Hassan Nyanje Charo v Khatib Mwashetani, Independent Electoral and Boundaries Commission, Juma Musa & Gideon Mwangangi Wambua (Civil Application 23 of 2014) [2014] KESC 5 (KLR) (8 December 2014) (Ruling)

Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR

Neutral citation: [2014] KESC 5 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 23 OF 2014

MK IBRAHIM & JB OJWANG, SCJJ

DECEMBER 8, 2014

BETWEEN

HASSAN NYANJE CHARO ..... APPLICANT

AND

KHATIB MWASHETANI ..... 1ST RESPONDENT

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

JUMA MUSA ..... 3RD RESPONDENT

GIDEON MWANGANGI WAMBUA ..... 4TH RESPONDENT

(Being an Application for Review of Refusal of Certification of intended appeal by the Court of Appeal in its Ruling dated 22nd May, 2014)

Supreme Court affirms the unconstitutionality of section 76(1) (a) of the Elections Act.

The Supreme Court considered the question as to whether an amendment could be read into a statutory provision pursuant to the orders of the High Court. The High Court ordered for certain amendments to be made to section 76(1) of the Elections Act and also ordered that a failure to effect the amendments within 60 days of the making of the order would mean that the provision that election results had to be gazetted within 7 days of their announcement would be read into the said section 76(1). The Supreme Court held that the courts had no power to amend legislation.

Reported by Phoebe Ayaya & Kipkemoi Sang

Constitutional Law *– amendment of statute – the principle of "reading-into legislation" – where the High Court ordered the Attorney General to initiate the process of legislative amendment within a given time frame, failure to which the section would stand amended as per the courts' orders – where such amendment was not done*

during the time frame given by the court – where the legislation in question was one passed after the promulgation of the Constitution of Kenya, 2010 – whether the directions of the court amounted to an amendment of the legislation – whether the legislation could be amended for being inconsistent with the Constitution in light of the unconstitutionality clause contained in the Constitution – whether the principle of "reading into legislation" was applicable in the circumstances – Constitution of Kenya, 2010 articles 2(4), 94(1), 159(1); Sixth Schedule, section 7(1).

Jurisdiction *- jurisdiction of the Supreme Court - where an application for review of a certification decision by the Court of Appeal had been filed out of the timelines set under article 87(2) of the Constitution - where the election petition as filed at the trial court was not filed within the requisite 28 days after the declaration of the results of an election - whether the Supreme Court had jurisdiction to entertain the application.*

Civil Practice and Procedure *- preliminary objection - where a preliminary objection raised a challenge about the jurisdiction of the court to entertain the suit - whether the preliminary objection raised "a point of law" as a basic test signaled in the Mukisa Biscuits case.*

Constitutional Law*- supremacy of the Constitution, separation of powers and sovereignty of the people - judicial authority and legislative authority as different forms of authority derived from the people of the Republic of Kenya - where the High Court issued orders for an amendment to be effected for provision of a reasonable timeline for gazettement of results under section 76(1)(a) of the Elections Act and also ordered that failure to effect such an amendment within 60 days of the making of the order would mean that a requirement for the gazettement of results within 7 days of their announcement would be read into the provision - whether the High Court had power to amend a legislative provision - Constitution of Kenya 2010, articles 2(4), 94(1), 159(1); Sixth Schedule, section 7(1); Supreme Court Act, 2011 Section 3.*

Brief facts

The applicant sought a review of a Court of Appeal ruling refusing to certify his intended appeal as one involving a matter of general public importance. The same was set down for hearing but the respondents filed a notice of preliminary objection on the grounds that the court lacked jurisdiction to hear and determine the matter, as it originated from proceedings that were a nullity, and thus, void *ab initio***;** and that the petition from which the application for review emanated, was filed out of time, and in contravention of article 87(2) of the Constitution of Kenya, 2010.

The matter had begun as *Election Petition No 9 of 2013* at the High Court at Mombasa, and as both the petition and *Election Petition No 4* were in respect of the same election for the same constituency they were consolidated.

The subject matter of the petition was the elections held on 4th March, 2013 whose results were released on 5th/6th March 2013. However the petition was filed on 10th April 2013 – 35 days after declaration of the results.

The ruling of the High Court held that the provisions of section 76(1) (a) of the Elections Act were not inconsistent with the Constitution. The Judge directed the Attorney-General to initiate the process of legislative amendment within 60 days, failure to which, it would be deemed that an amendment to section 76(1) (a) of the Elections Act would have had been effected. (*Gideon Mwangangi Wambua & another v Independent Electoral and Boundaries commission & 2 others* [2013] eKLR)

However, the Supreme Court made a contrary finding holding that section 76(1) (a) of the Elections Act was inconsistent with the Constitution, and hence a nullity. (*Hassan Ali Joho & others v Suleiman Sais Shabal & 2 others* [2014] eKLR)

The matter proceeded on merit, and the election court set aside the election results. However, an appeal to Court of Appeal led to the High Court decision being set aside and it was the said Appellate Court finding that the applicant sought to contest in the Supreme Court.

Issues

i. Whether the Supreme Court had the jurisdiction to entertain an application for review where the said matter had been filed outside the constitutional timelines at the trial court.

ii. Whether the preliminary objection as raised by the respondents challenging the legality of the Supreme Court's jurisdiction to entertain the matter was lawful.

iii. Whether the High Court while determining the issue of time, as provided under section 76(1) (a) of the Elections Act No.24 of 2011 amended the said section.

iv. Whether the Supreme Court decision in the *Joho case* which had found section 76(1)(a) of the Elections Act inconsistent with the Constitution, was applicable to the instant suit.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 2(4) "Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid".

Article 94(1) "The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament"

Article 159(1) "Judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under this Constitution"

Sixth schedule, section 7(1), "All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution ".

Held

1. The petition filed in the High Court which had challenged the election results of Lunga Lunga Constituency, had its foundation in article 87(2) of the Constitution of Kenya, 2010 which provided that; petitions concerning election other than the presidential election be filed within twenty eight days after the declaration of election results by the Independent Electoral and Boundaries Commission. The Constitution required that: there ought to be "election results which must be "declared." The two were mutually inclusive, and it was not possible to isolate them, for a legitimate election to be deemed as having taken place. It was the declaration of results that concluded the election cycle. The declaration of results for Lunga Lunga Constituency indeed took place. Therefore the applicant's contention that there was no declaration of results failed.
2. The principle in *Mukisa Case* required that, a preliminary objection could only be raised on a "point of law". Points of law could only be raised on assumption that all the facts pleaded by the other side were correct.
3. Objection to Jurisdiction was a good example of preliminary objection. The case before the Supreme Court raised two issues which fell in such category, firstly, that the Supreme Court lacked jurisdiction to hear and determine that matter, as it derived from proceedings that were a nullity, and were void *ab initio.* Secondly, that the petition from which the application emanated was filed out of time and contravened article 87(2) of the Constitution of Kenya, 2010.
4. Crystallization of the two issues singled out the issue as to whether the Supreme Court had jurisdiction to admit the application for review, when it was filed outside the constitutional timeline specified in article 87(2) of the Constitution of Kenya, 2010. That issue in itself was a "pure point of law" and fell within the principle in *Mukisa Biscuit Case (Mary Wambui case; Lisamula case and Lemanken Aramat v Harun Meitamei Lempanka & Two Others [2014]eKLR)*
5. "Reading-into legislation" might have been a new phraseology in the forensic language of the court; but the ultimate object touched on by the South African Case, was not entirely different from the object of section 7(1) of the sixth schedule of the Constitution of Kenya, 2010 which declared that of all laws in force immediately before the effective date, were to continue in force and remain to be construed with the alteration, adoption, qualifications and exceptions necessary to bring them into conformity with the Constitution . (*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (CCT10/99) [1999 ZACC}*

6. The position for the laws that were enacted after the promulgation date, of the Constitution of Kenya, 2010 was clear. Article 2(4) provided that any law, including customary law, that was inconsistent with the Constitution was void to the extent of the inconsistency, therefore, any act or omission in contravention of the Constitution was invalid.
7. The inevitable inference resolved into the principle that the Constitution of Kenya, 2010 did not envisage or create a legal vacuum, and all process regulated by law were to continue in progress as signaled by the Constitution. The Supreme Court was duty bound to signal a direction in respect of the "reading-into" for section 76(1) (a) of the Elections Act, on the basis of the persuasive authority from the South African jurisdiction in the case of *National Coalition for Gay and Lesbian Equality* the adoption of such an alternative principle, was not proper for the present case since the statute in question was enacted after the promulgation of the Constitution of Kenya, 2010. (*Communications Commission of Kenya & Five Others v Royal Media Services Ltd & Five Others [2014] eKLR*).
8. Since the Elections Act 2011 was enacted after the promulgation of the Constitution of Kenya, 2010, section 76(1) (a) was void *ab initio.* If a statute enacted after the inception of the Constitution was found to be inconsistent, the inconsistency would date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. An order declaring a provision of a statute invalid by reason of inconsistency with the Constitution automatically operated retrospectively to the date of inception of the Constitution. (*Sias Moise v Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Kriegler)*
9. Section 3 of the Supreme Court Act, 2011, gave the Supreme Court the mandate to assert the supremacy of the Constitution and the sovereignty of the people of Kenya and provide authoritative and impartial interpretation of the Constitution. Article 94(1) of the Constitution of Kenya, 2010 provided for the legislative authority as being derived from the people of the Republic of Kenya and was vested in parliament at the national level. Article 159(1) provided that judicial authority was derived from the people and vested, and ought to be exercised by the courts and tribunals established by or under the Constitution. The separation of powers did indeed serve an objective governance-purpose. The High Court had no power to amend section 76(1) (a) of the Elections Act.
10. The Constitution of Kenya, 2010, had been set upon judicial foundations long fashioned by common law principles and practices including the doctrine of precedent. The common law principle was designed to ensure certainty and predictability in the law. The doctrine required that cases with similar facts were to be decided in a similar manner. The Supreme Court entertained no notion that the prescribed time-lines were anything but a matter of *substantive law*— and not a technicality.
11. The High Court in petition No. 9 of 2013 consolidated with Petition No. 4 of 2013, while determining the issue of time, held that section 76(1)(a) of the Elections Act to be judicially amended to conform to the Constitution . In *Joho case*, the Supreme Court had ruled the relevant statutory provision to be unconstitutional and struck out. The declaration of results in the matter was made on March 5, 2013 and the election petition filed on April 10, 2013, was outside the 28-day limit after the declaration of results. The election petition was filed out of time, and on that account, could not be sustained. The High Court lacked jurisdiction to admit and determine it; and the proceedings before that court were a nullity *ab initio*. Parties could not reopen concluded causes of action.

Application dismissed.

Orders

i. *Preliminary objection by the 2nd and 3rd respondents dated July 31, 2014 were upheld.*
ii. *Application for review of refusal of Appellate Court certification, dated June 3, 2014 disallowed.*
iii. *Determinations in the Judgments of the High Court and the Court of Appeal declared null.*
iv. *Declaration of election results by the Independent Electoral and Boundaries Commission, in respect of the Lunga Lunga Constituency seat, affirmed.*
v. *Parties to bear their own costs at the High Court, Court of Appeal and the Supreme Court, respectively.*

Citations

Statutes

1. Constitution of Kenya, 2010
2. Elections Act
3. Marriage Act
4. Supreme Court Act

Advocates

None mentioned

RULING

Introduction

1. The applicant moved this Court by Originating Motion dated 4th June, 2014 seeking a review the Ruling of the Court of Appeal (Karanja, Makhandia & Sichale, JJA) dated 22nd May, 2014 refusing to certify his intended appeal as one involving a matter of general public importance.

2. The application was brought under certificate of urgency; and on 4th June, 2014 a single Judge of this Court (Ojwang, SCJ), after perusing the pleadings on record, declined to certify the matter urgent. He directed that the respondents be served within fourteen days, and a date be taken at the Registry for inter partes hearing.

3. Parties were served, and the matter set down for hearing on 22nd July, 2014; but on that occasion, the matter was adjourned, as learned counsel, Mr. Nyamodi sought leave to file a notice of preliminary objection. He was allowed seven days within which to file and serve his objection.

4. On 31st July, 2014 the 2nd and 3rd respondents through their legal representatives, M/s A.B. Patel & Patel Advocates, filed their notice of preliminary objection, the subject of this Ruling. They raised two points of law:

    i. that this Court lacks jurisdiction to hear and determine the matter, as it originates from proceedings that were a nullity, and thus, void ab initio;

    ii. that the petition from which this application emanates, was filed out of time, and in contravention of Article 87(2) of the *Constitution*.

5. The notice of preliminary objection was canvassed before this Court on 5th August, 2014.

II. Submissions

(a) The Case of the 2nd and 3rd Respondents

6. The 2nd and 3rd respondents were represented by learned counsel Mr. Nyamodi, who was holding brief for learned counsel, Mr. Khagram. Mr. Nyamodi also held brief for Mr. Balala, the advocate on record for the 1st respondent.

7. Learned counsel urged that this Court has no jurisdiction to entertain the application for review, as the election petition upon which this application and intended appeal are predicated, was filed out of time. Counsel's information - base was the list and bundle of authorities, dated and filed in Court on the 1st August, 2014 and a supplementary list and bundle of authorities dated 4th August, 2014 and filed on 5th August, 2014.

8. Counsel submitted that this matter had started off as Election Petition No. 9 of 2013 at the High Court at Mombasa, on 10th April, 2013, and both the petition and Election Petition No. 4 were in respect of the same election for the Constituency of Lunga Lunga, in Kwale County. Justice Odunga had been gazetted as the Election Court Judge to hear the two matters, and since they related to the same electoral area, he made orders consolidating them.

9. Counsel urged that on 10th May, 2013, an application was made by the 1st respondent herein seeking to strike out the two petitions, for having been filed out of time. Counsel submitted that the facts of this matter, in that respect, had not been disputed, and those facts are set out in the decision of Mr. Justice Odunga, dated 23rd May, 2013. Counsel cited paragraph 9 of that High Court decision: Gideon Mwangangi Wambua & Another v. Independent Electoral and Boundaries commission & Two Others [2013] eKLR— in which the learned Judge thus stated:

> The Applicant contends that the Petitioner has stated, and correctly so, in paragraph 4 of the petition, that the elections, the subject matter of this petition were held on the 4th March, 2013, and the results of that election declared on the 5th/6th March 2013 and that in paragraph 4 of his Affidavit supporting the Petition, he states:
>
> > Your Petitioner states that the election held on the 4th March 2013 when the following candidates who received votes as shown against their names when the results were declared on 5th/6th March 2013 at Shimoni Secondary school... and the returning Officer has returned Khatib Abdallah Mwashetani as being duly elected'. . ."

10. Mr. Nyamondi urged that by the applicant's account, in his petition before the High Court, the date of the declaration of election results was the 5th/ 6th March, 2013. However, the petition was filed on the 10th April, 2013— which was 35 days from the date of declaration of the results.

11. Counsel urged that the ruling by Odunga, J in the consolidated petition was rendered the same day as that by Justice Ochieng in Petition No. 8 of 2013:Suleiman Said Shabal v. Independent Electoral and Boundaries Commission & Three Others [2013] eKLR. Counsel submitted that the findings of the two Judges were the same; and Justice Odunga held that the provisions of Section 76(1) (a) of the *Elections Act* were not inconsistent with the *Constitution*. But since then, counsel urged, the Supreme Court has found to the contrary.

12. It was submitted that Petitions No. 4 and No. 9 only remained alive because of the findings of Mr. Justice Odunga; and the matter proceeded on merit, and the Election Court set aside the election results for Lunga Lunga constituency. However, an appeal to Court of Appeal led to the High Court decision being set aside. It was submitted that it is the said Appellate Court finding that the applicant seeks to contest in the Supreme Court.

13. Learned counsel submitted that the Supreme Court had made a finding contrary to that by Odunga and Ochieng JJ in Petition No. 10 of 2013: Hassan Ali Joho & Others v. Suleiman Sais Shabal and Two Others [2014] eKLR. He urged the Court to take notice of its decision in the Joho case, where it made a finding that Section 76(1)(a) of the *Elections Act* was inconsistent with the *Constitution*, and hence was a nullity.

14. Counsel urged that the only reason the two petitions (No.4 and No. 9) remained alive was Mr. Justice Odunga's decision. He submitted that the applicant was seeking to assert a right from a petition improperly brought, outside the terms of Article 87(2) of the *Constitution*. He submitted that while in Joho, no order was made in respect of the appeal then pending before the Court of Appeal, the

Supreme Court in a subsequent decision, held that the decision in Johowas to apply retrospectively to all uncompleted constitutional matters.

15. It was the 2nd and 3rd respondents' case that if this matter had been completed in the Court of Appeal, and there had been no further appeal, then all constitutional processes for rights-enforcement in petitions No.4 and 9 would have been concluded. However, by making an application before the Supreme Court, the applicant, it was urged, seeks to continue a constitutional process that was commenced by filing proceedings out of time, in Election Petitions No. 4 and No. 9.

16. Counsel reflected upon the effect of the Joho decision as perceived by this Court in Petition No. 7 of 2014: Mary Wambui Munene v. Peter Gichuki King'ara & Two Others [2014] eKLR. He submitted that in the Mary Wambui case, the sole issue determined was: whether these proceedings were a nullity ab initio, having been premised on a petition filed out of time at the High Court. The Court found the proceedings to be a nullity, on account of having been field out of time.

17. Mr. Nyamodi urged that the instant matter was akin to the Mary Wambui case, as it was filed out of time, and was still incomplete, and pending in Court, when the decision in Joho was rendered. He urged the Court to find, as it did in the Mary Wambui case, that it had no jurisdiction to entertain even an application for certification, in the circumstances. An application for certification is often a necessary step, when one seeks to appeal to the Supreme Court; and counsel urged that if the Court lacks jurisdiction to hear the appeal, then by extension, it also has no jurisdiction to hear the application before it.

18. Counsel asked the Court to uphold the preliminary objection, and dismiss the application with costs to the 1st, 2nd and 3rd respondents.

(b) The Case of the Applicant

19. The applicant was represented by learned counsel Mr. Asige, who contested the preliminary objection. He contended that the notice of preliminary objection had not specified the nature of the alleged lack of jurisdiction. He urged that the matter before the Court is an application for review of a refusal of certification, and not the substantive petition—and that fell within the jurisdiction of this Court.

20. Secondly, Mr. Asige submitted that even though the objection was split into two grounds, in reality it resolved into one ground: that the matter contravenes Article 87(2) of the *Constitution*. He urged that, whether this qualified as a preliminary objection should be determined on the basis of the principle in Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors [1969] EA 696:when one raises a preliminary objection, there must be agreed facts; and if any fact is disputed, then the matter does not merit consideration as a preliminary objection. He submitted that there were no agreed facts to support the application. He contended that the only proceeding filed in this application is this notice of preliminary objection, without any affidavit in reply to the affidavits sworn by the applicant, in support of the review application. In the circumstances, counsel contended, the respondents cannot present those grounds as "pure points of law" —and so they must deal with the application as a complete package.

21. Mr. Asige contended that Mr. Nyamodi urges only one point, that the petition which gives rise to this application was filed out of time, contrary to Article 87(2) of the *Constitution*. However, Mr. Asige submitted that there was no evidence, as no material had been produced to show the date of filing of the petition, Mr. Justice Odunga having merely recorded that the petition was filed 35 days outside the prescribed time. He urged that these were consolidated petitions (No. 4 and No.9), and there was no attribution to either, of the stated period of delay. Counsel relied on this suggestion to contest the validity of the preliminary objection.

22. Counsel cited a passage in the High Court Orders of 23rd May, 2013 as creating uncertainty, as to whether that Court had truly pronounced itself on nullity associated with delayed filing of petition —as follows:

> The Hon. Attorney General is directed to initiate the process of legislative amendment to the *Elections Act* 2011 with a view of providing a reasonable timeline within which the gazettement of the results under section 76(1) (a) of the Act is to be undertaken by the Independent Electoral and Boundaries Commission. If such amendment is not undertaken within 60 days, the said section will be deemed to contain a requirement that the said Commission is to gazette the results of the elections under section 76(1)(a) of the *Elections Act* within 7 days of the announcement of the results by the Returning Officer."

23. Mr. Asige submitted that the said Order by Odunga, J had the effect of amending Section 76(1)(a) of the *Elections Act*, with the Judge directing the Attorney-General who was a party to those proceedings, to initiate the process of legislative amendment; the amendment was to be undertaken within 60 days, failing which it would be deemed that an amendment to Section 76(1) (a) had been effected—including the requirement that the IEBC publishes election results within 7 days from the date of declaration. The argument was that Section 76(1)(a) was amended by the High Court.

24. Asked by the Court whether a Judge can amend a statute enacted by Parliament, counsel submitted that the learned Judge had drawn from the South African experience, that one can "read-in", or "read-out" on legislation, so as to harmonize particular provisions, and give meaning and intent, in a particular provision. He submitted further that, even if the Judge could not have ordered an amendment, the Attorney-General had been ordered to bring about new legislation within 60 days; and no appeal from that Order has been preferred to-date, and the 60-day period lapsed on 22nd July, 2013. Hence, according to learned counsel, the order of the High Court amended Section 76(1)(a) of the *Elections Act*, to incorporate the requirement prescribed by the High Court.

25. Mr. Asige contended that Section 76(1)(a) of the Act would have stood amended after 60 days following that Ruling, and that, that duration preceded the Supreme Court proceedings in Joho, filed on 26th August, 2013. Consequently, learned counsel urged, when this Court's Ruling was delivered in the Joho case, on 4th February, 2014 declaring that time runs as from the Returning Officer's issuance of Form 38 (the certificate of election), the provision annulled by this Court (Section 76(1)(a) of the *Elections Act*) was already obsolete, as it had been amended by the High Court.

26. Responding to this Court's suggestion that the process of statutory amendment involves gazettement and publication of the amendment, Mr. Asige submitted that the Court had ordered the Attorney-General to take the appropriate formal courses of action to give effect to its Order.

27. Consequently, counsel argued that the Joho decision declaring Section 76(1)(a) of the *Elections Act* to be void ab initio cannot be the basis for determining when time, as from results-declaration, begins to run; for the Joho case dealt with a provision of the law that was "non-existent". Counsel contended that such a position, if brought before the Supreme Court by counsel in the Joho case, might have led this Court, today, to an entirely different conclusion.

28. Learned counsel submitted, in the alternative, that even if the Court were to find that the Joho decision was rightly arrived at, it was not applicable to the instant case. He submitted that in the Joho case, it had been held that time begins to run from the time of declaration of election results by the Returning Officer, but that in the present case, the fundamental issue is that "no date of declaration of results has been specified". Counsel urged that the date of declaration of results was disputable: and so it cannot be maintained that the petition was filed out of time and that all proceedings are a nullity.

29. Mr. Asige sought to rely on this Court's decision in Petition No. 9 of 2014, Anami Silverse Lisamula v. Independent Electoral and Boundaries Commission & Two Others [2014] eKLR, in which the Court found that the petition fell outside the constitutional timelines, and consequently, that neither the High Court nor the Court of Appeal had jurisdiction to admit it. Mr. Asige invoked Justice Ojwang's concurring opinion in that case, to the effect that this Court has a wider jurisdiction than that of the Election Court and the Court of Appeal (paragraph 150):

> It is my perception that this Supreme Court has a larger profile than that which had been attributed to Courts of the past, by the Court of Appeal's decision in 'Lillian S'."

30. Counsel submitted that the concurring opinion of Ojwang, SCJ coincided with that of Rawal, DCJ in her separate concurring opinion: both ascribing to the Supreme Court an enlarged jurisdiction under the new Constitution, which was not constrained by the limitations to the jurisdiction of the High Court and the Court of Appeal, in an election matter. He urged that the objection to the application on jurisdictional grounds should be dismissed.

(c) The 2nd and 3rd Respondents: Reply

31. In reply to the applicant's submissions, learned counsel, Mr. Nyamodi urged that it was not the case, that the date of declaration of election results was unknown. He submitted that the dates were clearly indicated in paragraphs 9 and 10 of Mr. Justice Odunga's Ruling, and that no appeal has been preferred in respect of such factual finding. Hence, there was no need to adduce evidence to prove any facts. Counsel urged that, whether it was Petition No. 4 or No. 9 that was filed out of time, the applicant was certainly the petitioner in Petition No. 9, and it was of no consequence which particular one was filed out of time; for as No.9 serially follows No.4, it must have been filed after Petition No. 4, so that if it is contended that it is Petition No.4 that was filed out of time, then Petition No. 9 could not have been filed timeously.

32. As regards the "reading-in" concept of judicial law-making, counsel contested he learned Judge's approach, especially as, by that finding, the provisions of Section 76(1)(a) of the *Elections Act* were not unconstitutional, yet an Order followed for "aligning" those provisions to the *Constitution*. He submitted that "reading-in" on legislation is not available to Kenya's Courts, under the *Constitution* of 2010; and that it was inapposite for the learned Judge to adopt the authority in the South African case, National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC.

33. Learned counsel submitted that it devolved to the legislature to enact law; and the Judiciary's role was limited to striking down such law if it stood in contradiction to the *Constitution*. He urged that Odunga, J could not have made new legislation, as the amendment said to have been effected could hardly be identified: for what would then be the current content of Section 76(1)(a) of the *Elections Act*?

34. As regards the Supreme Court's decision in the Lisamula case, Mr. Nyamodi submitted that its vital facts are similar to those in the instant matter. The petition in that case was filed 35 days after declaration of election results. He urged that this petition should suffer the same fate as the petition in the Lisamula case, namely, dismissal.

35. Learned counsel submitted that the applicant had made a request that falls outside the *Constitution* and the legal constraints, and on this account, the application for review for non-certification should be dismissed, by upholding the preliminary objection with costs to the 1st, 2nd and 3rd respondents.

III. Analysis

36. Several questions arise for determination in this matter, as follows:

    (a) a) what is the level of clarity as to the matter sought to be struck out, in the preliminary objection?

    (b) is the date of declaration of election results, in the petition before the High Court, ascertainable in this case?

    (c) does the preliminary objection meet the basic test signalled in the Mukisa Biscuits case?

    (d) was Section 76(1) (a) of the *Elections Act*, 2011 (*Act No.24 of 2011)* amended by the Order of the High Court of 23rd May, 2013?

    (e) does the Supreme Court decision in the Joho case apply in this matter?

(i) Clarity in the Preliminary Objection: What is sought to be struck out?

37. Learned counsel, Mr. Asige contended that the preliminary objection was ambiguous in its formulation, and in particular in its claims that the Court has no jurisdiction to hear and determine this 'matter'. Counsel questioned which "matter" it is that was being referred to?

38. It is, however, not apparent to us that the objector's claim is so uncertain as to be a source of prejudice to the applicant. Black's Law Dictionary, 9th edition (page 1067) defines 'matter' thus:

> 1. A subject under consideration, esp. involving a dispute or litigation . . . 2. Something that is to be tried or proved; an allegation forming the basis of a claim or defence"

39. Coming up before the Court is an application dated 3rd June, 2014 for review of the refusal by the Court of Appeal to grant certification to the applicant, for an appeal to this Court. The application is brought by the applicant, Hassan Nyanje Charo, represented by learned counsel, Mr. Asige. It is clear to us that the applicant and his counsel know what they are seeking. The application is the matter, or the subject-matter, under consideration in this Court.

40. A notice of preliminary objection is not a new pleading, unknown in our legal system. We are satisfied that the instant objection meets the standard format regularly used in our Courts. The title of the notice of preliminary objection reflects that of the application before this Court.

ii. Declaration of Election Results: Ascertainment of Date

41. Mr. Asige submitted that the question of the petition—the basis of the instant application—having been filed out of time is untenable, as the date of declaration of election results is in dispute. In learned counsel's view, the election results for Lunga Lunga Constituency have yet to be declared. Mr. Nyamodi for the 1st, 2nd and 3rd respondents on the other hand, relies on the Ruling of Odunga, J of 23rd May, 2013, to urge that the date of declaration of results had been acknowledged by the petitioner (the applicant herein), before the High Court, as 5th/6th March, 2013.

42. What is before the Court is an application for a review of the refusal of leave to appeal to the Supreme Court. More particularly, this matter is the subject of a preliminary objection, to the admission for determination of the said application.

43. It is proper at this stage, in our perception, that the Court do guide itself on the basis of facts as stated, and issues as defined, in the other superior Courts.

44. It is the case that the election petition filed in the High Court had challenged the election results for Lunga Lunga Constituency, and had its foundation in Article 87 of the *Constitution*. Article 87(2) thus provides:

> Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission".

45. The said constitutional provision has a bearing on two elements that are relevant to the current application. For one to file an election petition, the *Constitution* requires that: there must be "election results"; and those results must be "declared". These two are mutually inclusive, and it is not possible to isolate them, where a legitimate election has to be deemed to have taken place; for it is the declaration of results that concludes the election cycle.

46. As the law contemplates the filing of a petition only after the declaration of results, it is prima facie untenable that there was no declaration at the time of applicant's petition. The declaration of results is done by the Independent Electoral and Boundaries Commission; and this Court had held in Raila Odinga & Others v. IEBC & Three Others Petition No. 5 of 2013, that an act by a public body, performed as part of its mandate, is prima facie right and regular [paragraph 196]:

> 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 et solemniter esse acta: 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"

47. Without prejudice to the applicant's appeal if and when filed, we take the position that the declaration of results for Lunga Lunga Constituency, indeed, took place. Whether the declaration met the constitutional threshold is what could be an issue, but it is not, at this stage. We have perused the documents forming the substance of the application, and we are in agreement with Mr. Nyamodi that the applicant, indeed, acknowledged the making of a declaration, in the election cycle for Lunga Lunga Constituency. We have noted that in the Ruling of the High Court (paragraph 12), the learned Judge reproduced the petitioner's (the applicant herein) grounds of opposition to the application of the 2nd respondent (1st respondent herein)— and these confirm our position on the said factual matters:

> In response to the 2nd respondent's case, the Petitioner in petition No. 9 of 2013 filed the following grounds of opposition:
>
> 1. There is no inconsistency or contravention of the provisions of S. 76(1)(a) of the *Elections Act* 2011 and Article 87(2) of the *Constitution*.
>
> 2. The provisions of section 76(a) of the *Elections Act* 2011 are not unconstitutional or void.
>
> 3. The Constitutionality or otherwise of an Act of Parliament and in particular S. 76 of the *Elections Act* 2011 cannot be challenged and determined by an election court through a Chamber summons application filed in an Election Petition.

4. The legal doctrine and presumption of constitutionality of an Act of Parliament and in particular S. 76(a) of the *Elections Act* 2011 has not been contravened by the lodgement of this Petition on 10th April, 2013.

5. The objection in the Chamber Summons dated 10th May, 2013 is a futile exercise in semantics which raises no constitutional issue and is at best like a storm in a tiny tea cup."

48. So it is clear that the petitioner (applicant herein) when faced with an application to strike out his petition on the ground that it was filed out of time, did not oppose that application on the basis that the date of declaration of results was unascertainable. His opposition focused on the constitutionality or otherwise of Section 76(1)(a) of the *Elections Act*.

49. Apart from the Ruling of Mr. Justice Odunga, this Court has made reference to the main Judgement of the High Court, delivered by the same Judge on 26th September, 2013: it bears the following content (paragraphs *5* and *6*):

> On 5th March 2013, the 3rd respondent in his capacity as the Constituency Returning Officer declaredthat Khatib Abdalla Mwashetani, the 2nd respondent was the valid elected Member of Parliament for the seat of the National Assembly for the said Constituency.
>
> > It is that declarationthat triggered these two petitions which were filed by two voters who are the two petitioners herein, Gideon Mwangangi Wambua as petitioner in Petition No. 4 of 2013 and Hassan Nyanje Charo as the petitioner in Petition No. 9 of 2013. For the purposes of this judgement the two petitioners will be referred to as the 1st and 2nd petitioners respectively" (emphasis supplied).

50. The learned Judge notes that it is the declaration of the results, that triggered the two petitions. It is thus quite clear, that the applicant's contention that there was no declaration of results in this matter, fails.

iii. Established Criteria in the Mukisa Biscuits Case: Does the Preliminary Objection Comply?

51. Mr. Asige submitted that the notice of preliminary objection as filed by the 2nd and 3rd respondents, does not meet the test set in the Mukisa Biscuits case: because no facts have been presented so it may be judged whether or not they are disputed; and because the objection does not rest on "pure points of law". Counsel contended that since it is an application for review, that is before the Court, and there is no petition and/or record of appeal filed, no facts have been placed before the Court.

52. The principles in the Mukisa Biscuits case were restated by this Court in then Joho case [paragraph 31]:

> To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors [1969] EA 696:
>
> > a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... [A] preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded

> by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion' . . ."

53. An example of a preliminary objection given in the Mukisa Biscuits case, is an objection to jurisdiction. The current notice of preliminary objection raises two issues falling in such a category, namely—

    i. that this Court lacks jurisdiction to hear and determine this matter, as it derives from proceedings that were a nullity, and were void ab initio; and

    ii. that the petition from which this application emanates was filed out of time, and in contravention of Article 87(2) of the *Constitution*.

54. The two issues crystallize into a single question, as to whether this Court has jurisdiction to admit the application for review, when it was filed outside the constitutional timelines specified in Article 87(2).

55. The clear point of law raised is whether the Court has jurisdiction to entertain an application that springs from a matter filed outside the 28 days for filling an election petition. A negative answer to that question has been returned by this Court in several cases: the Mary Wambui case; the Lisamula case; and in Lemanken Aramat v. Harun Meitamei Lempanka & Two Others [2014]eKLR. It is evident that a question as to whether a Court has jurisdiction to determine an appeal filed outside the 28 days' time-frame, is a "pure question of law", and falls within the principle in the Mukisa Biscuits case.

56. The remaining question is whether the set of facts presented before this Court is disputed. We have already resolved the point regarding the declaration of the election results: there is no basis for disagreement in that regard. Consequently, the preliminary objection before the Court, indeed, meets the test in the Mukisa Biscuits case.

iv. Amendment of Statute (S.76(1)(a) of the Election Act) by Court Order: Is this a Tenable Proposition?

57. It was an atypical argument by learned counsel, Mr. Asige, that the Supreme Court's annulment of Section 76(1)(a) of the *Elections Act* as being unconstitutional, in the Joho case, was a mere superfluity, as it had already been "amended" by the High Court (Odunga, J) in the Ruling dated 23rd May, 2013.

58. Does the idea of "reading into legislation", in the sense proposed by learned counsel in this matter, have a basis in the *Constitution*? Mr. Asige submitted that the learned Judge in signalling the amendment, had drawn from a South African case, National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC, which held that one could "read into legislation", to bring it to conformity with the *Constitution*. Mr. Nyamodi, on the contrary, urged that such a principle does not fall in line with Kenya's current constitutional dispensation. The relevant holding in the South African case thus declares:

> ... In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words 'or spouse' will automatically be read into Section 30(1) of the *Marriage Act*. ..."

59. Our perception is that there may be, depending on the moment in question, no meritorious, sharply-contrasted positions as conveyed by counsel on each side. "Reading into legislation" may be a new phraseology in the forensic language of our Courts; but the ultimate object touched by the South

African case, is not entirely different from the object of Section 7(1) of the Sixth Schedule to the *Constitution* of Kenya, 2010, which thus stipulates:

> All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution".

60. Such a position, however, is qualified; it is only applicable to existing laws that were in force under the old constitutional dispensation, and is an element in the transition from the previous status quo. It is a question which has already been the subject of this Court's pronouncement, in Communications Commission of Kenya & Five Others v. Royal Media Services Ltd & Five Others [2014] eKLR [paragraphs 130 and 131]:

> Our apprehension is that on the effective date, it is only the old Constitution that fell into disuse, save for the various sections saved by the Sixth Schedule. The existing legislative regime, on the other hand, remained in force, as decreed by Section 7 of the Sixth Schedule in the following terms:
>
> (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'
>
> The inevitable inference resolves into the principle that the new Constitution did not envisage or create a legal vacuum, and all processes regulated by law were to continue in progress, as signalled by the *Constitution*" [emphasis supplied]..**

61. As for all other law enacted after the promulgationdate of the current Constitution, the position is different, as is clear from the terms of Article 2(4):

> Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid".

62. This principle is clearly expressed in the Mary Wambui case, in which this Court was called upon to determine the span of applicability of its decision in the Joho case, regarding its finding on the validity of a statute. The Court considered whether the declaration of unconstitutionality should apply prospectively or retrospectively. The Court held that since the *Elections Act*, 2011 was enacted after the promulgation of the *Constitution*, Section 76(1)(a) was void ab initio. The Court examined the comparative jurisprudence, in the following terms [paragraph 85]:

> In the South African case of Sias Moise v. Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Kriegler [for the majority. held:**
>
> > If a statute enacted after the inception of the *Constitution* is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the *Constitution*, automatically operates retrospectively to the date of inception of the *Constitution*' . . . ."

63. This Court's conclusion was set out as follows:

> From the analysis above, and from a review of the principles in the Joho case as regards the settlement of electoral disputes, we are convinced that for the benefit of certainty and consistency, the declaration of invalidity must apply from the date of commencement of the *Elections Act*, i.e. 2nd December 2011."

64. By statute law (The *Supreme Court Act*, Section 3), this Court has a mandate to—

a. assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya;

b. provide authoritative and impartial interpretation of the *Constitution*.

65. On that basis, although this Court was not moved to adjudge the decision of the learned High Court Judge delivered on 23rd May, 2013, it is duty-bound to signal a direction in respect of the "reading-into," for Section 76(1) (a) of the *Elections Act*, on the basis of the persuasive authority from the South African jurisdiction. The adoption of such an interpretive principle, in our view, was not proper for this case, as the statute in question was one enacted after the promulgation of Kenya's Constitution in 2010.

66. The correct position in law, as it stands, is to be read from both Article 94(1) and Article 159(1) of the *Constitution*: the former provides that "[t]he legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament"; the latter provides that "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution". The separation of powers does, indeed, serve an objective governance-purpose which we would in this instance, uphold.

67. The High Court, with respect, had no power to "amend" Section 76(1) (a) of the *Elections Act*. The submission that when the decision in Joho was being delivered by this Court, there was already a newly-amended Section 76(1)(a) of the *Elections Act*, thanks to a High Court decision, cannot be sustained.

v. Authority of the Joho Case: Supreme Court's Position on Time-lines

68. We note that the novelties of Kenya's new Constitution have been set upon judicial foundations long fashioned by common law principles and practices. A most relevant principle in this regard is the doctrine of precedent. This common law principle is designed to ensure certainty and predictability in the law. It requires that cases with similar facts are to be decided in a similar manner. This Court has recently, in Lemanken Aramat v. Harun Maitamei Lempaka and Two Others, Sup. Ct. Petition No. 5 of 2014 [at para. 180], explicated the primary role of the doctrine of precedent in our legal system:

> The question which this Court ruled on in Mary Wambui . . . and in the Lisamula case is one and is clear: the petition at the High Court was filed out of time. This is the same question that we are called upon to rule on in this case. The common-law doctrine of precedent stipulates that it will be for the good of all that similar cases in facts are determined in a similar manner" [emphasis supplied..**

69. Sitting as a two-Judge Bench, we have no basis for departing from the established foundation of precedent, on the vitality of timeliness in the initiation of election causes. Indeed, it is to be recognized that the Supreme Court entertains no notion that the prescribed time-lines are anything but a matter of substantive law— and not a technicality.

70. Now, coming up before us is an application for review of the decision of the Court of Appeal, refusing to certify the applicant's intended appeal to this Court as one of general public importance. The thrust of the matter stems from High Court Election Petition No. 9 of 2013 (consolidated with Election Petition No. 4 of 2013). Upon filing that petition, a question arose as to whether it had been filed out of time, and the High Court held that the law (s.76 (1)(a) of the *Elections Act*) under which it was filed could be judicially amended to conform to the *Constitution*. Subsequently, however, in the Joho case, this Court ruled the relevant statutory provision to be unconstitutional, and struck it down.

71. The foregoing decision led to this Court's position in the Mary Wambui case [para.90]:

> We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action".

72. Notwithstanding that the question of constitutional time-lines for filing the petition in Court had been determined in the Supreme Court, the petition still survived within the judicial system: it was still undergoing various appellate stages provided for in law, and hence no rights could be said to have crystallized as yet.

73. The declaration of results in this matter was made on 5th March, 2013 and the election petition filed on 10th April, 2013. This, as already remarked, was outside the 28-day limit after the declaration of results. We have no hesitancy in holding that this matter should follow the path set in the Mary Wambui case. The election petition was filed out of time, and on this account, cannot be sustained. The High Court lacked jurisdiction to admit and determine it; and the proceedings before that Court were a nullity ab initio, and so are the subsequent proceedings emanating therefrom.

IV. Orders

74. Consequently, we make Orders as follows:

(a) The preliminary objection by the 2nd and 3rd respondents dated 31st July, 2014 is hereby upheld.

(b) The application for review of refusal of Appellate Court certification, dated 3rd June, 2014 is hereby disallowed.

(c) The determinations in the Judgments of the High Court and the Court of Appeal are declared null.

(d) For the avoidance of doubt, the declaration of election results by the Independent Electoral and Boundaries Commission, in respect of the Lunga Lunga Constituency seat, is hereby affirmed.

(e) The parties shall bear their own costs at the High Court, Court of Appeal and the Supreme Court, respectively.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER 2014.

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA