. Petition No. 2B of 2014, (the Munya case) to emphasize the significance of Section 85A of the Elections Act. In this case, it was held (at paragraph 64):

> "Section 85 A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion..."

(b) Scrutiny

233. It was also argued that the learned Judges of the Court of Appeal concluded that scrutiny is an automatic right that ought to be granted to any litigant even in the absence of a proper basis. It was counsel's contention that this holding also fundamentally contrasted the finding of this Court in the Raila Odinga case.

(c) Burden and standard of proof

234. It was also submitted that the learned Judges of the Court of Appeal deviated from the principles of the incidence of burden and standard of proof in election matters in contrast to the holding of this Court in the case of Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others, Sup Ct. Petition No. 5 of 2013 (the Raila Odinga case).

The doctrine of Stare decisis in Kenya

235. Article 163(7) of the Constitution constitutionalizes the dual doctrine of stare decisis: vertical precedent which is mandatory and horizontal precedent (at the Supreme Court) which is distinguishable. This provision provides that:

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

236. The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Court's vital essence and the decisions of this Court protect settled anticipations by ensuring that the Constitution is upheld and enforced and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of Article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy and to give jurisprudential guidance to the lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government and political-disposition particularly in the settlement of electoral disputes. As a Court entrusted with the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms.

237. The principle of Article 163(7) of the Constitution is further reinforced by Section 3 of the Supreme Court Act, 2011 mandating the Supreme Court to develop the law. Section 3 provides:

> "The object of this Act is to make further provisions with respect to the operation of the Supreme Court as a court of final authority to, among other things-
>
> a. ...
>
> b. ...
>
> c. develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;....."[Emphasis added]

238. Article 163(7) of the Constitution serves as a form of hierarchical control in respect to constitutional interpretation and the same is indefeasible and absolute. I must however emphasize the prerequisites of Article 259 of the Constitution requiring the Constitution to be interpreted in a manner that permits the development of the law [Article 259(1)(c)] and advances the rule of law, human rights and the fundamental freedoms in the Bill of Rights [Article 159(1)(b)]. As such, regard to the precedents of this Court does not bar lower Courts from adhering to these progressive requirements. As an interwoven system of justice, the responsibility of every judge is to ensure that the mandated exercise of judicial authority is followed and that ultimately, justice is delivered within the confines of the Constitution. Only then can the Judiciary deliver itself as a custodian of the sovereignty of the people.

239. The efficacy of precedent to promote the rule of law is of vital significance. The rule of law as a principle of democratic governance, requires a defined system of legal operation that is both certain and predictable aiding the seamless functioning of the political institutions in Kenya in the interwoven system of governance. Being the Court at the apex of the judicial system, this Court has to guide the lower Courts in rendering decisions that are principled and consistent. We have acknowledged that every Court in our hierarchical ordering has the professional competence to deal with issues presented before it [see: Peter Oduor Ngoge v. Francis Ole Kaparo & others Sup Ct. Petition No. 2 of 2012 and Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board Sup Ct. Petition No. 5 of 2012].

240. As already noted, the significance of Article 163(7) is to regulate the development and settlement of our jurisprudence through the Supreme Court as the forum entrusted with the final mandate to interpret Kenya's transformative charter. This Court for instance bears the final responsibility of interpreting the constitutional propriety of Acts of Parliament as demonstrated in the Joho case. Constitutional interpretation allows the country's constitutive charter to effectively guide the conduct of activities within the Republic. Therefore binding precedent ensures that arbitrary discretion by lower courts resulting into jurisprudential incoherence is avoided. This doctrine of precedent liberates Courts from considering every disputable issue as if it were being raised for the first time. This Court constantly examines its own previous decisions where similar facts abide as can be demonstrated in our consideration of election appeals. Under our mandate to develop the law, we endeavour to expand pre-set principles when the circumstances of the case permit.

241. We have discernibly pronounced ourselves on the value of precedent set by this Court [see: the Munya case at paragraphs 196 and 197; Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai and 4 Others Sup Ct Petition No 4 of 2012 at paragraphs 39, 40, 42, 50 and 60; George Mike Wanjohi v. Steven Kariuki & Others Petition No. 2A of 2014 at paragraphs 79, 82, 83 and 86; Frederick Otieno Outa v. Jared Odoyo Okello & 3 Others, Sup. Ct. Petition 10 of 2014 at paragraph 57 and Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others, Sup Ct. Petition No 4 of 2014, at paragraph 122].

242. The appropriate application of judicial precedent in consonance with the Constitution is a judicial norm and the fact that a Court may distinguish a case on the factual composition does not give it power to deviate from the ratio. The key utility of precedent is to ensure the protection of the fundamental utility of uniformity [Sir Frederick Pollock, Essays in Jurisprudence and Ethics, (MacMillan Company, 1882) at page 237]. The system of judicial precedent kept uniform by a Supreme Court (of appeal) as a chosen means of keeping up the assumption of uniformity is an indispensable auxiliary (ibid, p. 243). In applying case-law, one must consider the material conditions of the issue in question. One must then assign the question to its proper class or consideration and observe the right points of likeliness in the cases under consideration (ibid, p. 249).

243. It is to be noted that the judgments of a Court of final appeal stand on a different basis from those of subordinate courts. A departure therefore should be a rare phenomenon justifiable only on the basis of consideration of the deepest sentiments of justice occasioned by a complete dissociation of the factual situation between the previous case and that being considered. It must be apparent that the test of experience and the passage of time have rendered the rule untenable of application in the circumstances then prevailing. The settlement of electoral law by this Court eliminates any difficulty in identifying the rationes set forth as binding precedent.

244. The constitutional adoption of this doctrine of stare decisis in our jurisdiction is different from the common law position in England. Article 163(7) of the Constitution is express that the decisions of this Court are not binding on it. The outlines of distinguishing were laid down in the Rai case as elaborately highlighted. In the House of Lords prior to 1966, the decisions of the House of Lords were binding on the Court itself. Although as argued, this requirement was an insistence by the House of Lords itself and not one of absolute requirement (Neil Duxbury, The Nature and Authority of Precedent (Cambridge University Press, 2008) page. 103). The Court (Lord Gardiner L.C, Lord Viscount Dilhorne, Lord Reid, Lord Denning, Lord Parker of Waddington, Lord Morris of Borth-Y-Gest, Lord Hodson, Lord Pearce, Lord Upjohn and Lord Wilberforce) distinguished the application of the principle at the House of Lords and other Courts in England in the Practice Statement (Judicial Precedent) [1966]1 WLR 1234as follows:

> As delivered by Lord Gardiner L.C.:
>
> > Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House. [Emphasis added]

245. Noting the laid down guidelines regarding the essence and application of the principle of stare decisis in our judicial system, I now analyse the issue: whether the Court of Appeal in its majority decision, (exhibited in the lead judgment of Kiage JA, with G.B.M Kariuki JA, concurring) disregarded the decisions of this Court as far as the principles of time, scrutiny and burden of proof were concerned.

246. Counsel contended the majority holding (exhibited in the lead judgment of Kiage JA,) regarding the competency of the Appeal. In recognition of the principle of time and the question of jurisdiction, the Court of Appeal on its own motion invited the parties to comment on the competence of the appeal as it went to the very foundation of the appeal. Kiage JA, expressed doubt in a previous decision of the Court of Appeal in the Ferdinand Waititu case when the Court held:

> "These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Election Petition Rules be amended to bring about mechanisms of expediting trials.
>
> > "The Elections Act and the Rules made there under constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya. That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Article 87(1), and 105(2) and (3) of the Constitution is null and void. The Constitution is the Supreme law of the land and all statutes, Rules and Regulations must conform to the dictates of the Constitution."
>
> Kiage JA, was hesitant to apply this holding and indeed regarded it as possibly obiter. He applied the guidepost by this Court in the Joho and Senate cases leading other Courts towards upholding justice at all times. At paragraph 48, Kiage JA, held:
>
> > "While the principle of timely disposal of election petitions affirmed by the Court of Appeal, must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount."
>
> The judge evaluated the applicability of the Court of Appeal Rules to the entire realm of electoral law and noted that there was no inconsistency between the Rules and the electoral law (see page 33 of J. Kiage's Judgment). The judge did not go beyond the principles of this Court as enumerated in the Joho case. Rather, he applied the principles laid down by this Court against the special circumstances of the matter before him. I cannot fault his analysis on this issue as being a departure from the cited decisions of this Court, to do so would be to confine the Court of Appeal to a rigid application of the decisions of this Court even where the circumstances and the applicable law is well varied.

247. This Court has considered the principle of time at great length in its previous judgments, in particular, demonstrating the link between time and the jurisdiction of the Election court as well as the Court of Appeal. There is a nexus between Article 87(1) of the Constitution and Section 85A of the Elections Act, 2011 which in the Munya case (delivered 17 days after the Court Appeal's judgment in this matter) we stated to be as follows, (at paragraphs 62 and 63):

> "Article 87 (1) grants Parliament the latitude to enact legislation to provide for"timely resolution of electoral disputes." This provision must be viewed against the country's

electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about "timelines and timeliness", was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in name of which elections are decreed and conducted, should not be held captive to endless litigation."

"Herein lies the nexus between Article 87 (1) of the Constitution and Section 85A of the Elections Act. Election petitions, not surprisingly, come up for special legislation that prescribes the procedures and scope within which Courts of law have to resolve disputes. Thus, judicial resources should be utilized efficiently, effectively and prudently. By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes."[Emphasis added]

248. In the preceding paragraphs of this Judgement, I have analysed the actual time implications of Section 85A and its intersection with the Court of Appeal Rules in the settlement of election appeals particularly in instances where immoderate delay stems from the administrative arm of the Court. In the appeal before the Court, the honourable Judges of the Court of Appeal considered in great depth and in actual circumstance, the bounds of Section 85A of the Elections Act, 2011 vis a vis the Rules governing the Court. This examination was well within the bounds of their power and the same cannot be faulted for failure to abide by Article 163(7).

249. On scrutiny, Kiage JA, held that there were no condition precedents imposed by the Elections Act, 2011 to the grant of an Order for scrutiny (p. 56 of the lead judgment). This Court has now settled the law in this regard and held that scrutiny is not an automatic right and that sufficient basis is a requisite condition where such an Order is sought. In the Munya case, this Court endorsed the decision of the Court of Appeal on this issue in Nicholas Salat v. Wilfred Rotich Lesan & Others, Civil Appeal No. 228 of 2013 (Gatembu & M'Inoti, JJA, with Kiage JA, dissenting). At the time of the Court of Appeal's decision in this matter, the Supreme Court had not delivered the Munya case and I therefore do not find that the Judges of Appeal (in the majority) disregarded it.

250. On the question of burden of proof, I find that the lead Judgement of the Court of Appeal, did not disregard the precedent laid down by this Court in the Raila Odinga case. Kiage JA., only presented an analysis of the trial Judge's application of the holding in Mbowe v. Eliufo [1967] E.A 240. In that regard, there is no merit in the allegation of departure on this issue.

IV. Whether the judges of the Court of Appeal, in the majority decision (G.B.M Kariuki & P.O Kiage, with M. Warsame J.A dissenting) erred in holding that the 1st respondent's right to a fair trial, under Article 25(c) and 50 of the Constitution had been denied when the High Court curtailed the cross-examination of the 5th appellant;

251. The Court of Appeal, in its majority decision (G.B.M. Kariuki J.A) found that the trial Judge wrongly exercised his discretion with regards to: the 1strespondent's application for scrutiny and recount; the application to tender additional evidence; and the curtailment of cross-examination of the 5th appellant, Fiona Waithaka who was the Nairobi County Returning Officer and therefore deprived the 1st respondent the right to a fair hearing which is guaranteed under Article 50 of the Constitution and

which cannot be limited by virtue of Article 25.G.B.M. Kariuki, J.A in the majority opinion stated that (paragraph 104):

> "...the trial should have been conducted in a manner that would have facilitated ascertainment of the accuracy of votes, but instead the trial court stifled the adduction of evidence...the effect of this was to deny the appellant a fair hearing."

252. Arising from rival contentions from Counsel for the appellant and respondent on this question, it is my perception that the following issues arise for determination: (i) what is the scope of the right to a fair hearing or a fair trial?; (ii) Did the trial Judge deny the 1st respondent the right to a fair trial by denying the request for scrutiny and recount, curtailing the extent of cross-examination of witnesses and on the scrutiny report, and denying the application to introduce new evidence?; and (iii) What remedies are available if the trial Court infringed the right to a fair trial?

The scope of the right to a fair hearing

253. It is apt, first, in examination of the question before us to determine whether the Judges of the High Court and Court of Appeal in any way, at any stage of trial of this matter, violated the right to a 'fair hearing.' Consequently therefore it is important to understand the distinctive meaning, scope and implication of this right.

254. This right is clearly spelt out in the Constitution. Article 50(1) of the Constitution provides that:

> "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."
>
> Article 25 of the Constitution stipulates that:
>
> "Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
>
> (b) freedom from slavery or servitude;
>
> (c) the right to a fair trial;
>
> (d) the right to an order of habeas corpus."

255. Article 50(1) refers to the right to a fair hearing for all persons, while Article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. Often the terms 'fair hearing' and 'fair trial' are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that Article 50(1) deals with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas Article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of Articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect.

256. Indeed, the African Commission on Human and People's Rights established general principles to all legal proceedings applicable by Member States, of which Kenya is one. Therefore the principles are binding under Article 2(5) and (6) of the Constitution, and include the following:

> "General Principles Applicable to all Legal Proceedings:
>
> 1. Fair and Public Hearing
>
> In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.
>
> 2. Fair Hearing
>
> The essential elements of a fair hearing include:
>
> ...
>
> (e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
>
> (f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;
>
> ...
>
> (i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and
>
> (j) an entitlement to an appeal to a higher judicial body."

257. Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem(hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled."

258. What then are the norms or components of a fair hearing? The Supreme Court of India, in Indru Ramchand Bharvani & Others v. Union of India & Others, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements:

(i) an opportunity of hearing must be given; and

(ii) that opportunity must be reasonable (citing Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460).

259. That Court in Union of India v. J.N. Sinha & Another, 1971 SCR (1) 791 and C.B. Boarding & Lodging v. State of Mysore, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In Mineral Development Ltd. v. State of Bihar, 1960 AIR 468, 160 SCR (2) 909 the Court further observed that the concept of fair hearing is an elastic one and "is not susceptible of easy and precise definition."

260. The Court of Appeal at Kampala in Uganda in Obiga v. Electoral Commission & Anor., Election Petition Appeal No. 4 of 2011 [2012] UGCA 29 (Obiga) held that in order to determine whether a party received a fair hearing, the Court has to look to the statutes, case laws, and regulations that govern the decisions that the Court made.

261. It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court." (See Steel and Morris v. United Kingdom, [2005] ECHR 103, paragraph 59).

262. Counsel for the 1st appellant cited as persuasive authority the cases of Ruiz Torija v. Spain, Application No. 18390/91 and Hiro Balani v. Spain, Application No. 18064/91 in which the European Court of Human Rights applied Article 6-1 of the European Convention on Human Rights (ECHR) which, like Article 50(1) of the Constitution of Kenya, entitles an individual to a fair hearing by an independent and impartial tribunal. The right to a fair trial in Article 6-1 in the ECHR refers to both criminal and civil cases.

263. It is, therefore, trite law that all persons who come to the Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in Article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters alike.

Denial of the request to tender additional evidence

264. In a ruling dated 10th June, 2013, the trial Judge dismissed the 1st respondent's motion seeking admission of additional evidence in support of the petition through the affidavits of seven proposed witnesses. Counsel for the 1st respondent contended that this ruling infringed upon his right to a fair trial.

265. Counsel for the 1st and 2nd appellants argued that the 1st respondent was seeking to redraft the petition and introduce additional evidence after the expiry of the 28 day period, within which to file an election Petition and this was contrary to Article 87(2) of the Constitution and Section 76(4) of the Elections Act. Further, he contended that the trial Judge held that the evidence would amount to speculative evidence. Section 76(4) of the Elections Act provides that:

> "A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented."

266. Kiage J.A in his lead judgement found that the 1st respondent had made a sound and compelling case for the admission of the evidence. He stated that the trial Judge locked out the affidavits on technical grounds as opposed to on a meritorious basis. G.B.M. Kariuki J.A also in the majority, opined that the trial Judge was not alive to the need to have this evidence before him to facilitate the adjudication of the dispute. He insinuated that the trial Judge was biased and showed improper exercise of judicial discretion.

267. Warsame JA, in his dissenting opinion took a different view to that of the majority decision stating (at pages 45 and 46):

> "...Timeliness of filing of the petition and the witness statement and affidavits is an imperative constitutional obligation of the parties to put forward what they think their cause of action, or their complaint is.
>
> "The refusal by the learned judge of the application to allow these affidavits cannot be equated to shutting out evidence. If the appellant knew that the discovery of the truth and proof of his cause would require those witnesses, then he ought to have made the necessary attempts to secure them within reasonable time and in any event, before the close of pleadings. The appellant did not show that what he attempted to introduce was evidence, or was material discovered at a later date which he could not reasonably have been found earlier. And as already stated, election disputes have been accorded strict timelines by the Constitution and statute, and they must be adhered to." [Emphasis added]

268. I am of the view that the decision whether to admit additional evidence in the course of a trial is a discretionary power that the Court enjoys. A Court must however exercise this discretion judiciously taking into account the particular facts at hand. This is the view that this Court expressed in Raila Odinga where we held that:

> "The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence."

269. The Elections Petitions Rules have a similar provision to that of Rule 10 (f) of the Presidential Petition Rules. Rule 17 (1) of the Elections Petitions Rules provides that:

> "Pre-trial conferencing and prohibition of delayed interlocutory applications.
>
> 17.
>
> (1) Within seven days after the receipt of the last response to a petition, the court shall schedule a pre-trial conference with the parties in which it shall—
>
> ...
>
> (i) give directions as to the filing and serving of any further affidavits or the giving of additional evidence; ..."

270. The main question therefore is whether the 1st respondent's right to a fair hearing and trial were infringed upon by the denial of admission of new evidence. This Court in the Ruling in Raila Odinga set out the guidelines with regards to admission of additional evidence.

271. In that ruling, this Court, denied the admission of a nearly 900 page affidavit and set out guidelines for the admission of additional evidence. This Court held that: the admission of additional evidence is not

an automatic right and that a court can exercise its discretion on whether or not to admit the evidence; that further affidavits must not seek to introduce massive evidence which will, in effect, change the nature of the petition and also affect the respondent's duty to respond to the said evidence; and that, parties need to adhere to the strict timelines set out for the filing of petitions. This Court also found that all parties are at a level playing field and the addition of new evidence must not unfairly disadvantage the other party who has to respond to the additional evidence.

272. I am of the view that the decision of this Court in the Raila Odinga Ruling, commonly cited in most of the cases in which an application for additional evidence is considered by the court, was not meant to prohibit the filing of any further affidavit in all election petitions. That case must be distinguished from others by the single fact that the presidential election petition had a constitutional timeline of only 14 days within which it was to be heard and determined. The central challenge, inter alia, that faced the Supreme Court then, was whether there was sufficient time to accept the Petitioners affidavit filed on the 7th day of the 14 day period, and allow responses through replying affidavits, from the other parties; which by right and to meet the requirements of fair hearing they were entitled to, and still complete the hearing of the petition within the stipulated time set out by the Constitution. Given the circumstances including the time left, the Court was unable to admit the affidavit. This is different from a matter before the High Court in which the Court has 6 months within which to hear and determine an election petition.

273. The application in the current matter was made at the preliminary stages of the proceedings at the High Court which meant the Court had sufficient time to hear the matter and determine it even after admitting the additional evidence by affidavit. Likewise, the rest of the parties would have had sufficient time to respond to the additional evidence/affidavits without being prejudiced in any way. It is clear that the affidavits did not in any way allude to issues that had not already been pleaded in the petition. For this reason, I find that the trial Judge erroneously disallowed the admission of the additional affidavits and in doing so violated the 1st respondent's right to fair hearing.

Curtailing the extent of cross-examination of witnesses

274. One of the grounds upon which the majority decision of the Court of Appeal overturned the High Court's judgment was that the trial Judge (Mwongo J,) denied the 1st respondent a right to a fair hearing by curtailing his right to cross-examine the 5th appellant, Fiona Waithaka, the Returning Officer for Nairobi County. Counsel for the appellants submitted that that trial Court correctly curtailed such examination and provided the parameters of cross-examination and in so doing preserved the 1st appellant's right to a fair hearing. Counsel for the 1st respondent however disagreed with the appellants' contention and submitted that the right to cross-examine is at the very core of a person's right to a fair hearing.

275. The genesis of this issue is the trial Judge's ruling dated 26th June, 2013 [page 54 vol. B1 of the Record] where he held:

> "Accordingly, and for the above reasons, I am not inclined to allow the documents filed by the IEBC to be used in wide and general manner for cross-examination which may amount to mere fishing for information."

276. By way of background, Fiona Nduku Waithaka was the 3rd, 4th and 5th appellants' witness in the High Court. She is also the 5th appellant herein by virtue of her position as the Nairobi County Returning Officer during the general elections held on 4th March, 2013. In compliance with Rule 15 of the Elections (Parliamentary and County Elections) Petition Rules, 2013, she had filed an affidavit in response to the allegations raised in the petition. Rule 15 provides:

(1) A Respondent shall at the time of filing a response to the petition, file an affidavit sworn by a witness whom the Respondent intends to call at the trial, which affidavit shall set out the substance of the evidence. [Emphasis added]

277. In compliance with Rule 21, the 3rd appellant (IEBC) had delivered ballot boxes and the results of the Nairobi County gubernatorial election to the Registrar of the Court. Rule 21 provides:

21. The Commission shall deliver to the Registrar—

(a) the ballot boxes in respect of that election not less than forty-eight hours before the date fixed by the court for the trial; and

(b) the results of the relevant election within fourteen days of being served with the petition. [Emphasis added]

278. The ruling of the trial Judge setting out the parameters of cross-examination stated as follows:

> "During cross-examination of Fiona Nduku Waithaika RW1, by Mr. Kinyanjui for the petitioner, she was shown Form 36 for Embakasi Constituency. She had given evidence that she had looked at all forms 36 for all 17 Nairobi Constituencies before she compiled the Form 36 for Nairobi County. Mr. Ojienda for the 4th and 5th Respondent and Mr. Okonjo for the 1st, 2nd, & 3rd respondents objected to the line of questioning of counsel for the petitioner on several grounds."

279. Fiona Nduku Waithaka acknowledged the following in her evidence-in-chief as contained in her affidavit in response, at paragraph 7:

"

I. upon the completion of the tallying of results from all 17 constituencies in Nairobi County for the gubernatorial election, completed and signed a Form 36 as by law required in respect of the said election. A true copy of the Form 36 dated and duly signed by myself is annexed to the 4th Respondents Replying Affidavit..." [Emphasis added]

280. What necessitated the objection by Counsel for the appellants was the production of Form 36 for Embakasi Constituency by Counsel for the 1st respondent for authentication by the witness. Counsel for the 1st and 2nd appellants contended that the documents that the 1st respondent sought to cross-examine on, were neither made by the witness nor filed as part of the pleadings. Counsel for the 3rd, 4th and 5th appellants also raised objections on the basis that the documents were not filed as part of the pleadings but were provided to the Registrar pursuant to Rule 21 of the Election Petition Rules. Counsel for the 1stand 2nd appellants also noted that they had not been served with the said documents.

281. Counsel for the 1st respondent submitted that he applied for copies of all the forms filed by the IEBC and was duly furnished with them before trial. He argued that during the pre-trial proceedings, Counsel for the IEBC stated that they would be relying on all Forms 35 and 36 filed before the trial Court in furtherance of Rule 21. The relevant connotation is contained at pg. 143 V.B1 of the record

of appeal where Mr. Nyamodi, Counsel for the 1st, 2nd& 3rd respondents at the High Court stated as follows:

> "Our response is yet to be served. To be done today. We have also filed a Bundle of Documents in accordance with the Rules. These are the Results of all 17 Constituencies i.e. Form 35(each polling station) and Form 36 (each Constituency)." [Emphasis added]

282. By that statement, Counsel submitted that the IEBC intended to rely on the Forms 35 and 36 that it had filed in Court pursuant to Rule 21. He therefore argued that the said documents constituted and formed part of the IEBC's and the County Returning Officer's evidence of its conduct in the impugned election.

283. Rule 21 provides inter alia that the IEBC shall deliver to the Registrar of the Court results of the relevant election within 14 days of being served with the petition. The question then is whether the County Returning Officer can be cross-examined on the documents filed pursuant to Rule 21 of the Election Petition Rules.

284. As stated earlier, one of the grounds upon which the appellants objected to cross-examination of the witness was that cross-examination ought to be permitted on contested issues and documents or affidavits properly filed and served. The Elections Act and the Rules and Regulations made thereunder govern the conduct of election petitions. Specifically, Rule 12 provides for the process and manner for the filing of petitions as follows:

(1) A Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial.

(2) The affidavit under sub-rule (1) shall—

(a) ...

(b) ...

(c) form part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by the Petitioner on any contested issue. PARA Emphasis added.

285. Flowing from the above excerpt, the pertinent requirement is, at the time of filing of the petition, the petitioner must file an affidavit sworn by each witness he intends to call detailing the content of the evidence which the witness will adduce.

286. In the same light, Rule 15 provides that:

(1) A Respondent shall at the time of filing a response to the petition, file an affidavit sworn by a witness whom the Respondent intends to call at the trial, which affidavit shall set out the substance of the evidence.

(2) ...

(3) The affidavit shall form part of the record of the trial and a deponent may be cross-examined by the Petitioners and re-examined by the Respondent.

(4) Subject to sub-rule (5), a witness shall not give evidence for the Respondent unless an affidavit sworn by the witness, setting out the substance of the evidence, in sufficient copies for the use of the court and the Petitioner, is filed with the response as required by this rule. [Emphasis added]

287. These two Rules (R. 12 & 15) underscore the importance of one party sufficiently and timeously making their case known to the opposite party so that they can adequately prepare their case. Indeed, both rules are categorical that a witness cannot be allowed to give evidence unless they file a sworn affidavit in accordance with the Rules. In essence, the examination-in-chief in election petition disputes is by way of an affidavit. This is in line with the overriding objective of the Election Petition Rules which includes facilitating the just and expeditious resolutions of election disputes and further in congruence with the strict constitutional timelines with regard to the conduct of electoral disputes. This explains the admission of affidavit evidence as the basis upon which a party may be cross-examined.

288. The trial judge in his ruling on cross-examination stated as follows:

> "The implication here is that the cross-examination relates to and concerns matters deposed to in the affidavit which mandatorily and automatically became part of the trial record. To my mind, therefore, cross-examination of a deponent in respect of an election petition must relate to the substance of the evidence of that witness. But it must also be relevant and material to the scope of that witness's deposed role, actions and involvement in the subject matter as circumscribed by the issues in contention and the party's pleadings." [Emphasis added]

289. Is this the correct legal position with regard to cross-examination on affidavit evidence? Kiage JA, in his judgment, questioned the manner in which the trial Judge in his ruling distinguished the Evidence Act and the Election Petition Rules when the Judge held as follows (at page 44):

> "Fourthly, and this is another distinction of election procedure and practice as against that under the Evidence Act in Section 146(2)....The implication here is that the cross-examination relates to and concerns matters deposed to in the affidavit which mandatorily and automatically became part of the record."

290. Justice Kiage JA, in reference to the above proposition by the trial Judge stated that the Election Petition Rules do not in any manner dilute, limit or denigrate the salutary place of cross-examination in the adjudicative process. I agree with Justice Kiage in this respect. The Election Petition Rules ought to complement and not diminish the substance of the Evidence Act. There is no contradiction between the Election Petition Rules and the Evidence Act. The Rules only specify the mode of presenting evidence-in-chief which is by way of an affidavit and thereafter general rules of cross-examination would normally apply.

291. A similar position was held in the Madurai bench of Madras High Court in India in the case of P. Janakumar v. G. Pandiyaraj (2009) (1) CTC 763 where Section 145 of the Negotiable Instruments Act allowed adducing of evidence by way of an affidavit. The Court in stating that the 2002 amendment was only meant to save time held as follows:

> "... the complainant would otherwise have been bound to give his chief-examination on oath, but he is given the option to decide whether he would enter the witness box for his chief- examination or whether he would give his evidence on affidavit. This provision has been introduced only to reduce the time factor, considering the pile-up of cheque cases."

292. Further, with regard to the standard of adducing affidavit evidence, the Court was categorical that:

> "We make it clear that all the rules which apply to oral evidence equally apply to the evidence given on affidavit and merely because a person gives evidence on affidavit, the witnesses

cannot think that they can stray from the standard of truth or that they can produce documents which are not admissible in evidence."

293. Section 146(2) of the Evidence Act, Chapter 80 of the Laws of Kenya provides that:

> (2) Subject to the following provisions of this Act, the examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. [Emphasis added]

294. In essence, cross-examination need not be confined to the witness's evidence-in-chief as long as it relates to relevant facts. In the present case, cross-examination need not be restrained by the substance of the affidavit as long as it is an examination on relevant facts. Justice Kiage JA, therefore rightly held that there was no basis for the trial Judge's holding that Rule 15(3) confines or limits cross-examination to issues only deposed in the witness affidavit.

295. Generally, the purpose of cross-examination as elucidated in Cross & Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 313), is: first, to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted; and second, to cast doubt upon the accuracy of the evidence-in-chief given against such party.

296. The issue therefore is whether cross-examination by Counsel for the 1st respondent related to relevant facts in issue since it need not be confined to what was deposed in the witness's affidavit. What then is a 'relevant fact'?

297. In the Indian High Court decision of Delhi R. K. Chandolia v. Cbi & Ors, 225/2012 the Court held that:

> "The "relevant facts" in cross examination of course have a wider meaning than the term when applied to examination-in-chief. For instance, facts though otherwise irrelevant may involve questions affecting the credit of a witness, and such questions are permissible in the cross examination as per Section 146 and 153 but, questions manifestly irrelevant or not intended to contradict or qualify the statements in examination-in-chief, or, which do not impeach the credit of a witness, cannot be allowed in cross examination. It is well- established rule of evidence that a party should put to each of a witness so much of a case as concerns that particular witness. ...While allowing latitude in the cross examination, court has to see that the questions are directed towards the facts which are deposed in chief, the credibility of the witness, and the facts to which the witness was not to depose, but, to which the cross examiner thinks, is able to depose. It is also well-established that a witness cannot be contradicted on matters not relevant to the issue. He cannot be interrogated in the irrelevant matters merely for the purpose of contradicting him by other evidence. If it appears to the Judge that the question is vexatious and not relevant to any matter, he must disallow such a question. Even for the purpose of impeaching his credit by contradicting him, the witness cannot be put to an irrelevant question in the cross examination.
>
> However, if the question is relevant to the issue, the witness is bound to answer the same and cannot take an excuse of such a question to be criminating. That being so, it can be said that a witness is always not compellable to answer all the questions in cross examination. The court has ample power to disallow such questions, which are not relevant to the issue or the witness had no opportunity to know and on which, he is not competent to speak. This is in consonance with the well-established norm that a witness must be put that much of a case as concerns that particular witness." [Emphasis added]

298. Counsel for the 1st respondent argued that the trial Judge's denial of cross-examination infringed on his right to a fair hearing enshrined in Article 25(c) and 50(1) of the Constitution. Counsel relied on several cases to the effect that denial or curtailment of a right to cross-examination is tantamount to infringement of his right to a fair hearing. I am in agreement with Counsel that cross-examination holds a sacrosanct place in fortifying the right to a fair trial. Indeed Article 25(c) of the Constitution affirms that the right to a fair trial cannot be limited.

299. As guided by the law, cross-examination must be undertaken within certain parameters akin to the right to a fair hearing bestowed on all parties to a suit. The Supreme Court of India in the case of *M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen & Ors. AIR* 1972 SC 330, had occasion to pronounce itself on the correlation between affording a party the opportunity to cross-examine and the right to a fair hearing when it held:

> "The application of the principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used." [Emphasis added]

300. Further in the case of Union of India v Varma (1958) SCR 499, the Supreme Court of India held:

> "When a document is produced in a Court or a Tribunal, the question that naturally arises is: is it a genuine document, what are its contents and are the statements contained therein true..... If a letter or other document is produced to establish some fact which is relevant to the inquiry, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accordance with the principles of natural justice as also according to the procedure under O.19 of the Code and the Evidence Act, both of which incorporate the general principles." [Emphasis added]

301. In the present case, a Form 36 for Embakasi Constituency was shown to the Nairobi County Returning Officer. Before that, she had testified that she had looked at all Forms 36 before she constituted a Nairobi County Form 36. Counsel for the 1st respondent submitted that had he been allowed to cross-examine the County Returning Officer, he would have shown discrepancies between the various Constituencies' Forms 36 and the Nairobi County Form 36 as identified in the two scrutiny reports which the Court ordered suo moto.

302. What ought to be the scope of cross-examination with regard to a County Returning Officer in an election petition? G.B.M Kariuki JA, in his judgment stated the following with regard to cross-examination:

> "The trial Judge also disallowed cross-examination of the returning officer of the County of Nairobi, Fiona Nduku Waithaka, by the appellant when objection was taken by the respondents during her cross-examination. This was the single most important witness in the trial as she co-ordinated the electoral exercise and was in charge and therefore the person accountable. The appellant's counsel had the right to cross-examine her on the conduct of the election and in particular the voting exercise and the electoral documents to enable the Court to make its evaluation about the accuracy of the exercise and whether the will of the voters prevailed." [Emphasis added]

303. He further stated that:

> "The trial Judge was correct in stating that the documents were not part of the trial record and he rightly acknowledged that he had discretionary power to grant leave for their use and inclusion in the trial. But he declined to do so and reasoned that they were relayed to Court pursuant to rule 21 of the Elections Petition Rules for the purpose of scrutiny, tallying or recounting of votes!" [Emphasis added]

304. I note the observations and finding by the trial Judge in his ruling that:

> "I have carefully perused the Petitioner's pleadings. As a party, he is bound by them. A party is also bound by the depositions of his or her witnesses. Thus, where the Petitioner or his witnesses have deposed to a specific Form 35 or 36 of IEBC in respect of or alleging an irregularity, malpractice or otherwise this court shall grant leave to the Petitioner to cross-examine a witness using the specified form contained in the Forms 35 & 36 filed under rule 21. The Court shall grant leave on a case to case basis to ensure that the rights of all parties are duly protected, to guard against the enlargement or stifling of a party's case, and so as to bring onto the trial record only such matters in respect of which the pleadings specifically relate."

305. Indeed, it is incumbent upon the petitioner to sufficiently state his case when filing pleadings so that the respondents can adequately prepare their case. The respondent on the other hand ought to satisfactorily answer all allegations raised in the petition. In doing so, the respondent relies on sworn affidavits of relevant witnesses who will give competent and sufficient evidence to answer the petitioner's case. However, as stipulated in Section 146(2) of the Evidence Act read together with Rules 12 and 15 of the Election Petitions Rules cross-examination need not be confined to the statements made by the witness in his examination-in-chief as long as it relates to relevant facts and is based on contested issues.

306. It is clear from the trial C0urt's record that accuracy of transposition of results was one of the issues raised by the Petitioner. Therefore, cross-examination of the Returning Officer who transposed the results from the constituency Forms 36 to the County Form 36 was well within the dictates of Rules 12 and 15 which permit cross-examination on "contested issues". With respect, I am not convinced that sufficient reasons were given by the trial judge for denial of the 1st respondent of his right to cross-examine the Returning Officer who testified that she saw all the Forms 36 in Nairobi County and had transposed the results therein to the County Form 36.

307. Further I findit was inappropriate for the trial judge to anticipate the kind of questions that the 1st respondent would pose to the Returning Officer and conclude that they would not be within the "contested issues" as required by Rules 12 and 15 of the Election Petition Rules. The Rules, however, do not in any way oust the provisions of the Section 146 of the Evidence Act, which allows cross-examination to be conducted on relevant facts without restricting it to the examination-in-chief of the witness being cross-examined. It was therefore improper for him to curtail cross-examination on the basis that the documents relied upon by the 1st respondent for that purpose, were not part of the evidence before the Court.

308. Article 50 as read together with Article 25 signal the profound importance of the right to a fair trial within our jurisprudence to the extent that, unlike other constitutional rights and fundamental freedoms in our Bill of Rights, it cannot be limited. The right to a fair trial requires that no person should be deprived of their rights, without first having the opportunity to test the allegations and

supporting evidence in a Court of law. Therefore, Courts ought to strike a suitable balance between upholding the constitutional right to a fair trial and the need to enforce statutory provisions on timelines, without offending our unique legal framework.

309. According to Tanford AJ, in The Trial Process: Law, Tactics and Ethics (2009) LexisNexis, 4th Ed. (page 283):

> "In civil cases, cross-examination is also a fundamental right. While a judge has more discretion to limit cross-examination in civil cases, the judge may do so only after a party has had a fair and substantial opportunity to exercise the right.
>
> The right of cross-examination encompasses not merely the right to ask questions, but also the right to elicit testimony. A witness can and should be compelled by the judge to answer proper questions. Continued refusal to answer may subject the witness to punishment for contempt. In extreme cases, where cross-examination is effectively denied, the court may strike out all or part of the direct examination or grant a mistrial — even if the denial of an opportunity for full cross-examination is no one's fault. Whether the direct examination must be stricken because of the witness's failure to submit to cross-examination is largely a discretionary decision for the trial judge. It depends not on whether the witness was justified in not answering, but on whether it is fair to permit the direct to stand unchallenged."

310. It can, therefore, be accurately said that if a party is denied an opportunity to cross-examine a witness, a Court may strike out all or part of the evidence adduced during examination-in-chief or declare the process a mistrial. The Court exercises its discretion in determining which of these two recourses it will have based on whether it would be fair to allow the testimony of that witness to remain unchallenged.

311. Miller M, in his article "Completed cross-examination - A pre-requisite for a fair trial?" DR, November 2013:28 [2013] De Rebus 220 which discusses at length the right to cross-examine a witness as a pre-requisite for a fair trial, propounds particularly in respect of incomplete cross-examination that:

> "A party has a right to adduce and challenge evidence. It is unknown what the result of a complete cross-examination may have been or how it may have affected the outcome of the case. Whether it is because of the right of an accused person to adduce and challenge evidence in terms of s 35(3)(i) of the Constitution, or the right of a litigant in a civil case to a fair public hearing in terms of s 34 of the Constitution or whether it is because of the audi alteram partem rule, a party has the right to be afforded an opportunity to complete cross-examination of a witness called by the other party whose evidence is prejudicial or potentially prejudicial to him or her. Without that it cannot be said that there was a fair trial.
>
> It follows from this that there can be no discretion to admit such evidence and that its exclusion has nothing to do with the probative value thereof. It is a guaranteed right. I am of the opinion that where cross-examination has not been completed such evidence should simply be excluded and treated as inadmissible and pro non scripto."

312. In the present circumstances the testimony of the county Returning Officer remained unchallenged at the behest of the trial Judge for reasons that are not legally justifiable to curtail the right of the 1st respondent to cross-examine that witness. Therefore, this Court ought to determine what the proper recourse under these circumstances would be – to strike out the direct examination of the county Returning Officer or declare the entire process a mistrial. I am persuaded that the proper recourse considering that the county Returning Officer was a key witness for the 1st appellant would be to strike out the direct examination of the county Returning Officer, otherwise the 1st respondent cannot be said to have had a fair trial.

Curtailment of cross-examination on a scrutiny report particularly if the order is suo moto.

313. In addressing this issue, it is important to determine, firstly, the purpose of a scrutiny report and secondly, the consequences of such a report. The leading case on the issue of scrutiny is the case of Raila Odinga when this Court made a suo motu order of scrutiny of various forms used in the conduct of presidential election petition. At paragraph 169 of its judgment the Court held thus:

> "The purpose of the scrutiny was to understand the vital details of the electoral process, and to gain impressions on the integrity thereof."

314. The above object of scrutiny was further re-emphasized in Munya, when this Court held as follows [paragraph 153]:

(b) "The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount."

315. From the foregoing, it is clear that scrutiny is aimed at giving the Court a fair impression of how that particular election was conducted for the purposes of finding out whether indeed the election was conducted in accordance with the law, particularly Articles 81 and 86 of the Constitution. The report of the scrutiny cannot be ignored. Scrutiny is a necessary tool in assessing the credibility of the election and the Court must take it into consideration in arriving at its determination.

316. A scrutiny report is prepared by the Registrar as directed by the Court. The Election Courts have contended with the issue as to what status to accord a scrutiny report and especially on the issue whether parties may 'cross-examine' relevant witnesses' on it.

317. In this case cross-examination was denied purely on the basis that the petitioner sought to introduce new evidence. Though I find merit in the Judge's fear that the petitioner would indeed expand the scope of the petition through reliance on the scrutiny report, I do not think that such a preposition provides sufficient reasons for denial of the right to cross-examine. I shall be expounding on this in subsequent paragraphs.

318. The trial Judge, (Odunga J) in the case of Nuh Nassir Abdi v Ali Wario & 2 others, Mombasa High Court Petition No. 6 of 2013, [2013] eKLR, however had a contrary view on the issue as to whether cross-examination ought to be allowed on the scrutiny report, particularly the Polling Day Diaries which had been presented to Court by order of the Court. In this case, as in the present case scrutiny and recount had been ordered by the Court suo moto. The Court in allowing cross-examination held as follows:

> "In the course of cross-examination of the petitioner, the result of the said scrutiny as well as the Polling Day Diary in particular that of Bilbil Primary School were clearly dwelt on by the respondents. To now submit that the same cannot be subject of any examination is in my respectful view an attempt to lock the stable door after the horse has bolted.
>
> In the instant case, a scrutiny has been ordered albeit on the Court's own motion and the report therefrom has been the subject of cross examination in this case. During the scrutiny the subject Polling Day Diaries were some of the materials which were directed by the Court to be availed. When this Court directed that the Polling Day Diaries be availed, the

parties were put on notice that issues arising therefrom might possibly arise in the course of the hearing and determination of this petition. This Court ordered that copies of the said Diaries be made and served on all the parties and this was done.

Therefore it is my view that mere reference to the said Polling Day Diaries in cross examining a witness with a view to confirming what actually took place on the polling day would not necessarily be prejudicial to a party. To the contrary it may assist the Court in determining the question whether or not the principles under Article 81 of the Constitution were adhered to. However, the petitioner is put on notice that he should avoid the temptation to enlarge his case outside the scope of his pleadings since it is trite that a party is bound by his pleadings despite the evidence."[Emphasis added]

319. In allowing cross-examination of the Polling Day Diaries the Court considered the fact that the respondents had actually made reference to those diaries during cross-examination of the Petitioner. The respondents therefore could not object to the same reference being made when their witness was on the stand. Further, the Court considered that all parties had been put on notice that issues may arise during the hearing based on the scrutiny report particularly with respect to Polling Day Diaries.

320. The consequence of this was that parties were free to prepare their case with regard to questions that may arise therein. The Judge however was categorical that the petitioner could not use that as a leeway to enlarge his case. I entirely agree with the trial judge in the Nuh Abdi case since the Court should at all times seek to meet the ends of justice by exhibiting fairness to all parties in a suit. The right to cross-examine a witness should not be restricted except as provided for by law – in this case by the Evidence Act and the Election Petition Rules. At the same time the right of the other party to be given a fair opportunity to reply to the claim made should also not be impeded.

321. This Court in Obado has given some direction as to the status of a scrutiny report. The relevant passage provides as follows:

153. "We hold it to be improper that, when re-tally is conducted, a party should take this as an opportunity to introduce new spheres of disputes, which had not been signalled in his or her original pleadings. It is vital, in election disputes, that the respondent should know the case that faces him or her. Hence the petitioner ought to have indicated in his or her pleadings the disputed matters, with clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres, after re-tally has been conducted. However, where a trial Court exercises its discretion and, suo motu, orders a scrutiny, recount or re-tally, revealing irregularities other than those that were pleaded, then there is a proper basis for any party to pose questions upon such new findings; and the Court then will make findings on the effect of those irregularities on the declared results." [Emphasis added]

322. This Court held that parties can be allowed to 'pose questions' on a scrutiny report where new irregularities emerge hence granting an opportunity for parties to make submissions on the new issues. For instance the petitioners would be allowed to submit on the newly discovered irregularities directing the Court to all the discrepancies or irregularities manifest in the report and show how those irregularities affect the results. The respondents would on the other hand, particularly the IEBC, use that opportunity to explain the cause and effect of the alleged irregularities. If by any chance, the IEBC chose to explain the discrepancies by way of bringing in rebuttal or any evidence including relevant witnesses, then in that case, the opponent would be entitled to cross-examine that witness. Therefore, parties ought to be given an opportunity to submit on the scrutiny report and the Court must take the parties' submissions into considerations in arriving at its determination.

323. When scrutiny is carried out before close of a party's case, it would be prudent for the Court to allow cross-examination where there is an appropriate witness capable of carrying the burden of a scrutiny report. In the present case, the objection on the line of questioning was raised when the witness was shown the Form 36 for Embakasi Constituency.

324. The appellants' submitted that the witness was not the maker of the constituencies Forms 36 hence she was incapable of answering any questions pertaining to them. The 1st respondent on the other hand submitted that had he been allowed to cross-examine, he would shown that the witness transposed wrong figures from the 14 out of 17 Constituency Forms 36 to the Nairobi County Form 36.

325. Unfortunately, the trial Judge prevented any further cross-examination before the 1st respondent could show the tread of his line of thought. Indeed the Returning Officer was not the maker of the constituency Forms 36 but she was definitely the maker of the county Form 36 and could therefore be cross-examined on the accuracy of the transposition of the results from the former to the latter. The trial Court, in denying the 1st respondent the opportunity to cross-examine on the transposition of the results, deprived the 1st respondent of his constitutional right to a fair trial.

326. I reiterate that under Section 146(2) of the Evidence Act, the only necessary consideration in cross-examination is that the questions directed to the witness must relate to relevant facts. The purpose of cross-examination is to elicit as much information as possible from the opponent's witness necessary to advance one's case. Consequently, if in the course of cross-examination new facts emerge, then the Court would have no option but to consider that new evidence particularly if it relates to facts already pleaded.

327. The Court cannot close its mind to the existence of important evidence if it is to make a just determination. This is in line with Article 159 of the Constitution on the guiding principles for the exercise of judicial authority which includes protection and promotion of the purpose and principles of the Constitution. Some of these principles include integrity, transparency, rule of law and the aspiration of people of Kenya to social justice. How else will justice be seen to be done if not through conceptualizing the idea of justice as close as possible within the lens of the common 'mwanainchi'?

328. The trial Judge in his ruling on cross-examination of the Returning Officer stated that he would allow cross-examination on a case-by-case basis. The relevant passage from the trial Judge's ruling is as follows:

> "I have carefully perused the Petitioner's pleadings. As a party, he is bound by them. A party is also bound by the depositions of his or her witnesses. Thus, where the Petitioner or his witnesses have deposed to a specific Form 35 or 36 of IEBC in respect of or alleging an irregularity, malpractice or otherwise this court shall grant leave to the Petitioner to cross-examine a witness using the specified form contained in the Forms 35 & 36 filed under rule 21. The Court shall grant leave on a case to case basis to ensure that the rights of all parties are duly protected, to guard against the enlargement or stifling of a party's case, and so as to bring onto the trial record only such matters in respect of which the pleadings specifically relate." [Emphasis added]

329. The reasoning of the Judge was that a party cannot be allowed to expand his case by relying on discrepancies not originally pleaded but subsequently revealed in the scrutiny report. The Judge was of the view that doing so would prejudice the rights of the other party who had no prior notice of the 'new' issues raised by the petitioner.

330. I do not agree with the trial Judge's conclusion that cross-examination be allowed only on a case-by-case basis since this goes against the grain of Section 146(2) of the Evidence Act and Rules 12 and 15 of the Election Petition Rules. It was incumbent upon the trial Judge to apply these provisions of the law during cross-examination since they are very clear and unambiguous. There is no doubt as to their application in practical situations therefore I find that the trial Judge had no legal justification to allow cross-examination on a case-by-case basis.

V. Whether the Court of Appeal acted contrary to Articles 81(e) and 86 of the Constitution by nullifying the 1st and 2nd appellants election on the ground that the 1st respondent was not accorded the right to a fair hearing.

What remedies are available if the trial Court infringed the right to a fair trial?

331. In view of the foregoing, it is my considered opinion, that the trial judge in this matter curtailed the right to fair hearing of the 1st respondent contrary to the dictates of the Constitution. What remedy, then, lies to the aggrieved party – the Respondent - in this case?

332. I am of the view that this Court, as the final arbiter of constitutional controversy needs to settle the question regarding the remedies available in instances when the right to a fair hearing or a fair trial is infringed in electoral disputes. Indeed, as the Chief Justice Willy Mutunga in his concurring opinion in the Jasbir case stated at paragraph 81:

> "81 ...it will be good practice for this Court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it."

333. The Court of Appeal having found that the trial court had violated the right of the 1st Respondent, determined that the violation of the right to a fair trial could only be addressed by the nullification of the gubernatorial election for the Governor of the County of Nairobi. Is this the appropriate remedy that should be applied in this matter? Can an election be nullified on the basis that a party did not get a fair trial?

334. On the one hand, Counsel for the appellants led by senior Counsel Pheroz Nowrojee, argued that the Court of Appeal erred in nullifying the election on the basis that the right to a fair hearing was infringed upon. They argued that an election can only be nullified based on the grounds provided under Articles 81 and 86 of the Constitution. On the other hand, Counsel for the 1st respondent led by senior Counsel Paul Muite, argued that the 'electoral system' referred to in Articles 81 and 86 of the Constitution is a long process that begins with voter registration and ends with the judgment of this Court. They submitted that if a court cannot verify the electoral results in a fair manner, the election must be nullified.

335. A court when faced with a question as to whether or not to nullify an election has to be alive to the fact that an election is a direct expression of the sovereign will of the people and as such that will should not be interfered with whimsically or arbitrarily. These sentiments are fortified in the Kenyan context by Article 1(1) of the Constitution which decrees that all sovereign power belongs to the people of Kenya.

336. Article 81 provides the general principles for the electoral system thus:

> "The electoral system shall comply with the following principles-
>
> (a) freedom of citizens to exercise their political rights under Article 38;

(b) not more than two-thirds of the members of the elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspiration for the fair representation and equality of vote; and

(e) free and fair elections, which are-

(i) by secret ballot

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.

337. Article 86 addresses the voting process thus:

At every election, the Independent Electoral and Boundaries Commission shall ensure that-

(a) whatever voting method is used, the system is simple. Accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

338. These are the constitutional principles which an electoral body should strive to achieve when conducting an election or a referendum. In a nutshell, only where an election falls short of these principles is it invalid and thereby nullified.

339. The Elections Act, 2011 is an Act of parliament to inter alia provide for the conduct of elections. It cannot be gainsaid that this is the operation manual or code to the conduct of elections in Kenya. It lays the rules and regulations spanning a bookend timeframe from the registration of voters, until the resolution of any election dispute. Notably enough, the entire Act does not specifically address itself on when an election can be nullified. Part VI deals with election offences from section 56 to 73. However, none of these offences calls for the nullification of an election. The offences being of a criminal nature are directed personally to specific individuals and/or political parties and they attract criminal sanctions in persona such as fines and imprisonment.

340. However, section 83 deals with non-compliance with the law during an election. It states:

"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the

principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."

341. From this section and with a specific bias on when an election can be declared invalid, it is discernible that: generally, an election can only be declared void if that election did not substantially comply with the written law to that election – in this regard, the Constitution, the Elections Act, and the Regulations made thereunder, and any other relevant law; and, where there is substantial compliance with the written law in an election the irregularities must indeed have affected the result of the election for that election to be invalidated.

342. One can rightly state that for an election to be nullified, that election should have failed to meet the threshold set by the written law particularly with regard to how that election should be conducted. The emphasis then when considering whether or not to invalidate an election is not what happened subsequent to the declaration of the results, but what happened before and in the process of the election up until the declaration of the result.

343. The written law governing elections in Kenya has now been summarised in what is called the electoral code. In Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Civil Application No. 5 of 2014, (Munya) this Court demystified what the laws governing elections are in Kenya: (at paragraph 60)

> "Pursuant to this provision, Parliament has enacted a raft of legislation to regulate the conduct of election disputes, including election petitions at all levels of the Court system. In what is increasingly being referred to as the "Electoral Code", we now have, inter alia: the Elections Act 2011, the Elections (General) Regulations 2012, the Elections (Parliamentary and County Elections) Petition Rules, 2013 and the Supreme Court (Presidential Election Petition) Rules 2013.

344. The courts have had occasion to rule on when an election can be nullified. In the Raila Odinga decision this Court cited with approval the jurisprudence in Morgan and Others v. Simpson and Another [1974] 3 All ER 722 (Morgan case) where it was held:

> "...an election court was required to declare an election invalid (a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the Court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected..."

345. The Supreme Court, drawing from the Morgan case and having examined other jurisdictions, held with regard to invalidation of an election thus:

> "
>
> 196. We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the

contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite etsolemniteresseacta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law." (Emphasis provided)

346. Considering the above test, this Court in reaching its determination as whether or not to invalidate the presidential election, observed:

> "
>
> 303. We came to the conclusion that, by no means can the conduct of this election be said to have been perfect, even though, quite clearly, the election had been of the greatest interest to the Kenyan people, and they had voluntarily come out into the polling stations, for the purpose of electing the occupant of the Presidential office.

304. Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election." (Emphasis provided)

347. It then proceeded to declare and hold that the election though not perfect, the errors did not affect the result so as to warrant the cancellation of the election. The decision in RailaOdinga set the tone on how the courts below would approach the question of nullification of an election, and setting the criteria on when an election is to be nullified. This standard has been carried on by this Court in its subsequent decisions inter alia, Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others, Petition No. 2B of 2014 and Nathif Jama Adan v. Abdikhaim Osman Mohamed & 3 others, Petition No. 13 of 2014.

348. Having examined the electoral code, and the emerging jurisprudence on elections, it is my considered opinion that when a court of law is faced with the question whether or not to annul an election the following are the fundamentals as can be deduced from Munya:

1. If it is demonstrated that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such an election is not to be invalidated only on ground of irregularities.

2. Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated.

3. Mere allegations of procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election.

349. Does the instant case meet this test? The Appellants argue that it does not. There is insufficient evidence to show that there were any irregularities that were grave enough to affect the outcome. The Respondent's case, on the other hand, is that if he had been allowed a fair trial in which he submitted his affidavit with additional evidence and was allowed cross-examination as requested, then he would have met the threshold to have the election nullified.

350. As I have stated earlier, under Article 25(c) of the Constitution, the right to a fair trial is a right that cannot be limited. However, it is an individual's right, that is a right in personam and the remedy for the violation of such a right cannot be the nullification of an election. The Raila Odinga case

reiterated that an election reflects the views of the people expressed through the vote, not just rights of individuals, and therefore, courts of law must be careful not to exercise their power in such a manner as to interfere with the people's expression in instances where the proven election irregularities do not affect the election results. Since the Respondent's case remains speculative until such time the case is reopened for examination of evidence, it is premature to offer as a remedial measure, the nullification of the election at the center of the controversy.

351. As such, I find that the Court of Appeal erred in nullifying the 1st and 2nd appellants' election as a remedy for the violation of a fair hearing or trial. The Court of Appeal ought to have considered other reliefs for breach or infringement of fundamental rights provided under Article 23(3) of the Constitution. The Constitution clearly stipulates remedial measures for vindicating rights of individuals who may petition a court for redress. The annulment of elections on the sole basis of denial of a right to a fair trial, is not a ground for so doing, under Articles 81 and 86 or Section 83 of the Elections Act.____

352. Article 23(3) of the Constitution lays out the remedies available to a trial Judge hearing a case filed for the enforcement of the Bill of Rights. This section provides:

In any proceedings brought under Article 22, a Court may grant appropriate relief, including-

(a) A declaration of rights;

(b) An injunction;

(c) A conservatory order;

(d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) An order for compensation; and

(f) An order of judicial review." [Emphasis added]

353. While these remedies are available to the High Court in determining matters of enforcement of the bill of rights, Section 21 of the Supreme Court Act, 2011 gives this Court general power to make any Orders, or grant any relief that could have been made or granted by a Court from where an appeal emanates. In addition, election appeals are determined by this Court in exercise of its jurisdiction under Article 163(4)(a). As such, while interpreting the Constitution, this Court bears all the powers to grant constitutional remedies on appeal.

354. Several observations are imperative: first, that the determination of the violation of rights was an ancillary cause to the matter before the Court, that the remedies available in the main cause (electoral remedies) are not sufficient to address this violation. In that regard and in full consideration of the sanctity of rights, I find myself unable to merely declare the violation and move no further. That indeed would not be in consonance with my duty as a bearer of justice.

355. Remedies in human rights violations exist as an aid to the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights. In this regard, and in granting an appropriate remedy, I am empowered by Articles 10 and 23(4)(a) of the Constitution; to promote the national values and principles of governance as well as develop the law to give effect to rights and fundamental freedoms. Both of these empowering clauses

decry a situation where any right goes without a remedy. As observed by the Constitutional Court in South Africa in the case of Fose v. Minister of Safety and Security (CCT 14/96) [1997] ZACC 6:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

356. Due to the contributory role of the judiciary's administrative system in delaying proceedings and failure to allow the cross-examination of the crucial scrutiny report, it would appear to me that the institution ought to have been asked to bear the 1st respondent's legal costs as a measure of compensation for the infringement of his right to fair hearing capped at a certain amount. This would have illustrated the importance of a fundamental right. This matter is however hinged on elections and the citizen's right to franchise. As such, the circumstances demand a more inclusive mode encompassing the rights of Nairobi's electorate to vote under Article 38(3)(b) of the Constitution. This would be actualized through the power of remission pursuant to Section 22 of the Supreme Court Act, 2011. Section 22 provides that "the Supreme Court may remit any proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter." [Emphasis added]

357. In addition, this power is reinforced by Section 21(3) of the Supreme Court act, 2011 as follows:

> "The Supreme Court may make any order necessary for determining the real question in issue in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgement in the appeal." [Emphasis added]

358. In Serah Njeri Mwobi v. John Kimani Njoroge, Court of Appeal at Mombasa, Civil Appeal No. 314 of 2009, [2013] eKLR, the Court in finding that the appellant was denied her right to a fair trial when the trial judge failed to disqualify herself, observed that "it is a tenet of a fair trial that all parties to a dispute must have the right to due process of law in order to resolve the dispute." The Court allowed the appeal, set aside the judgement of the trial Judge and issued an order for a re-trial before any other competent judge of the High Court other than the one who had conducted the initial trial.

359. In the instant case, however, an order for re-trial would not be possible since the jurisdiction of the election Court to hear and determine an election petition expires after six months of the filing the petition. Article 105 of the Constitution stipulates that:

(1) The High Court shall hear and determine any question whether-

  (a) A person has been validly elected as a member of Parliament; or

  (b) The seat of a member has become vacant.

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

360. This means that the length of time that the Constitution has allocated for every petition to be heard and determined by the trial Court is confined only to six months from the date of filing. The import of this provision is that an Election Petition is only alive for six months; a retrial is only available where there is a live case. In the current matter the petition at the High Court was filed on 13th March, 2013 hence initializing the six-month period for the election Court to make a determination, which period

inevitably expired at midnight on 12th September, 2013. This is a constitutional imperative which, as explicated in the Joho decision, is cast in stone and cannot be altered. Therefore, it cannot be gainsaid that at present neither the trial Judge nor any other Judge of the High Court has jurisdiction to conduct a re-trial in this matter.

361. The constitutional timelines in hearing and determining electoral disputes are however set by the Constitution and statute and this Court has settled the same in various cases. It is a fact that the six month period of the High Court's power as an election Court in this case have lapsed. The time set by Section 85A of the Elections Act for the Court of Appeal has also lapsed meaning that the Court of Appeal also bears no such power.

Power of the Supreme Court to retry the issue

362. This Court could also remedy the denial of fair trial by creating a window for the cross-examination of the Returning Officer by the 1st respondent. In doing this the Court will have fully remedied the 1st respondent's denial of the right to fair hearing since he will be able to challenge the evidence of the returning officer in the same way as he would have done had the opportunity been granted by the High Court.

363. The right to a fair hearing as guaranteed by the Constitution is so vital that the Constitution itself expresses it as a non-derogable right. I am persuaded that the weight attached to this right by the Constitution itself warrants the exercise by this Court of its inherent powers and conduct a limited evidentiary hearing in which a witness who was not cross-examined will be cross-examined before this Court.

364. Article 163(4) of the Constitution bestows on this Court the power to make the final pronouncement on any matter involving constitutional interpretation and application. Article 159(2)(e) of the Constitution requires the courts to protect and promote the purposes and principles of the Constitution when exercising judicial authority.

365. Articles 10, 19, 20, 23(3), 25(c), 38(3)(b), 50(1), and 50(4) of the Constitution also empower this Court to make an Order that will guarantee the enforcement of the Bill of Rights in the circumstances and that power of remission must then be taken to mean that the Supreme Court can in very clear and distinguishable cases, remit a matter to itself. This power must however be made in the clearest constitutional considerations. Pursuant to Section 21(1)(a) of the Supreme Court Act, this Court bears the power to conduct the cross-examination sought and denied at the High Court as a cause necessary to the proper determination of this matter.

366. Section 21 of the Supreme Court Act, 2011 provides that:

(1) On an appeal in proceedings heard in any court or tribunal, the Supreme Court-

(a) may make any order, or grant any relief, that could have been made or granted by that court or tribunal; and

(b) may exercise the appellate jurisdiction of the Court of Appeal according to Article 163(4) (b) of the Constitution.

(2) In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award.

(3) The Supreme Court may make any order necessary for determining the real question in issue in the appeal, and may amend any defect or error in the record of appeal, and may direct the

court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal.

367. The Supreme Court Rules, 2012 stipulate in Rule 3, that:

> (5) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

368. The upshot of this is that this Court may make the same kind of orders that the High Court is empowered to make under Articles 22 and 165, when the matter comes to the Supreme Court on appeal, as the Court would find fit. As alluded to earlier on these remedies include declarations of rights, injunctions, conservatory orders, declaration of invalidity of any law, orders for compensation, orders for judicial review or any other appropriate relief where rights and fundamental freedoms have been denied, violated or are threatened.

369. Taking all these legal provisions into consideration, it is manifest that this Court may make any order that the High Court has jurisdiction to make in the enforcement of rights and fundamental freedoms. This Court also has the latitude to make any order that would be necessary for determining the real question in issue in this appeal and to ensure that the principles of the Constitution are promoted - including an order for a witness to be cross-examined. I am alive to the fact that this is not a remedy that this Court would hastily grant but in light of the violation of constitutional rights that occurred it is the most appropriate remedy under the circumstances.

V. Whether the Court of Appeal erred in capping of costs in election petition matters?

370. Counsel for the 1st and 2nd appellants submitted that at the Court of Appeal, they challenged the decision of the election Court to cap their costs at 2.5 million shillings. He urged that Section 84 of the Elections Act does not provide for the capping of costs and that such capping arose from Rule 36(1) of the Elections Petition Rules. Counsel contended that the capping of costs by the election Court violated the appellants' right to be heard on their Bill of Costs since it is the taxing master's unfettered discretion to cap costs. He questioned the constitutionality of Rule 36 of the Election Petitions Rules and submitted that the capping of costs, having been borne out of the judgement of the election Court involved the principle of taxation.

371. Counsel requested this Court to strike a balance when issuing costs, between deterring people from filing election petitions and the interests of the successful party in recovering costs. Counsel thus submitted that costs follow the event and he had incurred costs as a result of the application to tender additional evidence, application for stay proceedings, application to determine sequence of witnesses and application regarding on-going scrutiny of votes which were all dismissed with costs.

372. On the other hand, counsel for the 3rd, 4th and 5th appellants submitted that the Court of Appeal erred in failing to exercise its discretion judicially by awarding costs against a party not guilty of any misconduct contrary to the well-established precedent established in Kierson v. Joseph L Thompson & Sons Ltd [1913] 1 KB 587. It was counsel's submission that the appeal was allowed due to a perceived fault on the part of the election Court and not to the fault of any of the 3rd, 4th and 5th appellants at the Court of Appeal, thus, it was punitive for the Court to condemn the said respondents to pay costs

373. At the trial Court, the Judge granted the 1st to 5th appellants costs as the successful parties. However, he capped the costs of the 1st and 2nd appellants owing to the excessive photocopying of documents, such as legislation, which he observed were readily available. Mwongo J, further set a ceiling on costs as follows:

"150. I have, however, noted that the 4-5th Respondents had a penchant for making voluminous photocopies, in particular of statutes a number of which were repeated, yet are readily available. I will cap their recoverable photocopying costs to 60% of their total photocopying costs.

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"151. I will also set a ceiling on costs. In accordance to Rule 36 (1)(a), I hereby cap the costs payable to the 1st - 3rd respondent jointly at Kshs. 2,500,000, and to both the 4th and 5th respondents jointly at Kshs. 2,500,000. Accordingly, the total costs to be paid by the Petitioner to all the respondents shall not exceed Kshs 5,000,000. As this court has not made a determination of the actual costs, the Registrar of the Court shall pursuant to Rule 37 tax such costs under separate bills of costs."

374. At the Court of Appeal, the issue of capping of costs was noted as the basis for the 1st and 2nd appellants' cross appeal. In the majority decision, which affirmed the capping of costs as per Rule 36 (1) of the Elections Petitions Rules, Kiage JA, recognised that the 1st and 2nd appellants indeed had a complex and enormous task of defending the matter. However he also acknowledged that run-away costs awarded against Petitioners could have an effect of hindering a party's exploration of truth for fear of paying enormous costs.

375. He held as follows (at page 117):

> "the view I would take for meeting the 4th and 5th respondents concerns is that only once they prepare their Bill of Costs and the same gets taxed in a manner that is violative of their rights can their complaint be ripe for adjudication. As things now stand, without such bill having been prepared and taxed, I would hold that the argument is pre-mature and essentially speculative and would therefore dismiss the cross-appeal." [Emphasis added].

376. Section 84 of the Elections Act provides for costs and states that:

> "An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."

Further, Rule 36 of the Elections Petitions Rules provides for the manner in which Courts shall be guided when issuing costs. It provides that:

(1) The court shall, at the conclusion of an election petition, make an order specifying—

(a) the total amount of costs payable; and

(b) the persons by and to whom the costs shall be paid. [Emphasis added].

377. This Rule has prompted counsel for the 1st and 2nd appellants to argue that the purpose of Section 84 of the Elections Act was not to cap the costs; thereby Rule 36 violated the appellants' right to be heard on their Bill of Costs since it usurped the taxing master's unfettered discretion. To this regard, Order 16 of the Advocate's Remuneration Order, 2009 provides for the taxing masters discretion in awarding costs as follows:

> Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution,

negligence or mistake, or by payment of special charges or expenses to witnesses or other person, or by other unusual expenses. (Emphasis added).

378. In the George Mike Wanjohi v. Steven Kariuki and 2 Others Petition 2A of 2014; [2014] eKLR case (the Wanjohi case) This court affirmed its decision on costs in the Jasbir case, that is, costs follow the event and the Court has the discretion in awarding costs. The Wanjohi case went further to elaborate the unique nature of awarding costs in electoral disputes and relating it to Section 84 of the Elections Act and Rule 36 of the Elections Petition Rules. This Court held that Section 84 and Rule 36 limits the manner in which election Courts award costs in contrast to the award of costs in ordinary civil cases.

We held the following at paragraph 116:

> "From the above statutory provisions and excerpts from case law, we are of the view that in election petition matters, Courts are under the obligation to award costs following the event. In instances where there is a vexatious claim brought about by the petitioner or the respondents then it is up to the Court to determine whether a party will be disallowed costs or an imposition of the burden of paying costs will be placed on such a party. This means that the wording in Section 84 of the Elections Act and Rule 36 of the Election Petition Rules is indeed rigid with regards to the manner in which Courts will award costs. These provisions provide a different application with regard to costs in that election Courts do not have discretion in awarding costs as they ordinarily have under civil procedure. This provision is not punitive in nature but seeks to compensate the successful litigant for the expenses they incurred as a result of the case." (Emphasis added).

379. Prior to the Wanjohi case, the Court of Appeal had arrived at a similar decision in the case of Joseph Amisi Omukanda v. Independent Electoral and Boundaries Commission & 2 others Civil Appeal No. 45 of 2013; [2014] eKLR in which it held that the wording of Section 84 of the Elections Act and Rule 36 of the Elections Petition Rules is different from the wording in Section 27 of the Civil Procedure Act, which gives the Courts the discretion when awarding costs.

The Court pronounced that:

"...In our view, the legislature clearly intended to depart from the provisions regarding costs obtaining in Section 27 of the Civil Procedure Act to the provisions in Section 84 of the Elections Act which exclude discretion on the part of the court." [Emphasis added].

380. The issue thus is whether the trial Court infringed the rights of the 1st and 2nd appellants when it capped the costs thereby infringing their right to be heard before the taxing master. The above excerpts from legislation and case law illustrate that the Elections Act and regulations thereunder govern the resolution of election disputes. It is clear that the High Court, the Court of Appeal and the Supreme Court will not hesitate to adopt the principle that costs follow the event.

381. In addition, these Courts have discretion and the mandate to award the amount of costs payable. Costs arising from complex electoral issues can be enormous and result in hindering future litigants from challenging election petitions for fear of paying costs. This is the reason behind Courts being entrusted with the discretion to cap costs in electoral disputes. Every Kenyan has the civil and political right to institute any electoral dispute and financial difficulties should not act as and be a hindrance for filing such suits which seek to question whether an electoral process was conducted in accordance with the constitutional provision.

382. Kiage JA, was therefore correct in holding that only once the appellants had prepared their Bill of Costs and the same gets taxed in a manner that violates their rights can their complaint be ripe for

adjudication. Further he observed that as things now stand, without such a Bill having been prepared and taxed, the appellants' argument was pre-mature and essentially speculative. I am of the same opinion as Kiage JA, in this regard.

383. Counsel for the 3rd, 4th and 5th appellants submitted that, the appeal was allowed due to a perceived fault on the part of the election Court and not on the fault of any of the 3rd, 4th and 5th appellants thus it was punitive for the Court of Appeal to condemn them to pay costs.

384. In the Jasbir case, this Court dealt with the issue of costs and held as follows at paragraph 18:

> "It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs....."

385. In considering whether the Court of Appeal's order on costs were discriminatory and punitive, I am persuaded by R. Kuloba in Judicial Hints on Civil Procedure 2nd Ed Law Africa, Nairobi 2011 at page 94 which states that:

> "the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action." [Emphasis added].

386. Comparative case law also illustrates that awarding costs should not be used as a punitive measure but used to reimburse the successful party to a claim. In the Ugandan case of Col (RTD) Besigye Kizza v. Museveni Yoweri Kaguta and Electoral Commission Presidential Election Petition No. 1 of 2001, Odoki CJ, (as he then was) ordered that each party should bear its own costs and stated as follows:

> "... Costs are not intended to be punitive but a successful litigant may be deprived of his costs only exceptional circumstances. See Wambugu vs. Public Service Commission (1972) E.A. 296."

387. In addition, in the Indian case of Manindra Chandra Nandi v. Aswini Kumar Acharjya, [ILR (1921) 48 Ca. 427], the principle underlying the awarding of costs was stated as follows:

> "...We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as recompense to the successful party for the expenses to which he had been subjected..." [Emphasis added].

388. The excerpts above illustrate that costs follow the event and the awarding of costs to one successful party must not be seen as a punitive measure. Thus the 3rd, 4th and 5th appellants' argument in this regard cannot stand.

Conclusion

389. Having considered the process, the shortfalls and the constitutional call in this matter, I would have made the following Orders:

(a) As the evidence obtained as a result of the scrutiny exercise fails the test of Article 50(1) and (4) of the Constitution; the same is hereby excluded and subject to fresh procedural treatment to bring it into conformity with the prerequisites of fair hearing.

(b) The Returning Officer, Nairobi gubernatorial elections be cross-examined on the scrutiny report and re-examined according to the law to allow this Court an opportunity to make the proper determination of the appeal according to the law.

(c) The Judgement of the Court in the appeal shall be rendered upon the completion of this exercise and upon satisfactory examination of the findings by the Court.

390. However, in light of the decision taken by the majority, this proposal for the Court to remit the matter to itself, cannot be effected. As the case stands, no evidence has been adduced to warrant the nullification of the gubernatorial election of the Nairobi County held on 4th March, 2013. I am therefore in agreement with the final orders in the majority decision.

G. Orders

391. Upon considering the arguments and submissions of counsel, as well as the relevant material, works and precedents, we have come to our conclusion which takes the form of specific orders as follows:

(a) The decision of the Court of Appeal delivered on 13th May, 2014 is hereby annulled.

(b) The Judgment of the High Court dated 10th September, 2013 is hereby reinstated.

(c) For the avoidance of doubt, we reaffirm the status of the 1st appellant herein as the duly-elected Governor of Nairobi County as declared by the Independent Electoral and Boundaries Commission (IEBC) on 7th March, 2013, and as published in Kenya Gazette No. 3155 of 13th March, 2013.

(d) Parties shall bear their own respective costs at the High Court, the Court of Appeal and the Supreme Court.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST, 2014.

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W. M. MUTUNGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

K.H. RAWAL

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

.....

P. K. TUNOI

JUSTICE OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT