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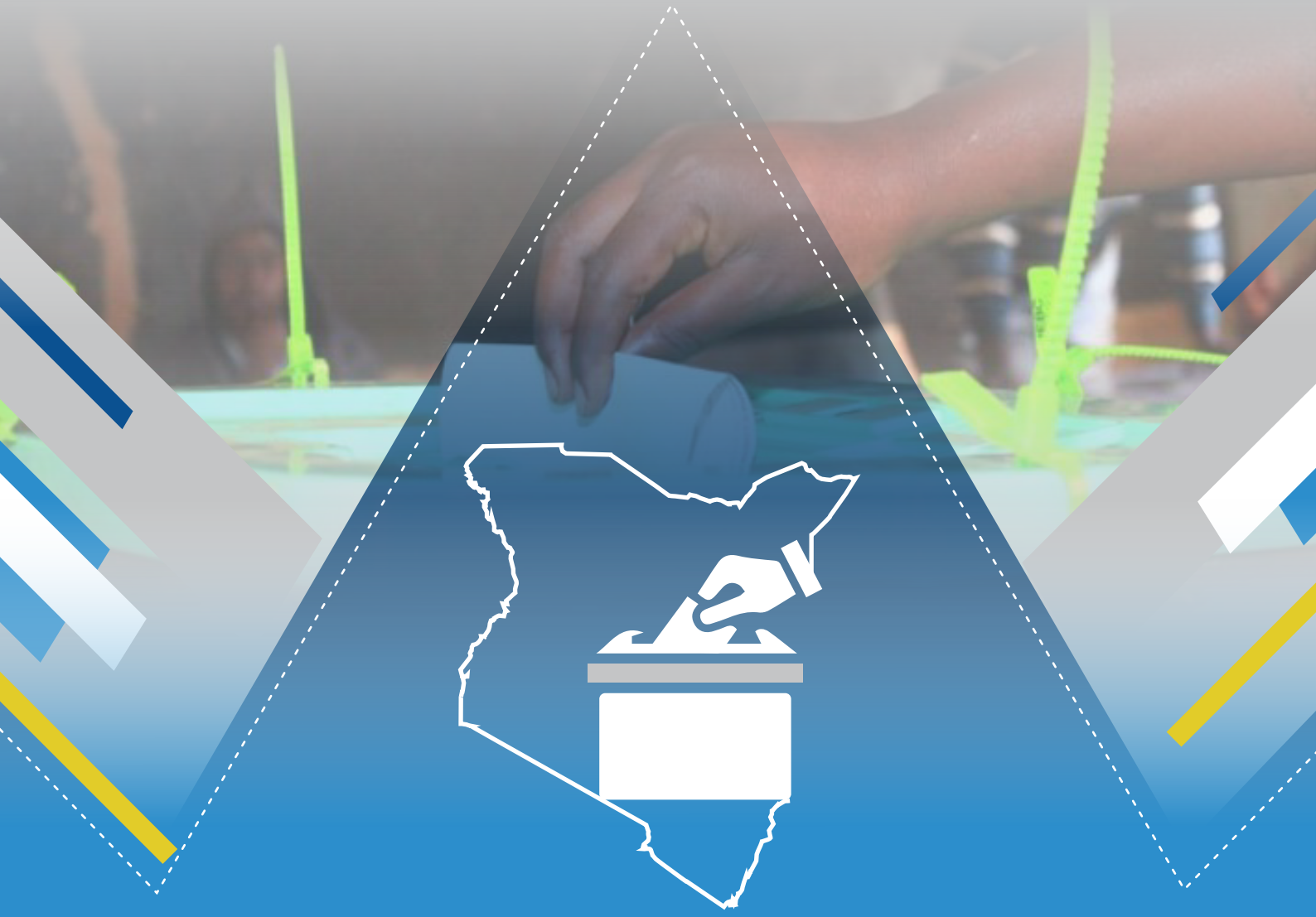

Select Decisions on the Themes Arising From the 2022 General Elections in Kenya

Compiled by
Lucianna Thuo

COMPENDIUM OF 2022 ELECTION PETITIONS VOLUME 5

Select Decisions, Issues and Themes Arising from the 2022 Elections in Kenya

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)

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The Kenyan Section of the International Commission of Jurist (ICJ Kenya) is a membership, non-governmental, non-partisan and not-for-profit organization registered as a society in Kenya Since 1959. ICJ Kenya works on the promotion of human rights, the rule of law and democracy in Kenya and across Africa.

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Foreword

The promulgation of Kenya's 2010 Constitution marked a pivotal moment in the country's legal and political landscape, ushering in a new era of governance and democracy. This transformative document reaffirmed the central place of the people as the true source of sovereignty, introduced rigorous standards for integrity and accountability, decentralized power from the central government, and established numerous independent offices to act as checks and balances in the exercise of authority. Within this restructured framework, election management systems have undergone significant evolution. From pre-election activities such as voter registration, candidate nomination, and the procurement of election materials, to the conduct of elections, the transmission and declaration of results, and the resolution of disputes, the 2010 Constitution has enforced strict adherence to the rule of law, public participation, transparency and accountability

The 2022 elections in Kenya marked the third general election cycle since the promulgation of the 2010 Constitution, and they were held under a complex and challenging context that reflected the evolving nature of the country's democratic processes. These elections took place amid significant debates and legal challenges, particularly concerning proposed constitutional amendments and electoral reforms.

One of the most contentious issues leading up to the 2022 elections was the Building Bridges Initiative (BBI), a constitutional amendment process that sought to reorganize Kenya's governance systems. The BBI process and the Constitutional Amendment Bill, 2021 did not meet the constitutional threshold for a constitutional amendment. However, the debates it sparked left an indelible mark on the electoral landscape, raising questions about the true nature of Kenya's democratic evolution. Adding to the complexity, several electoral amendments were introduced close to the election date, which created uncertainty and concerns about their impact on the electoral process.

Technology played a central role in the 2022 elections, further highlighting the evolving nature of Kenya's electoral landscape. The use of electronic systems for voter registration, identification, and results transmission was intended to enhance transparency and credibility. However, the reliance on technology also introduced new challenges, including fears of hacking, data breaches, and the

integrity of the electoral process. The mixed experiences with technology in previous elections, coupled with the high stakes of the 2022 polls, made the role ofdigital systems a focal point of both hope and concern. In this charged atmosphere, the contentious nature of elections at all levels accentuated the critical need for an impartial arbiter to resolve disputes. The Judiciary led by the Judiciary Committee on Elections (JCE), with its mandate to ensure the rule of law, was called upon to act as the ultimate guardian of electoral integrity.

An effective, impartial, and independent Judiciary was essential to navigate the complexities of these elections, ensuring that disputes were handled with fairness, efficiency, and unwavering integrity. The 2022 elections, therefore, were not just a test of Kenya's democratic resilience but also a testament to the ongoing journey of refining its democratic processes in the face of emerging challenges.

Public participation and accountability in election management has also elevated the importance of Election Dispute Resolution (EDR) mechanisms. These institutions serve as the interpreters, appliers, and enforcers of the law, providing an objective standard of fairness and credibility in the electoral process. The role of EDR mechanisms has been the subject of extensive political and scholarly debate, both in the lead-up to elections and during the post-election period. However, the immense responsibility placed on EDR systems is shouldered by individuals who, despite their best efforts, are subject to human imperfections and biases. This reality emphasizes the importance of unified jurisprudence on election laws.

This compendium serves as a crucial educational tool for all stakeholders involved in election management. It compiles decisions from the magistracy to the Supreme Court, offering readers the advantage of understanding the written law and how various players within the EDR system have interpreted and applied it. This publication is geared to eliminate uncertainty in the management of elections in Kenya and to serve as a reference tool for best practices in election management across the region. In a unique addition, this edition incorporates perspectives from other jurisdictions, exploring how they have presided over electoral dispute resolution. This regional perspective enhances the volume's value, making it not only a resource for Kenya but also a significant contribution to the broader discourse on electoral jurisprudence in Africa. The analysis within seeks to review the approaches to resolving complex issues that arose during the EDR processes, with the aim of identifying settled jurisprudence. This ensures that the understanding of the law in this area remains clear and consistent, thereby reducing instances of inconsistent jurisprudence in the future.

Moreover, the proposals for law reform presented in this compendium will play a crucial role in ensuring a coherent and cohesive body of legal norms governing EDR as we move into the next electoral cycle.

The Kenya Judiciary Academy welcomes this Compendium of 2022 Elections as a unique and essential tool in achieving our mandate of providing judicial education and training for judges and magistrates. This further aids in realizing the Judiciary's Social Transformation through Access to Justice (STAJ) blueprint which aims to have an inspired team of Judges, Judicial Officers and Judiciary Staff committed to excellence in the delivery of Justice specifically in enhancing training, talent management and capacity development.

The Judiciary Committee on Elections equally welcomes the Compendium as a collation of our ever-growing jurisprudence which will enrich the Committee's approach to engagement with relevant stakeholders ahead of the 2027 elections. The Compendium allows us to reflect on the effectiveness of the training offered as well as technical support offered to the Judges selected to hear EDR matters to ensure that election jurisprudence is predictable.

We commend ICJ Kenya for its continued dedication of keeping us informed of developments in electoral dispute resolution and welcome this significant contribution to electoral law jurisprudence in Kenya and beyond.

Hon. Justice Dr. Smokin Wanjala
Judge of the Supreme Court
of Kenya, Director General,
Kenya Judiciary Academy

Hon. Justice Mohammed Ibrahim
Judge of the Supreme Court of Kenya
Chair, Judiciary Committee on Elections

Preface

It is a great pleasure to once again contribute to the development of the ICJ Compendium of Election Petitions. This edition, much like Volume 4, aims to provide not only an in-depth analysis of the court's jurisprudence but also to examine the broader context in which the 2022 elections were held.

The 2022 elections faced several challenges, including the late appointment of IEBC commissioners less than a year before the elections. This was contrary to the recommendations of the Kriegler Report and international best practice, raising concerns about the IEBC's capacity to deliver credible results. Further doubt was cast when divisions emerged among the commissioners during the announcement of the results, an issue that formed part of the basis for the presidential election petitions filed post-declaration.

The 2022 elections also saw a rise in misinformation and disinformation. Manipulating data in elections can significantly erode trust in democratic processes, leading citizens to question the legitimacy of election outcomes. As the use of digital methods and data in elections grows, it is crucial to find a balance between the legitimate use of voter information for campaigning and the need to protect citizens' privacy while maintaining democratic values. Although misinformation is less prevalent in Kenya than in some other countries, it still presents a serious threat to democracy. The digital manipulation of data often occupies a legal grey area, making it difficult to regulate in the same manner as traditional forms of election tampering. This unchecked spread of misinformation requires thorough examination to understand its impact on voter behaviour and the overall electoral landscape. It is necessary for jurists and lawmakers to keep monitoring trends in the development of digital technologies and for law and policy makers to develop guidelines that ensure that data privacy and electoral integrity are not compromised during elections.

Unlike previous editions, which primarily focused on disputes following the declaration of results, this volume covers decisions made both before and after the declaration of results from the 2022 general elections. These pre-declaration decisions played a significant role in shaping the conduct and outcome of the elections. The volume of cases filed indicates a continued trend of litigating electoral issues in the lead-up to elections. Cases covered a wide range of issues, including educational qualifications, the resignation of public officers seeking elective positions, compliance with community support requirements for presidential cadi

dates, the need for independent candidates to provide copies of supporters' ID cards, the obligation of the IEBC to accommodate candidates with disabilities, and the constitutionality of recent legislative amendments such as the Political Parties (Amendment) Act 2022 and the Integrated Political Parties Management System (IPPMS). This edition provides an in-depth analysis of these cases and highlights the importance of stakeholder engagement, particularly where courts have struck down certain requirements due to insufficient public participation.

Following the 2022 elections, 222 petitions were filed, significantly fewer than the 388 filed in 2017. Of these, 9 were filed in the Supreme Court, marking the highest number of petitions in that court since the adoption of the 2010 Constitution. This could indicate public confidence in the Supreme Court or lingering doubts about the IEBC's ability to deliver credible elections. In the High Court, 12 petitions challenged gubernatorial elections, 2 challenged senatorial elections, 4 targeted elections of women representatives, and 28 contested elections of National Assembly members. At the Magistrates' Courts, 80 petitions were filed challenging MCA elections. Out of these, 24 (10.8%) were allowed, 111 (50%) were dismissed, 60 (27%) were struck out, and 27 (12.2%) were withdrawn before a full hearing.

An analysis of trends in petition outcomes between 2013 and 2022 reveals that, on average, only 10-13% of petitions are allowed, 50-60% are dismissed upon full hearing, 9-12% are withdrawn, and 16.5-30% are struck out on technicalities. The 2022 outcomes fall within these historical baselines.

In the post-declaration phase, there appear to be fewer unsettled jurisprudential questions. Robust jurisprudence from election and appellate courts in 2013 and 2017 clarified several legal issues, such as principles on scrutiny, recounting and retallying, the handling of interlocutory appeals, the extent of appeals from Magistrates' Courts, and the impact of irregularities on election results. Volume 5 thus aims to compare the jurisprudence from the 2013 and 2017 electoral dispute resolution processes, highlighting instances where appellate courts have resolved conflicting jurisprudence from lower courts. Notably, most appealed cases were struck out, resulting in relatively few jurisprudential upsets during this electoral cycle. The limitation of appeals emanating from Magistrates' Courts to a single tier also contributed to this phenomenon.

This edition further explores party nomination and party list processes, given their impact on the composition of legislative assemblies. In some regions, securing a party nomination virtually guarantees election due to the dominance of the sponsoring party. The issue of internal dispute resolution mechanisms (IDRM)

and when they are deemed to be sufficiently exhausted has been a point of protracted litigation, even reaching the Court of Appeal. Legislation now requires proof of an attempt to resolve disputes through IDRM before the Political Parties Disputes Tribunal (PPDT) can assume jurisdiction. However, conflicting jurisprudence remains regarding compliance with party nomination rules before exhaustion of IDRM can be demonstrated.

The 2022 elections were further complicated by late amendments to the Political Parties Act, which changed the nomination procedures to allow only two specific methods for party nominations. This caused incongruence between the law and the nomination rules already submitted to the Registrar of Political Parties, as many parties utilised methods not recognised by the Act, such as direct ticketing, consensus-building, casting lots, and opinion polls. Courts have since addressed issues like party autonomy in selecting nomination methods, the impact of nullified nominations and an order for fresh nominations on choice of nomination method and the necessity of IDRM for both party and coalition disputes.

Analysis of post-election disputes highlights the need for jurisprudential guidance from the Supreme Court on issues such as its pre-election dispute jurisdiction, the standard of proof for election offences alleged in election petitions, standing in election petitions and the implications of pre-election matters on final outcomes. As discussed in detail, the jurisprudence from the Sammy Waity case still portends some undesirable consequences where timelines for EDR are concerned.

Regarding party list nominations, it is evident that a legislative framework is needed to guide the process and define the jurisdiction of the courts. The Elections (Party Primaries and Party Lists Regulations) 2017 require revision to align with current practices and emerging jurisprudence. While the jurisdiction of courts over party list appeals is now settled, questions remain about the powers of the election court if a list is improperly constituted. Should the court reconstitute the list, or must it be returned to the IEBC? When is the list finalised: upon publication in newspapers or upon gazettement of the nominees? These questions, coupled with the absence of a second-tier appeal process for party list disputes, leave some uncertainty in this area.

It is my sincere hope that this volume finds its place in the growing body of literature on elections in Kenya and the African continent, contributing to our understanding of electoral law. As Kenya continues to foster South-South collaboration with other African judiciaries, it is crucial that our electoral law practices

are well-documented and scrutinised. The recommendations at the end of this text are intended to guide lawmakers and policymakers, with the ultimate aim of safeguarding the constitutional principles of the sovereignty of the people and their right to make political choices.

Lucianna Thuo

Author

About the author & editor

Lucianna Wambui Thuo is a seasoned Elections Law and Governance Specialist with over 12 years of extensive experience in electoral dispute resolution and related fields. She holds an LL.M in Human Rights and Democratisation in Africa from the University of Pretoria, South Africa, and a Diploma in Realising Human Rights through Criminal Law from Åbo Akademi University in Finland. Her academic background is further complemented by a Bachelor of Laws (LL. B) from the University of Nairobi and a Post-graduate Diploma in Law from the Kenya School of Law.

Lucianna has significantly contributed to electoral legal frameworks in various capacities. She served as the Research Coordinator for the Judiciary Working Committee on Elections (now Judiciary Committee on Elections) and as a Researcher for the Political Parties Disputes Tribunal (PPDT) in Kenya. Additionally, her role as a Legal Analyst for the Sierra Leone Cross Party Committee on Electoral Systems and Management Bodies Review demonstrates her regional impact. In academia, she has held the positions of Lecturer and Associate Dean at Kabarak University, Kenya, earning the Teacher of the Semester Award and the University Award for Excellence in Teaching and Learning.

Her consultancy expertise includes collaborations with renowned organizations like the International Foundation for Electoral Systems (IFES), the National Democratic Institute (NDI), the United Nations Development Programme (UNDP), the International Commission of Jurists-Kenya (ICJ-K), the Electoral Law and Governance Institute for Africa (ELGIA), the Federation of Women Lawyers (FIDA-K), and the Katiba Institute (KI). Lucianna's commitment to the field is further showcased through her publications, including the ICJ Compendiums of Election Petitions volumes 3 & 4, PPDT Case Digest 2023, and the Judiciary Bench Book on Electoral Dispute Resolution 2022 and the Judiciary Case Digest on Election Petitions 2024.

Lucianna's contributions extend beyond writing, as she has actively participated in numerous university and civil society events and conferences as a moderator and speaker. Her proficiency in language has enabled her to engage effectively across diverse platforms. An advocate for gender justice and democracy, Lucianna has an advanced social media presence, where she shares insights on elections, law, and governance. Her key skills include legal research, analysis, mentorship, training, and facilitating dialogue on complex electoral matters.

Acknowledgements

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is grateful to all individuals who played a critical role towards the successful production of this compendium.

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We also thank the Council and Members of ICJ Kenya for their support in the development of this publication. We would also like to appreciate the hard work of the ICJ Secretariat under the leadership of Demas Kiprono and particularly, the Democracy Governance and Rule of Law Programme team comprised of Julie Wayua Matheka, David Thuku Mburu, Wallace Nderu, Cheptum Toroitich, Mondekazi Ntshele and Susan Maina for conceptualising and coordinating the development of this publication.

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Protas Saende

Chairperson, ICJ Kenya

Abbreviations

AFRICOG	The Africa Centre for Open Governance
AJJF	Africa Judges and Jurists Forum
BVI	Biometric Voter Identification
BVR	Biometric Voter Registration
CoA	Court of Appeal
CRMS	Candidates Registration Management System
CTC	Constituency Tallying Centre
CUE-	Commission for University Education
DCI	Directorate of Criminal Investigations
ETR	Electronic Transmission of Results
HC	High Court
ICCPR	International Covenant on Civil and Political Rights
IDRM	Internal Disputes Resolution Mechanism
IEBC	Independent Electoral and Boundaries Commission
IPPMS	Integrated Political Parties Management System
KIEMS	Kenya Integrated Elections Management System
NSAC	National Security Advisory Committee
NTC	National Tallying Centre
ODPP	Office of the Director of Public Prosecutions
PEE	Post-Election Evaluation
PPA	Political Parties Act
PPDT	Political Parties Disputes Tribunal
PSD	Polling Station Diary
PWD	Person with a disability
RTS	Results Transmission System
SC	Supreme Court
UDA	United Democratic Alliance

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Overview of the Digest

The Digest, in keeping with the general format of the last three editions, focuses primarily on the decisions emanating from the courts from the 2022 general elections. Unlike previous digests which have focused on the disputes following the declaration of election results, this edition tracks the decisions that were made before declaration of election results (electoral process cases) before evaluating the decisions made after the August 8 2022 general elections.

The edition further elaborates on other editions by including some comparative perspectives from the region as well reviewing jurisprudence arising from party list petitions.

This edition is divided as follows:

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Part II: Cases touching on the electoral process

Part III: Presidential Election Petitions

Part IV: County Election Petitions

Part V: Parliamentary Election Petitions

Part VI: Party List Petitions

Part VII: Analysis

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Part IX: Summary of Law Reform Proposals

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I. BACKGROUND

I. Background

The 2022 general elections conducted on 8 August 2022 were significant for various reasons. Firstly, it was the first transition election under the 2010 Constitution, with the first presidential election having been conducted on 4 March 2013. Secondly, the wider context of recovery from the COVID-19 pandemic as well as economic downturn had created a desperation for change; for a government that would address the economic constraints experienced by the citizenry.

While there was an increase in the number of eligible voters, which rose to 22, 120, 458, an increase of 12.79%.[1] The Commission also expanded the number of countries in which Kenyans living in the diaspora could vote from 5 in 2017, to 12 in 2022. This allowed Kenyans in the United States of America (USA), United Kingdom (UK), Canada, United Arab Emirates, Qatar, Germany, South Sudan, Tanzania, Uganda, Rwanda, Burundi and South Africa to participate in the 2022 elections. However, as will be discussed in the section on cases touching on the electoral process, the courts were invited to determine whether persons with expired passports could participate in the elections.

Despite the significance of the 2022 elections and while all these efforts were made to increase participation of citizens in the elections, the voter turnout recorded stood at 64.77%, down from 78% recorded in 2017. This was attributed by the IEBC to the effects of COVID-19, insecurity, drought, fear of election related violence and economic constraints, among others.[2]

However, as noted by the Supreme Court, Kenyans' reaction to the declaration of the presidential election result on August 15 2022 demonstrated that the IEBC was yet to gain universal public confidence and trust as pertains to the internal management of the Commission and the conduct of elections. This is despite multiple attempts at reforming the electoral process.

Late amendment to electoral laws, particularly the Political Parties Act (PPA), hampered the effective conduct of party nominations, and ultimately the resolution of these disputes impacted on the registration of candidates.

1 IEBC Post Election Evaluation Report 2022, xix.
2 IEBC Post-Election Evaluation Report, xxi.

A. General context of the 2022 elections

The date of the election is set in the Constitution itself (Article 101, and Kenyans cast their votes for 6 elected leaders on the same day: President, Governor, Senator, County Woman representative, Member of National Assembly and County Assembly Ward representative. Article 101 sets the Second Tuesday of every fifth year from the date of the last general election as the date of election of the president. Elections for Governors and their deputies are held on the same day as the general election for Member of Parliament (Article 180(1) Constitution) and so are the elections for member of County Assembly (Article 177 (1)(a)). Save for some areas where county, parliamentary and county assembly elections were postponed for administrative reasons, presidential elections were held throughout the country.[3]

One significant challenge that affected the conduct of the 2022 elections was the swearing in of the Independent Electoral and Boundaries Commission (IEBC) commissioners in September 2021, which was less than a year before the election. This appointment occurred despite the IEBC Act's requirement that the process to fill vacancies within the commission be initiated at least six months before the tenure of commissioners expires or within 14 days of a vacancy being declared. Four commissioners had resigned in 2017, yet the selection process was only activated by the President in 2021. This delay contravened the recommendation of the Kriegler Report, which advocated for no changes to the commission within two years of an election.[4] Consequently, the Court of Appeal ruled that the IEBC was improperly constituted and, therefore, incapable of conducting the general elections.

3 Gubernatorial elections were postponed in Kakamega and Mombasa counties, parliamentary elections in Rongai, Kitui Rural (Kitui County), Kacheliba Constituency (West Pokot County), Pokot South Constituency (West Pokot County) and Rongai Constituency (Nakuru County) and county assembly elections were postponed in Nyaki West (North Imenti Constituency - Meru County) and Kwa Njenga (Embakasi South Constituency – Nairobi County).

4 The Independent Review Commission (IREC) had recommended that there be no changes in the membership of the Commission within 2 years of a general election. See Kriegler and Waki Reports Summarised Version Revised Edition 2009, 10; available on http:// www.kas.de/wf/doc/kas_16094-1522-2-30.pdf

The late appointment impeded effective planning for the 2022 elections and was attributed to the discord among the commissioners during the announcement of the presidential election results. As discussed later in this digest, the allocation of roles among the commissioners and the balance of powers between the chairperson and the commission were subjects of litigation before the Supreme Court. In its recommendations, the Supreme Court advised that legislative and administrative clarity be established regarding the allocation of roles among the commissioners, the Chief Executive Officer, and the Chairperson of the Commission.

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B. The place of technology in elections

Since the adoption of the 2010 Constitution and 2011 Elections Act, the IEBC has been required to 'develop a policy on the progressive use of technology in the electoral process'.[5]

Technology plays the following roles in an election:

i. Biometric Voter Registration (BVR);
ii. Electronic Voter Identification (EVI);
iii. Electronic Transmission of Results (ETR);
iv. On-line publication of the Register of Voters
v. Publication of polling result forms of presidential elections on an online public portal maintained by the Commission

The integrated system that includes biometric voter registration, biometric voter identification and electronic result transmission system is what is referred to as the Kenya Integrated Elections Management System (KIEMS). For practical purposes, whereas BVR is applied prior to the voting day, EVI is used during balloting/voting day and ETR is used for transmission of results after tallying. KIEMS kits are loaded with electronic voter identification and results transmission software, SIM cards of network operators and secure SD cards which contain the biographic and biometric data of voters. It is these KIEMS kits that are used to identify voters at the polling station and later to transmit results of the presidential election to the National Tallying Centre upon the declaration at the polling station.

5 S 44 Elections Act No 24 of 2011.

At present, it is only in relation to presidential election results that technology is deployed for results transmission. Technology was adopted to create credibility and verifiability of the election result, drawn from a past of manipulation of results as they were transmitted from polling stations to the National Tallying Centre. This mischief was captured by the Supreme Court in ***Raila Odinga v IEBC & 2 Others,*** Supreme Court Election Petition 1 of 2017 where it was asserted that electronic transmission of results was to address the mischief of:

> *the spectacle of all 290 returning officers from each constituency and 47 county returning officers travelling to Nairobi by whatever means of transport, carrying in hard copy the presidential results, which they had announced at their respective constituency tallying centres. The other fear was that some returning officers would in the process tamper with the announced results.*

The transmission of results of the presidential election is required to be done electronically from the polling stations to the National Tallying Centre. The Presiding Officer then transmits the physical result forms (34A) to the Constituency Returning Officer who verifies them and transmits the forms he prepares of all the presidential results in the constituency (34B) to the National Tallying Centre. The Chairperson of the IEBC, who is Constitutionally mandated as the Returning Officer for the presidential election, then tallies and verifies the results as contained in the Forms 34B as against those in Forms 34A before preparing Forms 34C and declaring the result. Since the results have been declared by the Court of Appeal to be final at the polling stations,[6] which decision was upheld by the Supreme Court in the 2017 Raila petition, it is not open to the Chairperson to correct any errors or inconsistencies revealed in the process of tallying and verification; instead, any such inconsistencies are to be notified to the members of the public, who would then be at liberty to petition the Supreme Court.[7]

Manipulation of the technology has been a consistent ground for petitioning the Supreme Court to nullify the elections since 2013. Failure of the KIEMS kits in 2013, as a result of which resort had to be had to manual identification was challenged by Raila Odinga in 2013. The court declined to nullify the result on the basis that technology is prone to failure and it was therefore the ruling of the court that the IEBC had no choice when technology failed but to result to a manual voter identification and results transmission system.

6 *IEBC v Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017.
7 *Raila Odinga v IEBC & 2 Others,* Supreme Court Election Petition 1 of 2017

In 2017, however, when there were allegations that third parties had access to the system and had manipulated the results transmission, taken together with the fact that IEBC declined to allow access to its servers, led the Supreme Court to nullify the first election in the following terms:

> *[279] It is clear from the above that IEBC in particular failed to allow access to two critical areas of their servers: its logs which would have proved or disproved the Petitioners' claim of hacking into the system and altering the presidential election results and its servers with Forms 34A and 34B electronically transmitted from polling stations and CTCs. It should never be lost sight of the fact that these are the Forms that Section 39(1C) specifically required to be scanned and electronically transmitted to the CTCs and the NTC. In other words, our Order of scrutiny was a golden opportunity for IEBC to place before Court evidence to debunk the Petitioners' said claims. If IEBC had nothing to hide, even before the Order was made, it would have itself readily provided access to its ICT logs and servers to disprove the Petitioners' claims. But what did IEBC do with it" It contumaciously disobeyed the Order in the critical areas.*
>
> *[280] Where does this leave us? It is trite law that failure to comply with a lawful demand, leave alone a specific Court Order, leaves the Court with no option but to draw an adverse inference against the party refusing to comply. In this case, IEBC's contumacious disobedience of this Court's Order of 28 August, 2017 in critical areas leaves us with no option but to accept the Petitioners' claims that either IEBC's IT system was infiltrated and compromised and the data therein interfered with or IEBC's officials themselves interfered with the data or simply refused to accept that it had bungled the whole transmission system and were unable to verify the data.*

In the run up to the 2022 elections, there were also allegations that foreigners had been engaged to manipulate the system used to manage the elections. Some Venezuelan nationals said to be employees of Smartmatic International (the company awarded the tender to supply the technology to be used in the 2022 elections) were arrested with election related material while coming into the country on 21 July 2022. The arrest resulted in a war of words between the IEBC and the Directorate of Criminal Investigations (DCI). The IEBC on one hand alleged that there was harassment and attempted intimidation of staff

performing their lawful duty under contract. On the other hand, DCI alleged that it was suspect that election material was being carried into the country as personal property and which was not accompanied by an election official. The material confiscated included IEBC stickers used in labelling IEBC material including KIEMS kit bags, laptop, a personal monitor, five flash discs, one mobile phone and an assortment of personal computer accessories. While the stalemate was resolved between the two institutions and a press release issued that they would work together to assure a credible, free and fair election, during the hearing of the presidential petitions, the response by the Commissioners alleged that only the Chair of the Commission knew of the coming of the three arrested persons and that he intended to allow the foreigners to subvert the process.[8] This was one of the issues that demonstrated a rift between the four IEBC Commissioners and the Chairperson during the hearing of the petition.

C. Candidature and coalition political parties

While the 2010 Constitution ushered in devolution which was meant to diffuse power from the centre, the 50%+1 vote required to secure the presidency not only creates incentives for coalition forming, but it also results in a two-horse race. This means that despite holding 6 elections on the same day, the presidency remains the central focus for political action, and the non-presidential elections are shaped by the binary national contest. Candidates in lower-level elections therefore seek to align with one or the other presidential candidates.[9]

As is often the case in every electoral cycle, the law was also amended in 2022 to usher in Political Parties Amendment Act No 2 of 2022 which introduced coalition political parties. As a result, coalition political parties were formed and a deadline issued for registration of coalition parties as well as changing party membership. The consequence was that no change of parties or coalitions was allowed after 26 March 2022. Party membership was managed through the Integrated Political Parties Management System (IPPMS). Later the High Court, in ***Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party)*** Machakos

8 DCI asserted that there may have been infiltration of the system by the Venezuelans. See 'DCI report: Venezuelans infiltrated IEBC systems' https://nation.africa/kenya/news/politics/dci-venezuelans-infiltrated-iebc-systems-3928666 (accessed 28 August 2022).

9 Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch & Justin Willis (07 Jun 2024): Has Kenya democratized? Institutional strengthening and contingency in the 2022 general elections, Journal of Eastern African Studies, DOI: 10.1080/17531055.2024.2359154, p.5.

Petition No E002 of 2022, found that the launch of the IPPMS a few months before the election ill-timed and a form of tokenism that was non-compliant to the guiding provisions of the law under article 81 of the Constitution. While the court allowed the petition, it declined to grant orders to suspend the IPPMS, directing instead that proper structures be established to put in place measures guaranteeing the full enjoyment of the fundamental rights and freedoms encapsulated under Articles 6(3), 27, 35, 38 and 56 of the Constitution of Kenya, 2010 with specific attention to minorities and indigenous peoples.

The two main coalitions that contested the election were the Kenya Kwanza coalition, led by William Samoei Ruto of the United Democratic Alliance as its presidential candidate and the Azimio la Umoja coalition, whose presidential candidate was Raila Amolo Odinga. Two other presidential candidates were also cleared: George Wajackoyah of the Roots Party and David Mwaure of the Agano Party. One of the challenges that arose in the run-up to the elections was the process of clearance of disabled candidates. One of the Petitioners, Reuben Kigame, was a person with disability who was not cleared for failure to comply with the Regulations which require signatures and copies of identity cards of at least 2000 registered voters in 24 counties.

The High Court deprecated the IEBC for failing to refer to the Constitution or any international instruments on disability, and in finding a violation of Article 54 of the Constitution, the High Court ruled as follows in ***Reuben Kigame Lichete v IEBC & Another,*** Constitutional Petition E275 of 2022 (unreported):

> 55. *By placing the manner in which the DRC treated the Petitioner and the various provisions of the Constitution and the law side by side, there is no doubt that the Petitioner's rights were variously flouted. For instance, there is no indication or at all that the Petitioner was accorded any assistance to overcome the disability in complying with the election requirements. There has also been no mention that the documents availed to the Petitioner were in braille or how the Petitioner was to access the whole country with a view of collecting the signatures and copies of identity cards of his supporters and in ways to overcome the constraints that arise from his disability…*
>
> *58…the DRC ought to have seized the opportunity and added its weight in ensuring that the Petitioner who was the only person with disability in the presidential race was accorded a reasonable opportunity to participate in the election. The DRC ought to have noted that despite the challenges*

> *on his part, the Petitioner had endeavoured to come up with the required number of signatures of his supporters albeit and slightly out of the regulatory timelines. However, the Petitioner was instead placed on an equal footing with the rest of the presidential aspirants. There was no reprieve of any kind that was accorded to the Petitioner on account of his disability. The way the Petitioner was treated, therefore, amounted to placing the bar for him quite high compared to the other non-disabled presidential aspirants…*

While the High Court directed the IEBC to reconsider Kigame's candidate, this decision was stayed by the Court of Appeal. Reuben Kigame was one of the Petitioners challenging the clearance process of presidential election candidates, but his petition was struck out for failure to comply with the requirements of Article 140 of the Constitution.

The Supreme Court also cited the pending appeal as a reason for declining jurisdiction. Several other presidential aspirants were locked out of the race for failure to meet the requirements under the Elections Act and Elections (General) Regulations.

Some of these cases are highlighted in the section covering electoral process disputes the introduction of coalition political parties also raised interpretation questions as to the majority and minority parties in legislative assemblies. The determination that Kenya Kwanza was the majority party in the National Assembly was challenged in court. In ***Kenneth Njagi and Others v Speaker, National Assembly and Others*** Nairobi High Court Petition E202 of 2023 the Court affirmed jurisdiction to determine whether the Speaker of the National Assembly acted in accordance with the law in making a determination that Kenya Kwanza is the majority Party while Azimio is the Minority party at the National Assembly.

The main Petition is yet to be determined as at the time of developing this digest.

In the case of ***Werambo Ramadhan Ali v County Assembly of Uasin Gishu & 2 Others*** [2020] eKLR the High Court was confronted with a similar question on whether the Petitioner therein was the minority party of the County Assembly of Uasin Gishu. While considering the respective election results, the Court pointed out as follows:

> ***[44]*** *It is not in dispute that the petitioner was elected the Kiplombe ward representative as evidenced by the certificate issued on 10.8.2017 by the returning officer. This was after the elections held on 8.8.2017, this was in regard to Article 177(1)(a)* of the *Constitution. There is a list of members elected and nominated by Jubilee party, ODM and the independent party. Under the ODM, the petitioner was the only elected representative. Previously, the petitioner had been the leader of the minority after the 2013 election, and he therefore qualified since his party was the second largest party in the county assembly, which was not disputed as it is provided under Article 38 (3) (C) of the Constitution.*

D. Regulation of campaigns and campaign financing

i. Regulation of campaigns under the Electoral Code of Conduct

Candidates vying for elective positions are mandated to adhere to the Electoral Code of Conduct during their political campaigns, as stipulated in section 110 of the Elections Act, 2011. All participants in the electoral process must ensure that every candidate is provided with an equitable opportunity to solicit support through legitimate and legal means, as underscored in the case of ***Wavinya Ndeti v IEBC & 4 Others*** Nairobi High Court Petition No. 4 of 2013. The electorate must be afforded the genuine opportunity to vote for a candidate of their choice, free from the distortions caused by unfair political campaigns, as observed in ***Jared Odoyo Okello v IEBC & 3 Others*** Kisumu Election Petition No. 1 of 2013.An election may be nullified if it is determined that the campaign was unfair, such as one characterised by baseless or malicious propaganda. In ***William Odhiambo Oduol v IEBC & 2 Others*** Kisumu Election Petition No. 2 of 2013, the Court nullified the election after the successful candidate's campaign team was found to have manipulated campaign materials by superimposing the image of a rival party's presidential candidate on the Petitioner's posters.

The Court held that the ODM campaign in Siaya County was conducted in a manner that compromised the integrity of the election, rendering the campaign neither free nor fair.

However, it is not considered an unfair campaign for a political party leader to encourage voters to elect only candidates affiliated with that party. Such conduct, including the promotion of the 'six-piece' voting strategy, does not violate the Electoral Code of Conduct, even if it disadvantages candidates from rival parties. This was affirmed in ***Jared Odoyo Okello v IEBC & 3 Others*** Kisumu Election Petition No. 1 of 2013.

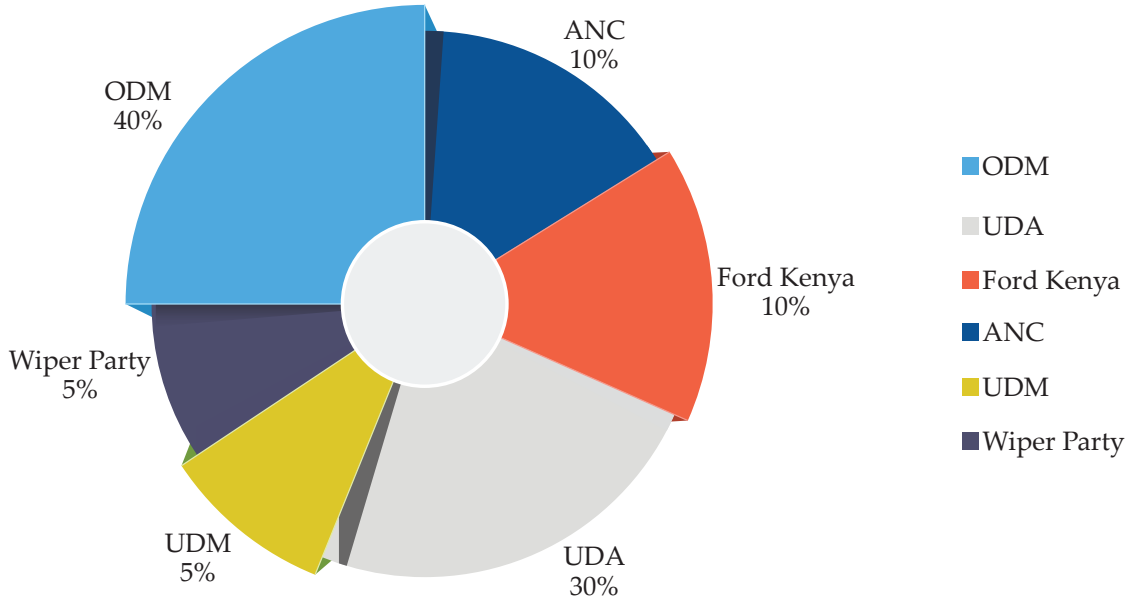
Mere boasts, vulgar language, and strong rhetoric, which are common in political discourse, do not constitute unfair campaign practices unless it can be demonstrated that they impeded the electorate's free exercise of their will. Likewise, promises of development made by a candidate do not amount to an unfair campaign, as established in ***Wavinya Ndeti v IEBC & 4 Others*** Nairobi High Court Election Petition No. 4 of 2013.

Nonetheless, where a candidate exploits the vulnerability of the electorate in a manner that compromises their free will, it may amount to undue influence, thereby invalidating the election. In ***Gideon Mwangangi Wambua & Another v IEBC & 2 Others*** Mombasa High Court Election Petition No. 4 of 2013, the Court found that the successful candidate's use of his private foundation to provide financial assistance to needy constituents blurred the line between charitable acts and political campaigning, thereby undermining the electorate's ability to exercise their free will.

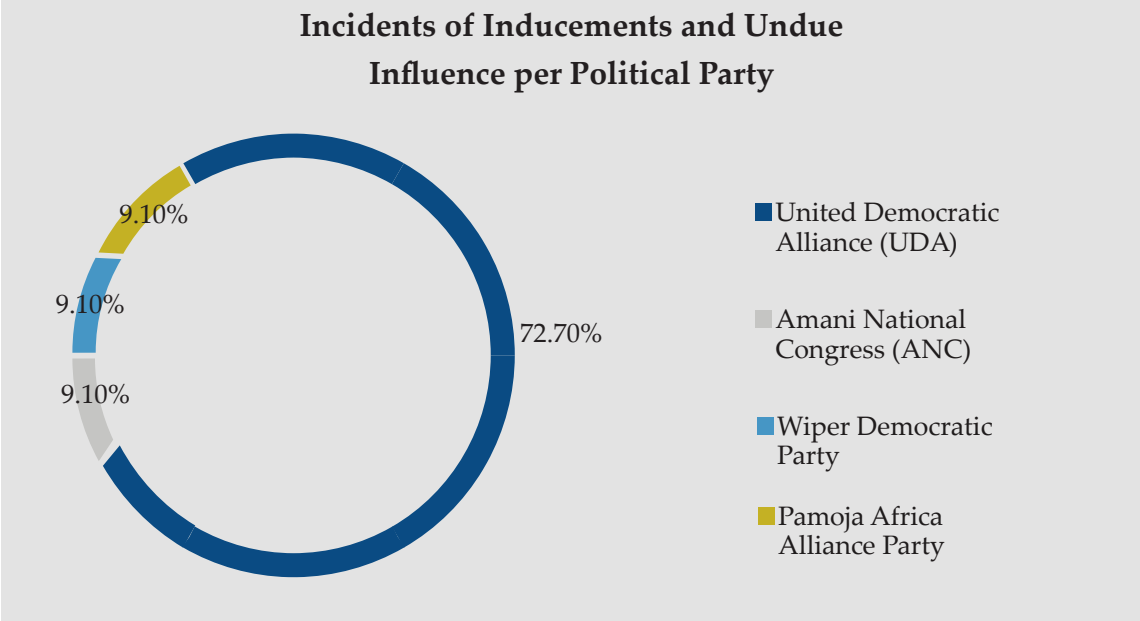
The responsibility for resolving disputes arising from political campaigns primarily lies with the IEBC, as stipulated in Rule 6(e), (f), and (g) of the Electoral Code of Conduct. However, this does not preclude an election court from nullifying an election based on the conduct of candidates during the campaign period. The Supreme Court, in ***Sammy Ndung'u Waity v IEBC & 3 Others*** Supreme Court Petition 33 of 2018, outlined the guiding principles for the handling of pre-election disputes, stating that such disputes should initially be addressed by the IEBC or PPDT, and any subsequent appeals should be heard by the High Court.

The 2022 elections revealed several challenges, including violence, hate speech, allegations of voter bribery, and the failure of political parties to adhere to their campaign schedules.

Incidents of violence per political party



Source: KNCHR 'Bound Ballot' 2023



Source: KNCHR 'Bound Ballot' 2023

In response, the IEBC, in its post-election evaluation report, recommended strict enforcement of the Election Offences Act and proposed amendments to the Elections Act to facilitate the development and enforcement of the Electoral Code of Conduct.[10] Additionally, there was noted non-compliance with campaign laws, particularly regarding the use of government resources and the misuse of party portraits and colours by independent candidates. The IEBC also called for

10 IEBC PEE, 31.

enhanced security during campaigns and stricter regulation of campaign timelines.[11] In the enforcement of the Electoral Code of Conduct, the IEBC was in 2022 hampered by a finding of the High Court that the Enforcement Committee was not constitutionally constituted. In ***Sabina Wanjiru Chege v IEBC Nairobi Constitutional Petition*** **E073 of 2022** an order of Certiorari was issued quashing parts of sections 7, 8, 10 and 15 of the Electoral Code of Conduct under the Second Schedule of the Elections Act as well as the parts of rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement Disputes establishing and granting powers to the Respondent's Electoral Code of Conduct Enforcement Committee to summon witnesses and to conduct hearings of complaints based on allegations of breach of the Electoral Code of Conduct. The order barred the Committee from proceeding with the hearing. This finding was upheld by the Court of Appeal[12]. However, at the Supreme Court, the apex court overturned the findings of unconstitutionality of the ECC Enforcement Committee. It affirmed that the IEBC had jurisdiction to summon, hear complaints, and make findings regarding breaches of the Electoral Code as per Article 88(4)(e) of the Constitution. It also succeeded in confirming the constitutional validity of the Electoral Code of Conduct.[13]

Misuse of public resources during campaigns

Source: KNCHR Elections Monitoring System (EMS)-2022 /Courtesy

11 IEBC PEE, 31.

12 *Independent Electoral and Boundaries Commission v Hon Sabina Wanjiru Chege* Civil Appeal E255 of 2022. See also *Hon. Moses Kuria v IEBC* IEBC/ECC/01/2022 where in March 2022 an injunction order was issued to bar the Committee from proceeding with the hearing. IEBC PEE (as above) 22.

13 *IEBC v Sabina Chege* Supreme Court Petition No 23 (E026 of 2022)

ii. Election campaign financing

Regulation of campaign financing is a critical component of political campaigns, with the IEBC mandated under Article 88(4)(i) of the Constitution to oversee this function. The Election Campaign Financing Act (Act 42 of 2013), while not fully operationalised due to the absence of necessary regulations, seeks to regulate campaign financing within the gazetted campaign period. However, it currently excludes funds raised prior to this period, which constitutes the bulk of campaign financing.

Kenyan electoral law prohibits the use of public resources for campaign purposes, as outlined in section 14 of the Election Offences Act, 2016. The IEBC is empowered to demand an account from certain public office holders and to confiscate resources used improperly during campaigns. Notably, this statute does not require presidential candidates or deputy presidents to account for public resources, creating an accountability gap, as highlighted in ***Raila Odinga v IEBC & 2 Others*** Supreme Court Presidential Petition 1 of 2017. Despite this prohibition, the misuse of state resources during campaigns remains widespread, with instances of government project launches and use of government vehicles, among other activities, being recorded.

Effective regulation of campaign spending is essential to prevent the use of illicit funds in corrupting the political process. The absence of a fully operational campaign financing framework, coupled with the continued use of state resources, exacerbates the high-stakes nature of elections and increases the likelihood of violence. The influx of funds from wealthy individuals also fosters expectations of reciprocal benefits, thereby facilitating state capture by a privileged minority.

The Election Campaign Financing Act anticipates the establishment of spending limits for candidates, political parties, and referendum committees during the expenditure period, including limits on media coverage. The Act empowers the IEBC to develop regulations to enforce these provisions, which must be tabled before Parliament for approval.

Parliament's refusal to adopt the necessary regulations in 2017 and 2021 was partly due to concerns about the formula used by the IEBC to set spending limits and the process of reporting campaign expenditures. There was particular concern about the duplication of reporting obligations for political party candidates. In ***Katiba Institute & 3 Others v IEBC & 3 Others*** Constitutional Petition E540 &

E546 of 2021, the High Court determined that the Election Campaign Financing Regulations required parliamentary approval as they were statutory instruments. The Court further ruled that the failure to conduct public consultations rendered the 2020 Regulations unconstitutional, affirming Parliament's authority to revoke them. Additionally, the Court found that section 29(1) of the Election Campaign Financing Act, which required regulations to be tabled in Parliament before publication in the Kenya Gazette, was inconsistent with Articles 10 and 88 of the Constitution. Without regulations, the IEBC was hampered in its attempts to regulate campaign financing in 2022, and this was among the significant challenges it identified by the IEBC in its post-election report. In response, the IEBC proposed to lobby Parliament for the operationalisation of the Election Campaign Financing Act.[14]

E. Resolution of disputes preceding declaration of election results

The constitutional and statutory framework for political parties in Kenya envisages democratic institutions and a general democratic culture. Article 4(2) of the 2010 Constitution describes the Republic of Kenya as 'a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.' The Republic of Kenya can only be true to this declaration if it institutionalises a culture of democracy in institutions like political parties through which Kenyans participate politically. Political parties are important stakeholders in Kenya's democratisation process. They, therefore, need to be democratic themselves. Moreover, the courts have asserted the public nature of political parties, which receive funding from public coffers, as a basis for their complying with constitutional dictates.

In ***Kilonzo v Wiper Democratic Movement & 3 Others*** (Civil Appeal E132 of 2022), the High Court asserted:

> *48…There is nothing in the provisions of section 38G and the entire part IVA of the PPA to negative a mandatory construction. The comprehensiveness of the provisions and repeated and consistent use of that word [shall] not only in the provisions but in other sections in the part IVA of the Act convey a deliberate intention to create some level of uniformity*

14 IEBC PEE, 31.

> *and certainty in the nomination process...These provisions signal a clear intention by parliament in its wisdom, to regulate the conduct of party nominations, while at the same time, allowing discretion to the political party to decide on the method of selection of delegates, the specifics of the actual delegates meeting and the process to be used, and the body to conduct interviews and how to conduct the interviews. This no doubt in deference to the autonomy of the party.*
>
> *49. What the provisions appears to intend is a credible, transparent, and accountable process in my opinion, in furtherance of the political rights of party members and aspirants.* ***Political parties draw funding from the exchequer and therefore the way they operate or conduct nominations is a matter of public interest as well.*** [emphasis added].

This means that compliance by political parties with Article 91 of the Constitution is the bedrock of democratic elections. Having mechanisms for resolution of disputes within political parties also allows for alternative dispute resolution outside the courts, thus expediting dispute resolution and entrenching a culture of democracy within political parties. The law requires litigants to attempt to exhaust party IDRMs in the matters specified in section 40(2) of the Political Parties Act to give political parties the first "good faith" chance to determine internal disputes. IDRMs are important because where the Constitution or statute has established an IDRM, that mechanism has to be used and exhausted.

One of the amendments introduced by the Political Parties Act in 2022 was the requirement of evidence of efforts to exhaust party internal dispute resolution mechanisms before approaching the Political Parties Disputes Tribunal (PPDT).[15] Coalition agreements are also required to set out provisions for dispute resolution before being lodged with the Registrar of Political Parties.[16]

The PPDT and courts exercise inherent deference to Political Party IDRMs, unless there is a clear injustice, unfair conduct or breach of rules of natural justice. Thus, a court will only interfere in internal party processes where the political party is reluctant to enforce its own rules, and decisions of its own tribunals and other tribunals.

15 Section 40 (2) Political Parties Act. Previously this requirement was established by the jurisprudence of the PPDT arising from the 2017 electoral cycle.
16 Section 40 (3) Political Parties Act.

Appeals from decisions of the PPDT can be lodged at the High Court on matters of law and fact, and at the Court of Appeal on matters of law only.[17] With amendments to the Political Parties Act introduced in 2022, there is no longer a further right of appeal to the Supreme Court.

In 2022, the PPDT determined 314 disputes countrywide, while the IEBC resolved 325 disputes at the Disputes Resolution Committee level. Where issues are not resolved in the pre-election phase, there is a 'jurisdictional residuum' which allows these disputes to be lodged in the High Court exercising its judicial review or supervisory jurisdiction under the Constitution. This is in accordance with the principles set out by the Supreme Court in ***Silverse Lisamula Anami v IEBC & 2 Others SCEP 30 of 2018, Sammy Ndung'u Waity v IEBC &3 Others*** SCEP 33 of 2018 and ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others SCEP 7 & 9 of 2018***.

The IEBC continues to express concern about untimely resolution of party nomination disputes, which continues to hamper its legal and operational timelines. The timelines under the Political Parties Act are also sometimes in conflict with the timelines under the Elections Act. The IEBC has therefore recommended a review of these timelines as well as both statutes to create deadlines for effective conduct of party nominations and conclusion of party nomination disputes.[18]

The interconnection between party nominations and registration of candidates can result in jurisdictional overlap, confusion, and forum shopping between the PPDT and the IEBC. The pronouncements of our courts on the allocation of jurisdiction between the IEBC, PPDT and the courts is discussed in the Analysis section of the text.

F. Late challenges to the electoral process

Late challenges to the electoral process posed a challenge to the administration of the 2022 elections. The electoral process is highly litigated in Kenya, as is evidenced by the jurisprudence that has emerged from our courts in 2022 alone. This has ranged from issues of resignation from public offices for those seeking elective office, educational qualifications for elective office, suitability for elective office on integrity issues, election campaign finance regu lation, enforcement of the electoral code of conduct, the constitutionality of the PoliticalParties Act, registration of diaspora voters, etc. Possibly the most relevant challenge in relation to the presidential election was the case challenging the

17 s 41 (2) Political Parties Act 2011.
18 IEBC Post Election Evaluation Report 2022, 31.

decision by the IEBC to not use a complementary voter identification system as required by section 44 of the Elections Act.

While the IEBC asserted that its decision to not use the manual register was informed by its findings in 2017 that the printed Register provided an avenue for misuse during the voting process, the High Court ruled that the decision deviated from Regulation 69(1)(e) of the Elections (General) Regulations, 2012, which provides, as part of the voting procedure, that identification of voters who could not be identified using electronic voter identification kits was to be done using the printed Register of Voters. The decision to abandon the use of the printed Register was, therefore, a violation of Articles 38, 83 and 86 of the Constitution.

The Court of Appeal in ***United Democratic Alliance Party v Kenya Human Rights Commission & Others*** Civil Application No E288 of 2022, granted a stay of the judgment of the High Court and reiterated that the decision in ***IEBC v Maina Kiai & 5 Others*** Civil Appeal No. 105 of 2017 would guide the IEBC in respect of voter identification. As such the process of voter identification was as follows:

> *i Presiding Officers must ensure that voters are identified by Biometrics upon production of an identification document used during registration. Biometric verification is a primary mode of identifying voters."*
>
> *ii. Where a voter cannot be identified using Biometrics, then the Presiding Officer shall use a complementary mechanism of alphanumeric search in the presence of the agents and the voter shall fill form 32A before being issued with the six ballot papers.*
>
> *iii. The Presiding Officer will resort to the use of the printed register of voters after approval from the Commission upon confirmation that the KIEMS Kit has completely failed and that there is no possibility of repair or replacement.*

G. Context of declaration of results

Unfortunately, the management of elections by IEBC officials has come to be a risky affair, with some IEBC staff members being physically assaulted and others losing their lives.[19] While there was angst that surrounded the wait for the declaration of the presidential election results, there was a general calm in the country after election day. This uneasy calm was interrupted on the day of the declaration of the results where was a delay in the announcement of the results by the Chairperson of the Commission. Scuffles emerged at the National Tallying Centre coupled with allegations of vote rigging by the Azimio la Umoja team. This was exacerbated by the refusal by four of the seven Commissioners of the IEBC to endorse the election result. Prior to the announcement by the Chairperson of the Commission, the four commissioners (Juliana Cherera, Francis Wanderi, Justus Nyang'aya and Irene Masit) held a press conference at a separate venue denouncing the result, claiming it was "opaque". According to the vice-chair of the Commission, Juliana Cherera:[20]

> *We cannot take ownership of the result that is going to be announced because of the opaque nature of this last phase of the general election…"We are going to give a comprehensive statement... and again we urge Kenyans to keep calm…*

These allegations were countered by a statement by the Chairperson of the IEBC asserting that the four Commissioners had attempted to force a re-run contrary to their oath of office.[21]

19 IEBC PEE Report 2022, 132, 140. One of these was Daniel Mbolu Musyoka, Returning Officer Embakasi East Constituency, who disappeared before declaring results and was found dead four days later in Loitoktok. See 'Embakasi IEBC official was abducted, kept in captivity then killed, say police' https://nation.africa/kenya/news/poll-official-killed-days-after-abduction-3917022 accessed 14 August 2024. See also the incident of the shooting of a presiding officer Mr Mohamed Kanyare in Eldas Constituency 'IEBC official's leg amputated after Wajir election day shooting' https://nation.africa/kenya/counties/wajir/iebc-official-s-leg-amputated-after-wajir-election-day-shooting-3918424 accessed 14 August 2024.

20 Dickens Olewe 'Kenya election result: William Ruto wins presidential poll' https://www.bbc.com/news/world-africa-62554210 (accessed 28 August 2022).

21 Press release on Staff Murder, Profiling and Misleading Reports on Presidential Election, 16 August 2022, available on https://www.iebc.or.ke/uploads/resources/qWGJXy8s9t.pdf (accessed 28 August 2022)

The Chair also decried harassment and intimidation in the run-up to the declaration of the results:[22]

> *During the announcement of the presidential results, the Chairman Wafula Chebukati, Commissioners Prof. Abdi Guliye and Boya Molu, and CS/CEO Marjan H. Marjan were physically attacked, assaulted, and injured by persons in the company of certain political leaders. We call for the arrest and prosecution of these assailants regardless of their political affiliation*

It is in this context that the Supreme Court was asked to determine the role of the Commission versus the role of the Chairperson as the Returning Officer of the presidential election. Article 138 (3) (c) provides:

> *…after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.*

On the other hand, Article 138 (10) of the Constitution provides:

> *Within seven days after the presidential election, the Chairperson of the Independent Electoral and Boundaries Commission shall:*
>
> (a) *declare the result of the election; and*
>
> (b) *deliver a written notification of the result to the Chief Justice and the incumbent President.*

As will be detailed below, the Supreme Court found that there was a lack of clarity in the policy and oversight responsibilities of the Chairperson, Chief Executive Officer and Commissioners of the IEBC. It recommended the establishment of formal internal guidelines to delineate the policy, strategy and oversight responsibilities of the Chairperson, Commissioners and CEO. The apex court further proposed that the roles of IEBC officials and third parties be explicitly defined in legislative and administrative directives to provide clarity and accountability.

22 Press release on Staff Murder, Profiling and Misleading Reports on Presidential Election, 16 August 2022, available on https://www.iebc.or.ke/uploads/resources/qWGJXy8s9t.pdf (accessed 28 August 2022)

H. Misinformation and disinformation in the 2022 elections

With the advent of the digital age, social media has come to play an increasingly important role in our lives, and by extension, in the electoral process. Historically, traditional media enabled political elites to control the flow of information, with mass media often serving as a tool for state propaganda during both the pre- and post-colonial periods.[23] In contrast, social media has enhanced Constitutionalism and democracy in Africa by 'promoting and facilitating broader public participation in decision-making and providing ordinary citizens with an opportunity to hold their leaders accountable'.[24] However, scholars have also decried the 'steady decline towards authoritarianism, populism, negative ethnicity and narrow nationalism' that this free flow of information, which allows its distortion, has spawned.[25] This is because there is now opportunity for ordinary citizens, states (both democratic and authoritarian), foreign governments and multinational companies which own digital platforms to facilitate the spread of fake news.[26] Although the dissemination of false information and propaganda during elections is not a novel occurrence, the digital age has amplified its reach and speed, making it much easier to access, share, and spread rapidly. This heightened virality poses significant risks to the integrity of democratic processes.[27]

Misinformation has been described as 'one of the greatest challenges facing democracy in our time'.[28] Misinformation refers to 'false and misleading information intentionally spread to cause harm or benefit the perpetrator, directed at an individual, groups, institutions or processes'.[29]

Disinformation is 'false or misleading information that is created or disseminated with the intent to cause harm or to benefit the perpetrator.

23 Charles Manga Fombad, 'Democracy and Fake News in Africa' (2022) 9(1) *Journal of International and Comparative Law* 137.
24 Fombad, as above, 131.
25 Fombad, as above, 132.
26 Fombad, as above.
27 Fombad, as above, 132.
28 Nic Cheeseman, 'Kenya 2022: Lies, Damn Lies, and Statistics', The Africa Report, 2 September 2022.
29 Beata Martin-Rozumilowicz and Rasto Kuzel, 'Social Media, Disinformation and Electoral Integrity' (IFES Working Paper), 10, available at https://www.ifes.org/publications/social-media-disinformation-and-electoral-integrity (accessed 12 August 2024).

The intent to cause harm may be directed toward individuals, groups, institutions, or processes.'[30] While there is no universally agreed upon definition of fake news, one author[31] asserts that it 'involves various categories of information offered as news that can be either wholly or partially false or contain deliberately misleading elements incorporated within its content, or context or information that is intentionally and verifiably false aimed at misleading others. Fombad argues that fake news can also include 'misleading information that is designed to cause confusion, especially in the minds of voters'.[32] In contrast to other rigging tactics often seen in hybrid democracies like Kenya, misinformation is a unique strategy that can be used by both the government and the opposition to influence electoral outcomes.[33]

While social media has boosted democracy and Constitutionalism in Africa by encouraging public participation and accountability, it also spreads fake news, endangering the continent's emerging democracies. Malicious use of fake news can distort democratic processes, harm institutions, and increase polarisation, thereby exacerbating democratic backsliding.[34]

Digital campaigning has become a mainstay of elections in Kenya, with platforms such as Twitter and Facebook, messaging apps such as WhatsApp, and the video-sharing app, TikTok playing a central mobilisation and information-sharing role during elections. While digital campaigns are yet to gain such traction as to replace in-person campaigns, its role in shaping public opinion cannot be underplayed. Politicians in Kenya and Africa broadly are now investing heavily in bloggers and influencers to increase their capacity to directly reach voters with their campaign messages.[35]

30 Martin-Rozumilowicz & Kuzel 'Social Media, Disinformation and Electoral Integrity', 10.
31 Wasserman, H. (2020). Fake news from Africa: Panics, politics and paradigms. Journalism, 21(1), 3-16. https://doi.org/10.1177/1464884917746861, 4.
32 Fombad, as above, 138.
33 Nic Cheeseman and Brian Klaas, How to Rig an Election (London: Yale University Press, 2018) 129.
34 Fombad, as above, at 131–32.
35 The Kenyan Elections 2022: The Role and Impact of Misinformation, Democracy in Africa, www.youtube.com/watch?v=_SGduMl04EU.

The increasing distrust in Kenya's traditional media has fostered an environment ripe for misinformation and disinformation. Research shows a decline in public confidence in mainstream media, often attributed to its perceived ties to ethnic and class interests. When media outlets exhibit clear bias towards a particular candidate or political agenda, it further undermines public trust. The concentration of media ownership in the hands of the political elite has strengthened the perception that the media is compromised, prioritising the interests of political and corporate elites over its duty to serve the public.[36] Following the 2022 elections, this perception was only reinforced by the media's inconsistent portrayal of election results. Contradictory reports from various media stations heightened public scepticism, leaving people uncertain about the accuracy and impartiality of the information presented.

In the run-up to the 2022 general election, the IEBC put significant effort into tackling the issues associated with using technology in election administration. However, during this period, a troubling trend emerged: politicians began to adopt new tactics to influence political outcomes by exploiting the rise of disinformation and misinformation. Politicians strategically spread false narratives online, aiming to discredit their opponents and secure an advantage in the election.[37]

During the election period, social media platforms were inundated with misinformation. False claims of victory, alleged political kidnappings, conspiracy theories, and targeted attacks were among the misleading content that spread widely during this time.[38] A deeply concerning aspect of the misinformation campaigns was the prevalence of hate speech, particularly targeting female political aspirants.

36 Catherine Gicheru 'Kenya' 153. https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf last accessed 24 June 2024.

37 V Miyandazi & L Thuo 'Navigating the Nexus of Elections, Technology, and Democracy Amid Escalating *Disinformation and Misinformation Challenges in Kenya' in Ron Krotoszynski, Jr., András Koltay and Charolotte Garden (eds) Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context* (Oxford University Press, 2024) 311; 321

38 Odanga Madung 'Opaque and Overstretched, Part II: How platforms failed to curb misinformation during the Kenyan 2022 election' *https://foundation.mozilla.org/en/campaigns/opaque-and-overstretched-part-ii/* last accessed 24 June 2024.

Platforms such as Twitter, WhatsApp, and TikTok became conduits for the dissemination of sexualised attacks against female candidates.[39] The widespread presence of social media acted as a catalyst, accelerating the rapid spread of misinformation and enabling it to reach a vast audience quickly. This proliferation not only fuelled the dissemination of false information but also disproportionately targeted female candidates, exacerbating the already significant challenges they face during electoral campaigns.[40]

In the period following the election, a critical issue arose: while the IEBC had published images of Form 34As showing results from nearly 99% of the 46,663 polling stations nationwide, the Commission had not yet compiled these figures on its public portal. Physical copies of Form 34As were being transported to the national tallying centre in Nairobi for thorough verification and the final aggregation of totals before the official results were scheduled to be announced by the IEBC chairperson.[41]

The lack of consolidated information led to a confusing tallying process, with various media outlets reporting conflicting figures derived from their own computations of Form 34As. For instance, on 10 August 2022, Citizen TV reported that presidential candidate Raila Odinga was leading with 51.3% of the vote, closely followed by William Ruto at 47.3%. Simultaneously, Nation Media Group displayed Ruto in the lead with 50.7%, while Odinga trailed at 48.6% at the same moment.[42] The divergence in reporting created confusion and allowed false news narratives to flourish. A Mozilla Foundation study highlights that the spread of misinformation was further amplified by tech platforms, contributing to the exacerbation of uncertainty surrounding election results.[43]

39 ''Fake news' in Kenya's 2022 elections: What has gender got to do with it?" https://fumbua.ke/2022/08/03/fake-news-in-kenyas-2022-elections-what-has-gender-got-to-do-with-it/ last accessed 24 June 2024.

40 As above.

41 Duncan Miriri and Ayenat Mersie, 'Early signs show right Kenyan presidential election' Reuters (10 August 2022) <https://www.reuters.com/world/africa/early-signs-show-tight-kenyan-presidential-election-2022-08-10/> accessed 24 June 2024.

42 Duncan Miriri and Ayenat Mersie, 'Early signs show right Kenyan presidential election' Reuters (10 August 2022) <https://www.reuters.com/world/africa/early-signs-show-tight-kenyan-presidential-election-2022-08-10/> accessed 24 June 2024

43 Mozilla 'Fellow Research: Platforms Failed to Curb Misinformation After Kenyan Election' November 3, 2022. https://foundation.mozilla.org/en/blog/fellow-research-platforms-failed-to-curb-misinformation-after-kenyan-election/ last accessed 24 June 2024.

Despite assurances from these companies to tackle problematic content before the elections, misinformation continued to spread significantly.[44] This failure to effectively combat false information on their platforms added to public confusion and distrust, making it difficult for voters to distinguish between accurate information and misleading claims. On this issue, Cheeseman aptly observed:

> *Even those of us well seasoned in analysing rigging claims have struggled to cope with the bewildering monsoon of misinformation that has rained down on social media. When you wake up every morning to a new set of messages about how the process was manipulated, it can be hard not to believe there must be something in them – even as every claim you investigate turns out to be unconvincing.45*

This situation became more pronounced in the run up to the announcement of William Ruto as the President-elect by IEBC Chairperson Wafula Chebukati on 15 August 2022. There ran on national television a last-minute announcement by four IEBC commissioners who disavowed the verification and tallying process, asserting that the actual results diverged from those about to be declared by the chairperson.[46] This dramatic turn of events, occurring just prior to the chairperson's planned announcement of the results, caused a heightened state of agitation among Kenyans, and fuelled a surge of conspiracy theories online. As noted by Cheeseman:[47]

> *Misinformation thrives, of course, when key institutions cannot be trusted and when it is repeated by respected figures. In the context of the Kenyan elections, many citizens went into the campaign with limited trust in Chebukati because he had presided over the 2017 elections that was nullified by the Supreme Court. Their trust was further eroded – some might say exploded – when, just as he was about to read out the result, four 'rebel' commissioners gave a rival 'presser' saying they could not stand behind the results. It did not matter that when the four*

44 ibid.

45 Nic Cheeseman 'Kenya 2022: Lies, damn lies, and statistics' The Africa Report (2 September 2022) <https://www.theafricareport.com/237697/kenya-2022-lies-damn-lies-and-statistics/> accessed 24 June 2024.

46 *Raila Odinga & 16 Others v William Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae)* [2022] eKLR [61]–[62].

47 Nic Cheeseman 'Kenya 2022: Lies, damn lies, and statistics' The Africa Report (2 September 2022) <https://www.theafricareport.com/237697/kenya-2022-lies-damn-lies-and-statistics/> accessed 24 June 2024.

> *four commissioners subsequently provided details of their concerns it transpired that they rested, in part, on a mathematical misunderstanding so basic that it called into question both their capacity and their motivations. The sight of the IEBC once again at war with itself was enough to give credence to the claims the Commission had been politically captured and had fabricated the entire process.*

Even more alarming was the alleged verification of the misinformation by trusted interlocutors such as John Githongo, a well-known Kenyan corruption whistleblower, which made the misinformation more likely to be believed by Kenyans.[48] Moreover, during the hearing of the presidential petition, a concerning increase in the use of misinformation was observed.[49] It was argued that this increase was attributed to the fact that voting was over, and the potential for backlash from this misinformation affecting voting behaviour was reduced.[50] However, little attention was paid to the potential impact of this misleading content on voter sentiment and behaviour.[51]

Disinformation appeared to play out in the presidential election petitions as well, with claims that some Forms 34A given to agents differed from those on the public portal. These claims were later dismissed due to a lack of credible evidence. The Court rejected the Forms 34A submitted in affidavits by two advocates for the first Petitioner, noting they significantly deviated from the originals and certified copies on the public portal. The Court criticized the advocates for presenting misleading or fabricated evidence and identified false information in the affidavit of Githongo, which included forgeries and inadmissible hearsay. Githongo's request to withdraw his affidavit before the hearings had been denied.[52]

48 The Kenyan Elections 2022: The Role and Impact of Misinformation, Democracy in Africa, www.youtube.com/watch?v=_SGduMl04EU.

49 Democracy in Africa, 'The Kenyan elections 2022: The role and impact of misinformation' <https://www.youtube.com/watch?v=_SGduMl04EU> accessed 25 June 2024.

50 Ibid.

51 Democracy in Africa 'The Kenyan elections 2022: The role and impact of misinformation' https://www.youtube.com/watch?v=_SGduMl04EU last accessed 25 June 2024.

52 Raila Odinga and 16 Others v William Ruto and 10 Others; Law Society of Kenya and 4 Others (amicus curiae) [2022] eKLR, at para 97.

The Court expressed frustration with the Petitioners' unsubstantiated claims, likening them to "hot air" and a "wild goose chase."[53] Ultimately, the evidence was deemed insufficient to annul the presidential election, with the Supreme Court affirming the IEBC's declaration of William Ruto as the president-elect.

It is clear from the foregoing that the manipulation of data in elections can erode trust in the democratic process, leading citizens to doubt the authenticity and legitimacy of election outcomes. As the use of data and digital tactics in elections evolves, it is vital to balance the legitimate use of voter information for campaign purposes with the need to protect citizens' privacy and uphold democratic values.

Misinformation during elections, though less prevalent in Kenya compared to other nations, remains a significant threat to democracy and requires vigilant oversight from defenders of democratic principles. Digital manipulation of data and information to be a useful tool, not only because they offer distinct advantages but also because they fall into a legal grey area, escaping strict regulation as election rigging.[54] The unchecked dissemination of misinformation can have serious consequences for the democratic process, including an erosion of public trust in democratic institutions and processes, warranting a closer examination of its implications on voter decision-making and the overall electoral landscape.

I. African Judges and Jurists Forum (AJJF) Presidential Election Petition Observation Mission

The Africa Judges and Jurists Forum (AJJF) deployed an Observer Mission comprising of eminent African jurists, to observe the hearing by the Supreme Court of Kenya, of the 2022 presidential election petition. The Observer Mission arrived in Nairobi on 28 August 2022 and completed its mission on 4 September 2022. Headed by Retired Chief Justice of the Republic of Tanzania Mohammed Chande Othman, the Observer Mission comprised of Justice Henry Boissie Mbha retired Justice of the Supreme Court of Appeal and immediate past President of the Electoral Court of South Africa; Justice Moses Chinhengo, AJJF Chairperson and Justice of the Court of Appeal of Lesotho and former Judge of the High Court of Zimbabwe and of Botswana; Lady Justice Lillian Tibatemwa-Ekirikubinza of the Supreme Court of Uganda; and Lady Justice Ivy Kamanga of the Supreme Court of Appeal of Malawi.

53 At para 54.
54 Cheeseman` and Klaas *How to rig an election* 132.

The purpose of the Observer Mission was to monitor the proceedings before the Supreme Court of Kenya and assess whether these proceedings were being handled in a manner that adheres to regional and global standards relevant for the handling of election disputes. In particular, the Observer Mission sought to assess whether the Supreme Court handled the proceedings in a manner which adheres to the right to a fair hearing for the parties involved in the petition. The Observer Mission did not examine the election process itself, but only confined its review to the manner in which the Supreme Court handled proceedings concerning the hearing and determination of the presidential election petition. The Mission did not evaluate the evidence before the Court or assess the application of jurisprudence by the Supreme Court in that petition, as its mandate was limited to assessing the conformity of the proceedings to fair trial standards, irrespective of the outcome of the case.

J. Mission Observations

The following were the findings of the AJJF observation mission on the various EDR related rights.

i The right to consult and be represented by counsel of one's choice

The right of each party to legal representation was fully respected and honoured as each party was allowed to appoint and be represented by legal counsel of choice. However, due to the limited space available, restrictions were imposed on the number of legal counsels who could sit with the parties in the main court room. The Court issued directions stipulating the number of legal counsels who would be permitted to sit in the main court room. Each party was allocated an equal number of lawyers who could sit and consult with the parties in the main court room, while the rest of the legal counsels were allocated an overflow court room. These restrictions on the number of legal counsel who could sit in the maincourt room were consistent with article 14 of the International Covenant on

Civil and Political Rights (ICCPR) and article 7 of the African Charter on Human and Peoples' Rights (African Charter) which permit restricted access to the court room in the interests of orderly administration of justice.[55]

The fact that each party was allocated equal number of legal counsels who could sit in the main court room is consistent with the right of parties to be treated equally before the court in line with articles 14 of the ICCPR and 3 of the African Charter.

ii. The right to a public hearing

The right of the parties to have the election petition adjudicated through a public hearing was respected and honoured. Due to limited space available in the court room, only the parties, accredited media and legal counsel were permitted to physically attend the court proceedings. However, adequate measures were undertaken to ensure that the hearing would be conducted in full view of the public. For instance, the proceedings were broadcast on various radio and television stations with national and international coverage. They were also livestreamed on various social media platforms, including Facebook, You Tube and Twitter. The Supreme Court provided a detailed schedule outlining the dates and times during which the various proceedings were to be held, and this enabled the public and the media to follow the proceedings using various online and broadcasting channels. Therefore, although the public could not access the court room physically, they were able to follow the proceedings and thus, the hearings were conducted in full view of the public in compliance with article 14 of the ICCPR and article 7 of the African Charter.

55 See also General Comment 32, para 29 which stipulates: 'Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public.

iii. Right to equality before the law

In terms of article 14(1) of the ICCPR and article 3 of the African Charter, parties must be treated equally before the court. This right was respected by the Supreme Court. After filing their written submissions, each party was given an opportunity to make their oral submissions and to respond during the hearings. The Court set aside three days for the hearing. A full day was allocated to the Petitioners to make their oral submissions while another full day was allocated to the Respondents. The third day was dedicated for rejoinders. Throughout the hearing, the Mission observed that judges sufficiently engaged with each party's submissions. Restrictions on the number of legal counsels who could sit in the main room were equally applied on the parties as each party was allocated an equal number of legal counsels who could sit in the main court room.

However, the Mission noted that the legal framework did not accord equal time for Petitioners and Respondents to prepare and file their initial submissions. While the Petitioners have seven days from the date of declaration of the result to file a petition, the Respondents [and *amici*] have only four days to file their responses.[56] Therefore, the Petitioners have more time to prepare their initial submissions while the Respondent have less time. This undermines the principle that all parties must be treated equally, including being given equal opportunity to prepare and present their cases. However, this is an issue which cannot be addressed by the Supreme Court. It is the mandate of the legislature to relook into this and assess if there is a need to amend the legal framework to ensure that Petitioners and Respondents have equal time to prepare and present their initial submissions.

iv. Right to access an independent tribunal established by law

The right of the parties to have their legal dispute resolved by an independent tribunal established by law was respected, as is required under article 14 of the ICCPR and article 7 of the African Charter. Article 140(1) of the Constitution of Kenya mandates the Supreme Court to hear and decide petitions challenging the results of presidential elections. The Petitioners in the 2022 case filed their petition before the Supreme Court, and their petition was heard and decided by the judges of the Supreme Court. The Mission did not observe anything which suggests subversion of the independence of the judges who presided over the

56 See Art 140 (1), Constitution of Kenya.

petition. The Mission noted reports (carried mainly on social media) suggesting that some of the judges had resigned or had been compromised by parties to the case.[57] However, none of these reports have been substantiated. The Mission also observed that the judges conducted themselves impartially. While delivering the summary judgment, the Deputy Chief Justice indicated that some of the parties had made attempts to meet the judges prior to the delivery of the judgment. The judges declined those requests, in order to safeguard their independence and to maintain public confidence in the independence of the Court.[58]

iii. Right to adequate opportunity to prepare, present and challenge evidence

All the parties were given an opportunity to file their written as well as make oral submissions during the hearing. They were given an opportunity to respond to arguments made by the opposing parties and challenge the evidence adduced. However, the Mission noted that the Constitution sets a strict timeframe within which the proceedings must be concluded, and the petition be determined. Article 140 (2) of the Constitution stipulates that "Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final." This timeframe may not be enough to give the parties adequate time to prepare their cases and responses. However, this is an issue which cannot be addressed by the Supreme Court. It is the mandate of the legislature to relook into this and assess if there is a need to amend the legal framework and provide for a longer timeframe.

iv. Right to an expeditious hearing

Under article 14 of the ICCPR and article 7 of the African Charter, parties have a right to have their legal dispute determined by an independent court within a reasonable time and to be given reasons for the decision(s) made by the court. This right was fully respected by the Supreme Court of Kenya. The Court conducted hearings and delivered its judgement within 14 days as stipulated in article 140(2) of the Constitution, and thus there were no delays.

57 'Judiciary Warns of Sponsored Social Media Attacks on Supreme Court Judges' https://www.citizen.digital/news/judiciary-warns-of-sponsored-social-media-attacks-on-supreme-court-judges-n305511 (accessed 5 November 2022).

58 DCJ Mwilu Reveals How Several Attorneys Attempted To Call Before Court Ruling - Opera News (accessed 6 November 2022), see Principle A (5) AU Principles on Fair Trial and Legal Assistance in Africa, 2003.

The Court dismissed the application and delivered a summary judgement which outlined reasons for its verdict. The Court delivered its full judgment on 26 September 2022.

K. Overview of electoral dispute resolution 2013-2022

The next section will review decisions from the courts touching on the 2022 electoral process. The first section will review cases touching on various aspects of the electoral process, including eligibility for office, education, resignation of public servants seeking elective office, the mandate of the Electoral Code of Conduct Enforcement Committee, the constitutionality of the Political Parties Act, the use of a complementary voter identification system and inclusion in the electoral process.

Outcome of 2013 Election Petitions

No.	POSITION	PETITIONS FILED	Total Judgments Delivered Per Seat	Judgments Where Petitions Allowed	Judgments Where Petitions Dismissed	PETITIONS	PETITIONS STRUCK OUT
1.	Governor	24	22	3	19	0	2
2.	Senator	13	7	2	5	2	4
3.	Member of National Assembly	70	54	9	45	5	11
4.	Women Member of National Assembly	9	3	0	3	1	5
5.	County Assembly Representative	67	51	9	42	7	8
6.	Speaker of County	5	2	1	1	2	1
TOTAL		188	139	24	115	17	31

Summary of 388 Election Petitions filed in 2017

POSITION	NUMBER	TOTAL
Governor	35	160
Senator	15	
Women Representatives	12	
Member of National Assembly	98	
Member County Assembly	139	139
Party List Petitions a) Filed in High Court b) Filed in Magistrates Courts	 9 80	 89
Total		388

Outcome of the 2017 election petitions

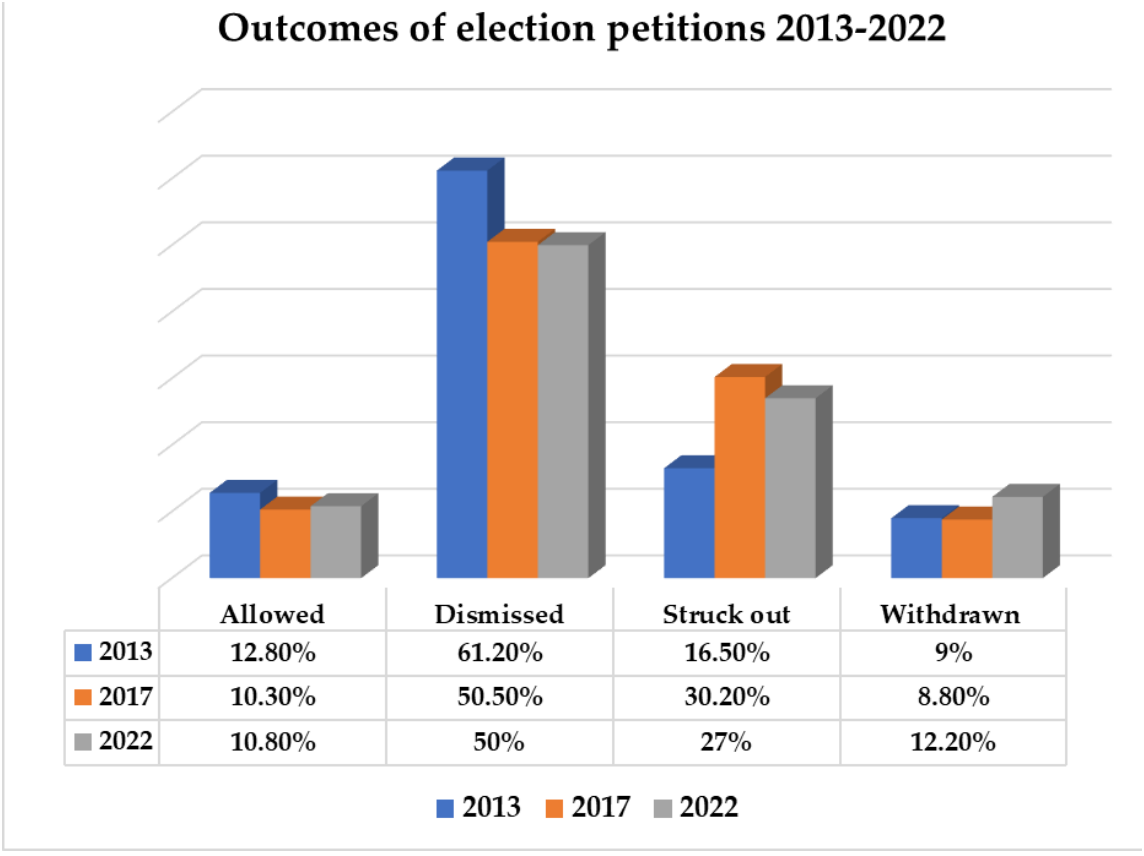
POSITION	NUMBER	TOTAL
Petitions allowed		40
1. Upon Judgment	**40**	
2. Upon Ruling	**None**	
Petitions dismissed		313
3. Upon Judgment	**196**	
4. Upon Ruling	**117**	
Petitions withdrawn	**34**	34
Petition abated (death of Respondent elect)	**1**	1
Total	388	

Summary of the 2022 election petitions

POSITION	NUMBER	TOTAL
Presidential	**9**	9
Governor	**12**	46
Senator	**2**	
Women Representatives	**4**	
Member of National Assembly	**28**	
Member County Assembly	**80**	80
Party List Petitions a) Filed in High Court b) Filed in Magistrates Courts	 **3** **84**	 87
Total		222

Outcome of the 2022 election petitions

POSITION	NUMBER	TOTAL
Petitions allowed		24
1. Upon Judgment	24	
2. Upon Ruling	0	
Petitions dismissed		171
3. Upon Judgment	111	
4. Upon Ruling	60	
Petitions withdrawn	27	27
	Total	222



Appeals filed 2022-2023

POSITION & COURT	NO.	TOTAL
COURT OF APPEAL		35◎
Nairobi	20	
Kisumu	10	
Mombasa	5	
HIGH COURT		80
High Court of Kenya	80	
◎ 30 appeals emanate from High Court whereas 5 Appeals emanated from High Court Election Appeals of Members of County Assembly.		

II. CASES TOUCHING ON THE ELECTORAL PROCESS

EDUCATIONAL REQUIREMENTS UNDER THE ELECTIONS ACT & THE ELECTIONS (GENERAL) REGULATIONS

County Assembly Forum & 6 Others v Attorney General & 2 Others Constitutional Petition E229, E226, E249 and 14 of 2021

In the High Court at Nairobi (Milimani Law Courts)

Coram: AC, Mrima J

Judgement Allowing Petition

Date: 15 October 2021

Res judicata-Whether the right to petition Parliament under Article 119 precludes the filing of a Constitutional petition-eligibility criteria for members of county assembly-whether requirement of a university degree was a limitation of the right of the right to be a candidate for public office or office within a political party and if elected, to hold office-whether subjecting all the candidates for the positions of Member of County Assembly (MCA) to a minimum academic qualification of university degree prejudiced the rights and fundamental freedoms of those who were not able to directly acquire/afford university degrees.

Summary of the facts:

The consolidated petitions were provoked by the Constitutional requirement of a degree qualification to any candidature nomination to an election for the office of a member of the county assembly in Kenya as set out in section 22(1)(b)(ii) of the Elections Act (the impugned provision).

Contemporaneously filed with the petition was an application that sought interim stay of the implementation of section 22(1)(b)(ii) pending the hearing of the application and the consolidated petitions. The import of section 22(1)(b)(ii) of the Elections Act was that anyone seeking the elective candidate position of a Member of Parliament and for the Member of the County Assembly must have met the qualification of having a degree from a recognized university. The impugned section was the product of an amendment to the Elections Act through Election Laws (Amendment) Act No. 1 of 2017. The amendment passed and was assented to on 9 January 2017, published on 16 January 2017 and became operational on 30 January 2017.

The 1st, 2nd and 3rd Petitioners contended that the amendment as to qualification was suspended and could only take effect after the 2017 general elections. They further provided statistics to the effect that only 30% of the two thousand two hundred and fifty elected members of county assembly were eligible with regards to the qualification and that the remaining 70% would be ineligible for a second term in their elective positions.

It was their case that due to the socio-economic factors affecting all citizens in Kenya, the requirement for a degree qualification was untenable and unfair to the wider public. In support of their allegation, they noted that only 3.5 % of Kenyans as reported in the 2019 National Census Report held degrees from recognized universities. The 1st, 2nd and 3rd Petitioners laid emphasis on the Commission for University Education (CUE) report for the year 2017-2018 that reported only a handful, approximately four hundred and twenty thousand persons were eligible to register for a degree in the universities. Further, with the age of majority being 18 years and considering the education system in Kenya, one would only be eligible to vie for an elective position at the age of 21.

The 1st, 2nd and 3rd Petitioners argued that the pandemic disrupted normal school running and therefore anyone that would want to vie for an elective position would otherwise have to forego his or her ambitions. They averred that the lack of astute governance and good leadership was attributable to unethical and corrupt leaders and the same was not due to academic qualifications. Thus, the impugned provision of the section in the Elections Act was untenable and unconstitutional. The 4th Petitioner's case was that Section 22(b)(ii) was untenable as the state had not made post-secondary education easily accessible due to imposition of school fees for tertiary education. That the imposition of the section was a violation of Article 38(3) of the Constitution and that it passed as unfair since most of the Kenyans could not afford tertiary education fees. Moreover, the 4th Petitioner contended that the implementation of section 22 (1) of the Elections Act had the effect of undermining the sovereignty of the people of Kenya and their right to vote for candidates of their choice during nominations, contrary to Articles 1 and 38 of the Constitution of Kenya. The 4th Petitioner contended that section 22(1) of the Elections Act was discriminatory and in violation of Article 27 of the Constitution, unfair and unequal for limiting the rights guaranteed under Article 38(3) of the Constitution. It was their case that the additional qualification was motivated by irrational considerations, and that it was unreasonable and hostile under the current Constitutional dispensation because secondary and university education were easily and freely available to Kenyans.

Their concern was that a university degree qualification would make leadership for the wealthy, and the introduction of the requirement was based on the flawed assumption that persons possessing a degree would make better leaders, which did not pass the threshold under Article 24 of the Constitution.

They contended that in the event an elected leader failed in their leadership, the Constitution had clauses for recall of such leaders and to choose persons of their liking regardless of their academic qualifications. They urged the court to also take into account the fact that the academic progress of many who had hoped to have graduated by 2022 had been hampered by the COVID-19 pandemic, which was not contemplated by the legislature at the time the impugned provision was enacted.

The 5th Petitioner submitted that the implementation of the section would violate the rights of youths, women, elders living with disability and the marginalised. Moreover, it was contended that section 22(b)(ii) was unreasonable and unjustifiable for not considering that most marginalized communities had no access to education, and that the section did not recognize any other alternate way of training, thereby perpetuating discrimination by failing to consider other competencies of leadership that equate to academic qualifications.

In addition, it was their case that the introduction of the competency-based curriculum was one of the ways to show leadership pegged on skill training rather than the conventional degree qualification.

Reliance was also placed on statistics provided by Kenya Universities and Colleges Central Placement Service (KUCCPS) that indicated that only 16.4% percent of the candidates had the privilege of getting admission to university thereby locking out 83.6% from leadership.

The 5th Petitioner argued that the amendment, particularly Section 22 of the Elections Act, unreasonably excluded Kenyans, especially youth and marginalized individuals, from participating in elections, violating Article 55 of the Constitution. Article 55 mandates affirmative action to ensure youth representation in political, social, economic, and other spheres. The 5th Petitioner sought the following reliefs: Firstly, a declaration of the unconstitutionality and illegality of Section 22 of the Elections Act for contravening Articles 27, 38, 99, 100, 137, 180, and 193 of the Constitution. Secondly, a declaration that Section 22 violated fundamental freedoms, particularly Article 38 of the Constitution.

Thirdly, a declaration that Section 22's requirement of a degree qualification for contestants in all elective posts lacked justification in a democratic society, contravening principles of human dignity, equality, and freedom, rendering it unconstitutional and null. Lastly, a declaration of the inconsistency of Section 22 of the Elections Act with the Constitution of Kenya, rendering it null and void to the extent of the inconsistency.

The 6th Petitioner, Daniel Ndambuki Mutua, argued that Section 22 of the Elections Act, which introduced a university degree qualification for elective posts, hindered his political aspirations for the 2022 general elections despite his leadership roles in the Kenya Prisons Service. 6th Petitioner, who was then a student at Kenyatta University, stated that he would not graduate by 2022 due to the COVID-19 pandemic. He contended that Sections 22(1)(b), 22(1A), 24(1)(b), and 26(1) of the Elections Act were discriminatory, unconstitutional, and inconsistent with national values and principles of governance outlined in Article 10 of the Constitution. The 6th Petitioner also cited a previous court ruling in **Johnson Muthama v Minster for Justice and Constitutional Affairs & Others Constitutional Petition No. 198 of 2011,** where sections 22(1)(b) and 24(1)(b) were declared unconstitutional. He further argued that the amendment lacked adequate public participation as required by Article 10(2)(a) of the Constitution. The 6th Petitioner sought several declarations, including the nullification of Sections 3(1), 22(1)(b), 22(1A), 22(1B), 24(1)(b), and 26(1) of the Elections Act, asserting their inconsistency with various Constitutional provisions. He also demanded declarations regarding the violation of his Constitutional rights to equality and freedom from discrimination, as well as breaches of international human rights laws and principles. Additionally, 6th Petitioner called for declarations of breach of the doctrines of legitimate expectation, reasonableness, rationality, proportionality, and principles of democracy.

The 7th Petitioner, Amin Ekiram, argued that according to the provisions of articles 99(1), 193(1), 137, and 148 of the Constitution, individuals qualified to run for various elective positions if they met educational, moral, and ethical requirements set by the Constitution or by law. The 7th Petitioner was aggrieved by the amendment brought about by the Election Laws (Amendment) Act 2017, which amended section 22(1)(b) of the Act to make it a requirement for candidates for the position of Member of County Assembly to have a degree from a recognized university.

The 7th Petitioner contended that this amendment would unjustifiably limit the rights and fundamental freedoms of Kenyans guaranteed under Article 38(3) of the Constitution. The 7th Petitioner argued that the amendment was oppressive, imposed unreasonable restrictions, and discriminated against political candidates, thus violating Article 27 of the Constitution. The 7th Petitioner also highlighted that only 2.733% of Kenya's population had attained a university degree, indicating that the amendment disproportionately affected the majority of Kenyans without just cause, contravening Article 24 of the Constitution.

Additionally, the 7th Petitioner claimed that the blanket application of section 22 of the Elections Act violated Article 55(a) & (b) of the Constitution, which obligates the State to take measures, including affirmative action, to ensure youth, women, and marginalized groups have opportunities to participate in various spheres of life. As a remedy, the 7th Petitioner prayed for declarations that section 22 of the Elections Act limited political rights guaranteed under the Bill of Rights, was discriminatory against women and marginalized groups, and was unconstitutional in disqualifying individuals without a degree certificate from running for various elective positions and being nominated by political parties. The 1st and 2nd Respondent's case was that the Elections Act 2011 was enacted in accordance to articles 99(1)(b) and 193(1)(b) of the Constitution that set out the eligibility criteria for Members of Parliament and Members of County Assembly.

Counsel highlighted previous precedents, the case of **Johnson Muthama v Minister for Justice and Constitutional Affairs & Another (2012) eKLR** in which the requirement of a post-secondary school qualification was challenged and declared unconstitutional. Further, the same issue was challenged in the case of **John Harun Mwau v Independent Electoral and Boundaries Commission & Another** where the court deponed that it was necessary that all candidates seeking nomination for any elective position to have acquired a certificate, diploma or any other post-secondary qualification within three months of nomination recognized by the relevant ministry.

Learned counsel deponed that on appeal, the court held that qualifications for persons seeking elective office were not discriminatory since they cut across all parties and that anyone that was not qualified should first seek to attain the requisite certifications. The 2nd Respondent submitted that the matter was res judicata and had been properly determined by courts of coordinate jurisdiction. Therefore, having been enacted into law by dint of legislative function, it was proper. Moreover, the functions of member of county assembly were not so differentiated

from the functions of the Members of Parliament as to require differentiated qualifications. The 2nd Respondent further asserted that the removal of the section would be violating the provisions of article 99 and article 193 of the Constitution and that the Petitioners had not met the requirements as provided; therefore, the petition should thus be dismissed.

The 3rd Respondent, Speaker of the National Assembly, opposed the consolidated Petitions and applications for conservatory orders. In the grounds of opposition, the 3rd Respondent stated that before the consolidated petitions were filed, the National Assembly had received public Petitions from Mr. Anthony Manyara and Mr. John Ndwiga regarding the constitutionality of sections 22 (1) (b) and 1A of the Elections Act, 2011. At the time of the hearing, the Public Petitions were being considered pursuant to National Assembly Standing Orders and article 119 of the Constitution. under Standing Order No. 227.

On this basis, the 3rd Respondent argued that the National Assembly had exclusive original jurisdiction to first determine the Public Petitions before the court could intervene. It further stated that Parliament had the mandate to enact legislation prescribing educational, moral, and ethical requirements for contesting in an election, citing the Supreme Court decision in **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR** to uphold the doctrine of separation of powers by exercising restraint.

The 3rd Respondent contended that the Petitioners had failed to demonstrate how the impugned provisions violated their fundamental rights and freedoms in the Constitution. Supporting the qualifications provided for under section 22 of the Elections Act, it was argued that representation, legislation, oversight, and appropriation duties and functions of a Member of County Assembly require educational qualifications of at least a university degree.

Mr. Michael Sialai, the Clerk National Assembly, in the replying affidavit, argued that the consolidated Petitions were *res judicata* and an abuse of process, referring to the decision of Justice Lenaola, as he then was, in **John Harun Mwau v Independent Electoral & Boundaries Commission & Another (2013) eKLR,** where it was found that the impugned provisions were Constitutional. He also highlighted the ongoing consideration of the Public Petitions before the National Assembly. Mr. Sialai discredited the assertion that the introduction of the degree qualification was discriminatory, citing legal precedents and the rationale behind the enactment of the impugned provisions derived from Section 9 of the County Governments Act. The 1st Interested Party argued that the consolidated petitions

offended the Constitutional doctrine of separation of powers by seeking the court's intervention in matters reserved for Parliament, as outlined in article 94 of the Constitution. It emphasized Parliament's authority, under article 82(1)(b) of the Constitution, to enact legislation for candidate nominations and the guiding principles of leadership and integrity outlined in article 73(2)(a).

The 1st Interested Party contended that educational qualifications for election to a State office, as prescribed by Parliament, were not discriminatory but rather aimed at achieving the Constitutional goals set out in article 10. Therefore, it urged the dismissal of the consolidated petitions and applications, highlighting the need to consider the overall object and purpose of the Elections Act in light of Constitutional principles.

Issues for determination

1. Whether the consolidated Petitions are res-judicata.
2. Whether the consolidated Petitions were caught up by the ripeness doctrine.
3. Depending on the outcome in (i) and (ii) above, the settled principles in Constitutional and statutory interpretation.
4. Whether section 22(1)(b)(ii) of the Elections Act offends articles 24, 27, 38(2), 55 and 56 of the Constitution.
5. Whether there was adequate public participation in the enactment of section22(1)(b)(ii)

Determination of the court

On the first issue, the learned judge juxtaposed the decisions made in **John Harun Mwau v Independent Electoral and Boundaries Commission & another [2013] eKLR** and in **Johnson Muthama v Minister for Justice and Constitutional Affairs & another [2012] eKLR.**

Having found that the decisions made were in light of the other amendments in relation to section 22 of the Elections Act and that the issue raised on Members of the County Assembly in the subject case was not subject of litigation in the previous matters, the doctrine of stare decisis could not apply in this case. The court maintained that the only forum which presented itself for a possible adjudication of the issues raised in the consolidated Petitions was the case in **Okiya Omtatah Okoiti & Another v Attorney General & Another [2021] eKLR**. However, the Court declined jurisdiction and the matter was not fully and finally determined.

On the issue of whether the consolidated petitions were caught up by the ripeness doctrine, the court stated that it was a section out of the broader principle of non-justiciability and that the court should not be invited in a matter that is yet to be fully apprehended or when the issues are yet to crystalize. The 3rd Respondents relied on article 119 of the Constitution and referenced the amendments bills being Election (Amendment Bill) No 42 of 2021 and Election (Amendment Bill) No 43 of 2021 both which sought to repeal the impugned provision. Article 119 provides that every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. The article also directs Parliament to make provision for the procedure for the exercise of this right.

The Respondents claimed that there existed consolidated petitions before the National Assembly that addressed the constitutionality of Section 22(1)(b)(ii) of the Elections Act and that intervention of the court would amount to addressing the matter without fully exhausting all available options. The question for consideration before court was whether the Public Petitions presented before Parliament concerning the constitutionality of section 22(1)(b)(ii) of the Elections Act could so competently address the fundamental rights and freedoms of the Petitioners herein as to render the consolidated Petitions herein not ripe for consideration. The learned judge reiterated the remarks made in **Council of Governors & 3 others v Senate & 53 others [2015] eKLR** affirming the fact that there were petitions presented before Parliament did not bar any party from ventilating issues in court. Further, s Parliament's legislative function was not curtailed by the High Court's exercise of its jurisdiction. However, Parliament had the legislative mandate to ensure that every law legislated was within the confines of the Constitution. Therefore, the contention that the consolidated petitions were caught up by the doctrine of ripeness failed.

On the issue of whether the impugned provision offended the Constitution, the court ruled that a look at the impugned provision demanded a holistic interpretation of the Constitution. The demand was that there be a purposive interpretation of the Constitution where the courts ought to find against unworkable and impractical allegations. The court opined that a reading of article 38(3) of the Constitution revealed that the impugned provision limited the political rights as so enshrined and had to pass the muster under article 24 of the Constitution. Article 24 of the Constitution outlines the conditions under which rights and fundamental freedoms may be limited. It specifies that any limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality,

and freedom. Factors to be considered include the nature of the right, the importance of the limitation's purpose, the extent of the limitation, and the need to prevent prejudice to others' rights. Moreover, the limitation should be proportionate to its purpose, and less restrictive means should be explored if available.

Legislation limiting a right or fundamental freedom must explicitly express the intention to do so, be clear and specific about the limitation, and not encroach upon the core or essential content of the right. Furthermore, those seeking to justify a limitation must demonstrate compliance with these requirements to the relevant authority.

Additionally, Chapter 4 provisions on equality are modified to accommodate Muslim law before Kadhis' Courts in matters related to personal status, marriage, divorce, and inheritance, but only to the extent strictly necessary.

The limitation imposed by the impugned provision did not pass the test of article 24, as the limitation had to be justifiable and reasonable. From the already meted out statistics, only 1.2 million Kenyans held degrees translating to 3.5% of the Kenyan population. Therefore, representation at the ward level would be adversely affected.

The learned judge relied on the provisions of the Kenya National Qualification Framework Act 2014 that provides for alternative qualifications to the conventional degree. On one hand, the Respondents argued that some of the functions of a member of county assembly such as legislation required some form of education. On the other hand the Petitioners demanded proof of where the county functions failed as a result of the lack of the university degree qualifications by some of the MCAs.

The impugned provision had the effect of requiring all elective positions in Kenya to have similar academic qualifications, namely a minimum of a university degree. Despite the differing responsibilities of offices such as the President, Deputy President, Governor, Member of Parliament (MP), and Member of the County Assembly (MCA), they were all subject to this uniform requirement. There was a recognized need for differentiated qualifications, considering the diverse nature of these positions and the principle of political self-fulfilment enshrined in the Constitution. However, while acknowledging the importance of academic qualifications for MCAs in line with global standards, it was argued that the impugned provision lacked nuance and failed to consider the varied responsibilities and remuneration of different positions.

Critically, it was contended that the provision ran counter to several Constitutional principles. It did not meet the standards of limitation set out in Article 24, as it unfairly discriminated based on educational qualifications and placed unreasonable restrictions on political rights under Article 38(3). Additionally, it failed to uphold the rights of minorities and marginalized groups as outlined in Article 56.

While recognizing the importance of ethical standards for public officeholders, it was emphasized that the impugned provision did not align with Constitutional principles and needed re-evaluation to ensure compatibility with Kenya's social, economic, and educational realities.

In the scrutiny of whether there was sufficient public participation in the adoption of section 22(1)(b)(ii) of the Elections Act, the foundational principle of public involvement in governance, as enshrined in Article 10 of the Kenyan Constitution, came under close examination. The Constitutional provision binds all state organs, officers, and citizens, mandating their involvement in decision-making processes, including the enactment of laws and formulation of public policies.

In the case of **Simon Mbugua & another v Central Bank of Kenya & 2 others Petitions 210 & 214 of 2019 (Consolidated) [2019] eKLR,** the court deliberated on the definition and significance of public participation. Citing Black's Law Dictionary and the South African Constitutional Court's decision in **Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC),** the court emphasized the active involvement of communities in decisions affecting them.

Furthermore, the court drew from local precedents such as **Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR,** where six principles for public participation were articulated. These principles highlighted the government's responsibility to craft effective mechanisms for public engagement, ensuring inclusivity, access to information, and meaningful representation of stakeholders' views.

Building upon international jurisprudence, notably **Doctors for Life International v Speaker of the National Assembly and Others (supra),** Ngcobo, J's elucidation of the right to political participation underscored the duty of governments to facilitate public involvement in the law-making process. This duty, rooted in democratic principles, requires not only the provision of information but also active measures to enable citizens to influence legislative decisions.

The court's analysis also considered the reasonableness of Parliament's actions in facilitating public participation, as outlined in **Matatiele Municipality v President of the Republic of South Africa (CCT73/05A) [2006] ZACC 12.** It emphasized the need for tailored approaches to public engagement, taking into account the nature and impact of legislation, as well as the diversity of the population.

In the specific case under review, the court found no evidence of adequate public participation in the enactment of section 22(1)(b)(ii) of the Elections Act. Despite the absence of contestation from Respondents, the Petitioners' claim remained unchallenged, indicating a failure on the part of Parliament to fulfill its Constitutional obligation.

Consequently, the court concluded that the provision fell short of the Constitutional requirement for legitimacy under Article 10(2)(a) of the Constitution. This decision underscored the imperative for robust public engagement in legislative processes to uphold the principles of democracy and ensure the validity of enacted laws.

The court proceeded to make the following findings: It declared that section 22(1)(b)(ii) of the Elections Act was unconstitutional and in violation of Article 10(2)(a) of the Constitution for failing to undertake public participation. It declared that section 22(1)(b)(ii) of the Elections Act was unconstitutional and in violation of Articles 24, 27, 38(3), and 56 of the Constitution. The court issued an order declaring that section 22(1)(b)(ii) of the Elections Act was operational, had no legal effect, and was void *ab initio*. It nullified the requirement that a person must possess a degree from a university recognized in Kenya to qualify to be a Member of a County Assembly. The court made no order as to costs, considering the matter as a public interest litigation.

Paul Macharia Wambui & 10 Others v Speaker of the National Assembly & 6 Others Constitutional Petition 28 of 2021 and Petition E037, E065 & E549 of 2021 & E077 of 2022

In the High Court of Kenya at Nairobi

Coram: AC Mrima J

Judgment allowing petition

Date: 13 April 2022

Res judicata-Ripeness doctrine-principles of constitutional interpretation-whether section 22 (1) (b) (i) of the Elections Act offended Articles 24, 27, 38 55 & 56 of the Constitution-whether public participation in the enactment of section 22 (1) (b) (i) of the Elections Act was adequate

Summary of Facts

In this judgment, five petitions were consolidated for consideration. These petitions include Petition No 28 of 2021, which was jointly instituted by the 1st to 3rd Petitioners; Petition No E549 of 2021, instituted by the 4th Petitioner; Petition No E037 of 2021, jointly instituted by the 5th and 6th Petitioners; Petition No E065 of 2022, instituted by the 7th Petitioner; and Petition No E077 of 2022, jointly commenced by the 8th to 11th Petitioners. The court referred to these cases collectively as "the consolidated petitions," with Petition No 28 of 2021 being designated as the lead petition. The parties in the consolidated petitions appeared as named in the title of the judgment.

The consolidated petitions challenged the constitutionality of section 22(1)(b)(i) of the Elections Act, introduced through an amendment by the Election Laws (Amendment) Act, No 1 of 2017, referred to as "the impugned provision." This provision mandated a university degree qualification as a precondition for nomination for election or inclusion in political party lists for Members of Parliament. The petitions opposed the impugned provision.

The Petitioners varied in their backgrounds and interests. The 1st to 3rd Petitioners were described as Kenyans of goodwill, registered voters capable of participating in elections and referenda. The 4th Petitioner was a third-year student at Egerton University, pursuing a degree in Statistics at the Faculty of Science. The 5th and 6th Petitioners were Members of the County Assembly of Machakos, representing

Ndalani and Kola Wards, respectively, and expressed their desire to vie for positions as Members of the National Assembly in the upcoming general elections. The 7th Petitioner was an Advocate of the High Court of Kenya, a public-spirited individual, a defender of the Constitution, an ICT expert, a CPA-K holder, and a Cyber Security expert, who instituted the petition in the public interest. The 8th Petitioner was a Member of the County Assembly of Narok County for Suswa Ward and a student at Kenyatta University pursuing an undergraduate degree in Human Resource Management. The 9th Petitioner was a Kenyan adult living with a disability, registered with the National Council for Persons with Disabilities (NCPWD) under Registration No NCPWD/P/4357, and aspired to vie for the senatorial position in Narok County in the next general elections. The 10th Petitioner was a Kenyan adult aspiring to vie for the position of Member of the National Assembly within Narok County. The 11th Petitioner was a serving Member of the Narok County Assembly representing Mara Ward and was a final-year student at the Management University of Africa, pursuing a Bachelor of Management and Leadership degree.

The Respondents in this case were various public officials and institutions. The 1st Respondent was the Speaker of the National Assembly, a constitutional office created under article 106 of the Constitution, whose mandate included presiding over any sitting of the National Assembly. The 2nd Respondent was the National Assembly, created under article 93 of the Constitution, with the mandate to represent the people of Kenya and enact legislation. The 3rd Respondent was the Speaker of the Senate, also a constitutional office created under article 106 of the Constitution, mandated to preside over any sitting of the Senate. The 4th Respondent was the Senate, created under article 93 of the Constitution, with the mandate to represent and protect the interests of the counties and their governments. The 5th Respondent was the Honourable Attorney General of the Republic of Kenya, sued in this capacity under article 156 of the Constitution, which designates the Attorney General as the principal legal advisor to the government, responsible for promoting, protecting, and upholding the rule of law and defending the public interest. The 6th Respondent was identified as the Minister for Justice and Constitutional Affairs, a position that appeared to be non-existent under the current constitutional governance structure in Kenya. The 7th Respondent was the Independent Electoral and Boundaries Commission (IEBC), an independent constitutional commission established under article 88(1) of the Constitution, tasked with conducting and supervising referenda and elections in Kenya.

The Petitioners' cases, as stated, variously challenged the impugned provision, seeking multiple forms of relief. In Petition No 28 of 2021, the Petitioners sought a declaration that the revised section 22 of the Elections Act was void, a nullity ab initio, and contrary to chapter 1(1) and 4 as read with article 38 of the Constitution. In Petition No E549 of 2021, the Petitioners sought a series of declarations, including that the amendment to the Elections Act, 2011, introducing the mandatory requirement for a degree for nomination for election as Member of Parliament and Member of County Assembly was effected via a single amendment Act, that there was no public participation in the amendment process, and that section 22(1)(b)(i) of the Elections Act, 2011, was null, void, and inoperational with respect to the 2022 general elections. In Petition No E037 of 2021, the Petitioners sought declarations that various sections of the Elections Act, 2011, were inconsistent and in conflict with the Constitution, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, and that these sections were in breach of the doctrines of legitimate expectation, reasonableness, rationality, proportionality, and democratic principles. In Petition No E065 of 2022, the Petitioners sought declarations that section 22(1)(b)(i) of the Elections Act, 2011, was unconstitutional for lack of public participation and for violating various articles of the Constitution, and orders declaring the impugned provision inoperational, of no legal effect, and void ab initio, along with directives for voter education. In Petition No E077 of 2022, the Petitioners sought similar declarations regarding the unconstitutionality of section 22(1)(b)(i) of the Elections Act, 2011, due to violations of constitutional rights and the lack of public participation, as well as orders nullifying the degree requirement for Members of Parliament and directing the 2nd Respondent to clear the Petitioners to vie as Members of Parliament despite not possessing a degree.

During the hearing, it was noted that the 1st, 2nd, 3rd, 4th, 5th, and 6th Petitioners did not participate, leading the court to deem their respective petitions abandoned. However, the 7th to 11th Petitioners actively pursued their cases, arguing that the impugned provision violated articles 10(2)(a) of the Constitution due to a lack of public participation, articles 24, 25, and 27 for discriminatorily restricting democracy, article 54 for violating the rights of persons living with disabilities, article 56 for violating the rights of minorities and marginalized groups, article 35(3) for the failure of the 7th Respondent to publish the educational requirements for the position of Member of Parliament in the Gazette Notices, article 38(3) for infringing on political rights, and article 47 for failure to accord an administrative action that was expeditious, efficient, lawful, reasonable, and procedurally fair.

The Petitioners supported their arguments with written and oral submissions, Lists of Authorities, and judicial decisions. The court, recognizing the urgency of the matter and the time constraints, decided not to reproduce the submissions verbatim but assured that they would be considered in the discussion. The court commended the counsel involved for their well-researched submissions, which addressed the issues in dispute in great detail.

On the other hand, the Respondents opposed the consolidated petitions. The 1st and 2nd Respondents filed a replying affidavit, and the 3rd and 4th Respondents filed a replying affidavit in Petition No E077 of 2022 and Petition No E065 of 2022, along with written submissions. The Honourable Attorney General also filed grounds of opposition to the consolidated petitions and written submissions. The 7th Respondent, the IEBC, filed replying affidavits in Petition No E077 of 2022 and in the consolidated petitions, as well as written submissions and a List of Authorities.

The Respondents collectively argued that the consolidated petitions were barred by the doctrine of res judicata, asserting that the impugned provision enjoyed a presumption of constitutionality and that there was no evidence to prove its unconstitutionality. They further contended that if the court found the impugned provision unconstitutional, the declaration of unconstitutionality should be suspended until the next general election, citing the ongoing electioneering process and the need for certainty in the law, particularly since some public officers who intended to vie but did not possess university degrees had not resigned as required under section 43(5) of the Elections Act. The Respondents ultimately urged the court to find the consolidated petitions untenable and to dismiss them.

Issues for determination

1. Whether the consolidated petitions were res-judicata.
2. Whether the consolidated petitions were caught up by the ripeness doctrine.
3. Depending on the outcome in (i) and (ii) above, the settled principles in constitutional and statutory interpretation.
4. Whether section 22(1)(b)(i) of the Elections Act offends articles 24, 27, 38(2), 55 and 56 of the Constitution.
5. Whether there was adequate public participation in the enactment of section 22(1)(b)(i) of the Elections Act.

Determination of the court

The consolidated petitions under review challenge the validity of recent amendments to the Elections Act, specifically focusing on the university degree requirement for candidates seeking election to parliamentary positions. The primary legal question addressed by the court is whether these petitions were barred by the principle of res judicata, which precludes litigation of issues already decided in previous judgments.

In assessing this issue, the court first examined the precedents set by **Johnson Muthama v Minister for Justice and Constitutional Affairs & Another [2012] eKLR** and **John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR.** Both cases had previously addressed aspects of electoral qualifications, but the court determined that these cases did not preclude the current petitions.

Johnson Muthama involved a challenge to section 24(1) of the Elections Act, which set qualifications for nomination as a Member of Parliament. The Petitioners argued that this section violated the constitutional provisions on equality and political rights under articles 27 and 38 of the Constitution. The court, led by Lenaola J (as he then was), found that section 24(1) did not contravene these constitutional provisions. The judge emphasized that Parliament, under article 82(1)(b) of the Constitution, had the authority to legislate on election qualifications, and any declaration of unconstitutionality of this provision would imply a declaration of the Constitution's unconstitutionality, which was impermissible. The decision in ***Johnson Muthama*** thus upheld the legitimacy of the legislative framework for electoral qualifications.

John Harun Mwau further examined the constitutionality of section 24(1) of the Elections Act concerning educational qualifications. The Petitioner argued that the educational requirements imposed by the IEBC were unconstitutional. The court upheld the section, asserting that it aligned with the principles established under article 81 of the Constitution, which mandates fair and inclusive electoral systems. The judge noted that challenges to legislative provisions that mirror constitutional requirements could not be sustained, as it would equate to challenging the Constitution itself. The Court of Appeal, in upholding this decision, confirmed that the educational qualification standards were non-discriminatory and applicable uniformly to all candidates.

The consolidated petitions, however, challenge the 2017 amendment to the Elections Act, which introduced a university degree requirement for parliamentary candidates. This issue was not addressed in either ***Johnson Muthama*** or ***John Harun Mwau***, as both cases dealt with earlier amendments or different provisions of the Elections Act. The court noted that the 2017 amendment presented a new issue, distinct from those previously adjudicated. The legal question in the consolidated petitions pertained to the constitutionality of the new degree requirement, which was not in existence during the time of the earlier judgments.

The court also reviewed **Okiya Omtatah Okoiti & Another v Attorney General & Another [2019] eKLR,** a case challenging the 2017 amendment. The court in ***Okiya Omtatah*** did not fully resolve the constitutionality of the new requirements but declined jurisdiction on the matter, indicating that the issue was not definitively settled. The consolidated petitions thus presented a novel challenge that had not been addressed by previous courts.

Ultimately, the court found that the consolidated petitions were not res judicata because they raised issues related to the 2017 amendment to the Elections Act, which had not been previously litigated. The principle of res judicata did not bar the current petitions as they addressed new legal questions concerning the university degree requirement for parliamentary candidates. This determination allowed the court to proceed with a fresh evaluation of the constitutional validity of the recent legislative changes.

In addressing the ripeness doctrine, the court deliberated on its applicability to the consolidated petitions challenging the constitutionality of certain provisions of the Elections Act. This doctrine, as part of the broader principle of non-justiciability, precludes courts from adjudicating disputes that are not sufficiently developed or are premature for judicial intervention. It operates under the premise that certain disputes should be resolved through other fora before judicial involvement.

The court referred to the **County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) [2022] eKLR** case, which had extensively discussed the ripeness doctrine. The court echoed this discussion, noting that the doctrine prevents adjudication of hypothetical or premature disputes. The **Kiriro wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR** case further defined the doctrine, explaining that ripeness concerns whether a dispute has matured sufficiently to permit a meaningful court decision.

The Court of Appeal in **National Assembly of Kenya & another v Institute for Social Accountability & 6 others Nairobi Civil Appeal 92 of 2015 [2017] eKLR,** criticised the Constitutional Court for addressing hypothetical issues, asserting that such matters should be resolved through appropriate institutional mechanisms before judicial review. The court in this case emphasised that disputes relating to functions, revenue sharing, and legislative processes are political questions best resolved by political institutions.

In **National Assembly of Kenya & another v The Institute for Social Accountability & 6 others [2017] eKLR,** it was held that the High Court should not adjudicate hypothetical disputes and that such matters must achieve constitutional ripeness before judicial consideration. Likewise, in **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Nairobi Constitutional Petition No 453 of 2015 [2016] eKLR,** Onguto J articulated that the justiciability doctrine prohibits court intervention in matters that are premature or purely academic.

The Respondents argued that since Parliament was considering public petitions challenging the constitutionality of section 22(1)(b)(i) of the Elections Act and had already passed an amendment related to this provision, the court should refrain from exercising jurisdiction. They contended that the pending legislative process rendered the petitions not ripe for judicial intervention. Counsel for the 3rd and 4th Respondents referred to Election (Amendment Bill) No 42 of 2021 and Election (Amendment Bill) No 43 of 2021, which aimed to repeal the contested provision, asserting that allowing Parliament to address these issues first was appropriate.

The court examined whether the public petitions before Parliament could effectively address the fundamental rights and freedoms implicated by the consolidated petitions. Referring to article 119 of the Constitution, which guarantees the right to petition Parliament to consider matters within its authority, the court acknowledged that while Parliament has the authority to enact, amend, or repeal legislation, it does not preclude the High Court from addressing constitutional issues.

The court referenced the decision in **Council of Governors & 3 others v Senate & 53 others [2015] eKLR**, which rejected the argument that pending parliamentary petitions deprived the court of jurisdiction. The court affirmed that while Parliament's role includes legislation and amendment, the judiciary maintains the duty to ensure that such legislative actions comply with constitutional standards. Thus, the court is not precluded from reviewing legislation for constitutional conformity, even if Parliament is also considering related matters.

The court found that the consolidated petitions were not barred by the ripeness doctrine. The arguments suggesting that the petitions were premature due to the ongoing parliamentary process were dismissed. The court asserted its jurisdiction to address the constitutional issues raised by the petitions, ensuring that parliamentary actions remained within constitutional bounds.

On the principles of constitutional interpretation, the court noted that the consolidated petitions before the court primarily sought the interpretation of various constitutional provisions in relation to section 22(1)(b)(ii) of the Elections Act. The Constitution, being the supreme law, commands precedence over all other laws, necessitating an interpretation that aligns with its overarching principles.

In **Okiya Omtatah Okoiti v Public Service Commission & 73 Others [2021] eKLR,** the court explored the principles of constitutional interpretation, emphasizing that the Constitution provides guidelines for its own interpretation under Articles 20(4) and 259(1). Article 20(4) directs that the Bill of Rights be interpreted to promote values like human dignity, equality, and freedom, while Article 259(1) requires the Constitution to be interpreted to advance its purposes, values, principles, rule of law, human rights, and good governance. The Supreme Court in In the Matter of **Interim Independent Electoral Commission [2011] eKLR** supported a purposive approach to constitutional interpretation, moving away from formalistic methods. It highlighted the need to consider the Constitution's values, principles, and socio-historical context, as outlined in Articles 10 and 159(1).

The principle of holistic interpretation, as affirmed in **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2015] eKLR** and further elaborated in In the Matter of **the Kenya National Human Rights Commission, Supreme Court Advisory Opinion Reference No 1 of 2012 [2014] eKLR,** suggests that the Constitution should be interpreted contextually, ensuring coherence among its provisions.

In ***Tinyefuza v Attorney General*** [1997] UGCC 3, it was observed that the Constitution should be read as an integrated whole where each provision supports and sustains others. This principle of harmony is reiterated in **Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 Others [2012] eKLR,** which emphasises a broad and purposive interpretation of the Constitution, avoiding rigid legalism.

Advisory Opinion Application No 2 of 2012 reiterated the need for a purposive interpretation that aligns with the Constitution's aspirations, while **R v Drug Mart (1985) and Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)** highlight the importance of interpreting rights and freedoms in light of their purpose and historical context.

Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 Others [2012] eKLR also summarized principles of constitutional interpretation, including the integration of the Constitution as a whole, avoiding interpretations that produce absurd or impracticable results.

In **Law Society of Kenya v Attorney General & Another [2021] eKLR**, the court applied a similar approach, evaluating the constitutionality of statutes by considering their purpose and effect, guided by principles established in cases like **R v Oakes and The Queen v Big M Drug Mart Ltd.**

Finally, in **John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General [2019] eKLR,** the court affirmed that the constitutionality of statutes must be assessed against the constitutional mandate, taking into account legislative purpose and impact.

These cases collectively underscore the necessity of interpreting the Constitution and statutes in a manner that aligns with its values, purposes, and principles, ensuring coherence and avoiding interpretations that undermine its fundamental objectives.

The 4th issue the court addressed was the constitutionality of section 22 of the Elections Act, which prescribes qualifications for candidates seeking election. This section mandates that candidates for parliamentary and county assembly seats must hold a degree from a university recognised in Kenya. Additionally, candidates for the positions of President, Deputy President, County Governor, and Deputy County Governor must also possess such a degree.

Section 22 of the Elections Act comprises several provisions. Subsection (1) outlines that a candidate must be qualified under both the Constitution and the Act, including holding a degree from a university recognised in Kenya, to be nominated. This applies to Members of Parliament and members of a county assembly. Subsection (1A) specifies that this requirement applies to general elections conducted after the 2017 elections. Subsection (1B) extends these qualifications to candidates for party list positions under section 34. Subsection (2) extends

the degree requirement to candidates for President, Deputy President, County Governor, and Deputy County Governor. Subsection (2A) provides exceptions to these requirements for the first elections under the Constitution, except for the positions of President, Deputy President, Governor, and Deputy Governor.

The Petitioners contended that section 22 imposes an undue restriction on political rights and freedoms, arguing that it violates Article 24 of the Constitution. Article 24 allows for the limitation of rights and freedoms, but only if such limitations are reasonable and justifiable in an open and democratic society. The Petitioners argued that section 22 does not meet these criteria as it imposes an unreasonable restriction on political participation.

The court evaluated section 22 against the standards set out in Article 24 of the Constitution, which requires that any limitation on rights and freedoms be reasonable and justifiable. Article 24(1) states that a right or fundamental freedom may only be limited by law, and the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Factors to be considered include the nature of the right, the importance of the limitation's purpose, the extent of the limitation, and whether there are less restrictive means to achieve the purpose. The court referenced precedents such as In the Matter of **the Speaker of the Senate & Another and the tests from R v Oakes**, as applied in **Law Society of Kenya v Attorney General & Another Petition No E327 of 2020 [2021] eKLR.**

The court acknowledged that while educational qualifications are significant, the blanket requirement of a university degree is unreasonable. This provision disregards alternative qualifications recognised under the National Qualifications Framework Act, No 22 of 2014. The Act defines "National Qualifications Framework" as a system for managing qualifications and sets principles for recognising both domestic and foreign qualifications. It aims to establish standards for recognising alternative qualifications, which the court found were not considered in section 22.

The Petitioners highlighted that only 3.5% of the Kenyan population holds a university degree, with a significant disparity across counties. Areas like Mt. Elgon and Kakamega Forest, for instance, lack university graduates, which could potentially exclude them from parliamentary representation. They also pointed out the financial burden and limited transition rate from secondary education to higher education, exacerbated by the COVID-19 pandemic, which disrupted academic schedules and further restricted access to higher education.

The court found that the provision of a university degree as a sole qualification was irrational and unjustifiable. It imposed an unreasonable burden on candidates and failed to accommodate the broader range of qualifications recognised by the National Qualifications Act. This approach was deemed contrary to constitutional principles, including Article 24, which demands reasonable and justifiable limitations, Article 27, which ensures equality before the law and non-discrimination, Article 38(3), which protects political rights, and Article 56, which safeguards the rights of minority and marginalised groups.The court concluded that section 22 was unconstitutional, recommending a review to accommodate a more inclusive range of qualifications that better reflect Kenya's socio-economic and educational context.

The final issue was whether there was adequate public participation in the enactment of section 22 (1) (b) (i) of the Elections Act. The court's review was grounded in the constitutional mandate for public participation, as outlined in Article 10 of the Kenyan Constitution. This article enshrines public participation as a fundamental national value and principle of governance, binding all state organs, officers, and public entities when enacting, applying, or interpreting laws, or making public policy decisions.

Article 10(2) specifies that national values and principles of governance include democracy, participation of the people, good governance, and transparency. Public participation is thus a constitutional requirement that ensures the people's involvement in governance processes, reinforcing the democratic principle that government should reflect the will of the people.

In **Simon Mbugua & Another v Central Bank of Kenya & 2 Others [2019] eKLR**, a three-judge bench defined public participation in line with Black's Law Dictionary, describing it as the act of taking part in decisions that affect the community. This was supported by reference to **Doctors for Life International v Speaker of the National Assembly and Others [2006] ZACC 11,** where public participation was characterised as the active involvement of citizens in decision-making processes. The South African case underscored that public participation encompasses not only engaging in public debates but also ensuring that citizens are provided with the necessary information and opportunities to exercise their right to participate in public affairs.

The court also cited **Matatiele Municipality v President of the Republic of South Africa (2) [2006] ZACC 12,** which affirmed that the modalities for public participation are to be designed by legislative bodies and must be flexible and innovative. This case stressed that public participation should be tailored to the specific nature of the legislation and the societal context, rather than adhering to a rigid formula. It was highlighted that the effectiveness of public participation is the key test, with various mechanisms, such as regional workshops or media campaigns, being used to facilitate genuine public engagement.

In **Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR,** the High Court established six principles for assessing public participation: the programme must match the subject matter, be innovative and adaptable, ensure access to relevant information, include intentional inclusivity, consider views in good faith, and complement rather than replace the technical roles of government officials.

Doctors for Life International and ***Matatiele Municipality*** further reinforced that effective public participation requires more than mere procedural compliance. It involves facilitating meaningful involvement through accessible information and genuine opportunities for public input, which contributes to informed decision-making by legislators.

In the consolidated petitions, it was contended that there was insufficient public participation in the enactment of section 22(1)(b)(i) of the Elections Act. Although the 3rd and 4th Respondents claimed that the Bill was referred to the Committee on Justice and Legal Affairs, which received memoranda from various commissions, this was deemed inadequate. The court observed that the participation process lacked transparency and was not sufficiently inclusive, as the Senate only received presentations from a limited number of entities and did not adequately disclose the invitation process.

The court emphasised that public participation is a constitutional requirement and a critical aspect of legislative legitimacy. In this case, the enactment of section 22(1)(b)(i) was found to fall short of the constitutional standards set by Article 10(2)(a). The lack of comprehensive public consultation and stakeholder engagement rendered the process deficient. The court concluded that the provision was unconstitutional and violated Articles 24, 27, 38(3), and 56 of the Constitution.

As a result, the court declared section 22(1)(b)(i) of the Elections Act unconstitutional and void ab initio. This declaration nullified the requirement that candidates for Parliament must possess a degree from a university recognised in Kenya. The decision was made in the public interest, and no costs were awarded, reflecting the court's recognition of the broader implications of the case for public participation in legislative processes.

Buoga v Attorney General & Another Constitutional Petition E290 of 2022

High Court of Kenya at Nairobi

Coram: Mrima J

Judgment allowing petition

30 September 2022

Jurisdiction-principles of Constitutional interpretation-constitutionality of section 22(2) of the Elections Act

Summary of facts

The Petition before the Court, filed by Victor Buoga on 16 June 2022, challenges the constitutionality of section 22(2) of the Elections Act No. 24 of 2011. Buoga, a public-spirited citizen, argued that this provision, which set specific academic qualifications for County Governor candidates, was inconsistent with Article 180(2) of the Constitution. He contended that the Constitution does not impose such qualifications and that section 22(2) discriminated against potential candidates, violating Article 27 of the Constitution.

Buoga's application, also filed on 16 June 2022, sought interim orders to restrain the Independent Electoral and Boundaries Commission (IEBC) from applying the impugned section and from printing ballot papers for County Governor elections until the petition's resolution. The Petitioner also sought conservatory orders to prevent the IEBC from determining candidates' eligibility based on academic qualifications. Buoga's arguments included referencing a dispute before the IEBC's Dispute Resolution Committee, IEBC/DRC/CRG/56/2022, concerning the eligibility of Wavinya Ndeti based on her academic qualifications. He claimed that there is no constitutional provision requiring a degree for gubernatorial candidates and that the impugned section contravenes Articles 2(2), 24(1), 27, 33, and 38(2) of the Constitution.

In his submissions dated 5 July 2022, Buoga relied on the decision in **County Assembly Forum & 6 other v Attorney General & 2 others Petition Nos. E229, E226, E249 & 14 of 2021 (consolidated)** where the Court found section 22(1)(b)(ii) of the Elections Act unconstitutional for violating various constitutional provisions. Buoga argued that the current petition is not affected by the doctrine of exhaustion as outlined in **Muthinja Kabiru & 2 others v Samuel Munga Henry &**

1756 others [2013] eKLR, asserting that the constitutionality of a statute is not an administrative matter.

The Petitioner asserted that section 22(2) of the Elections Act fails to align with Article 180(2) of the Constitution, which should be read in conjunction with Article 193(1)(b) to ensure no single constitutional provision is considered in isolation. Buoga argued that Parliament should have conformed to the Constitution, or the impugned section would be invalid under Article 2(4) of the Constitution. He further argued that imposing academic qualifications for County Governor conflicts with the principle of devolution and constitutes an unreasonable restriction of constitutional rights.

Buoga concluded that since section 22(1)(b)(ii) of the Elections Act was declared unconstitutional, the qualifications for County Governor should be aligned with those for a Member of County Assembly. He prayed that the Court declare the impugned section null and void and in violation of Article 27 of the Constitution, which prohibits discrimination and unequal application of the law.

The 1st Respondent, the Attorney General, opposed the Petition through Grounds of Opposition dated 23 June 2022. The Attorney General argued that the Petition was defective as it failed to interpret section 22(2) of the Elections Act in harmony with Article 193(1)(b) of the Constitution, which outlines qualifications for Members of County Assembly. The Attorney General contended that the educational requirements for the Office of Governor, as opposed to the Office of Member of County Assembly, are justified due to the distinct functions and responsibilities of the two offices. It was further claimed that the Petition abused the Court process by disregarding the derivative nature of section 22(1)(b)(ii) of the Elections Act from Articles 180(2) and 193(1) of the Constitution and failed to specify which constitutional provisions were violated. The Attorney General did not file written submissions.

The 2nd Respondent, the IEBC, opposed the Petition through a Replying Affidavit by Chrispine Owiye, dated 28 June 2022, and a response of the same date. The IEBC argued that the qualification for County Governor elections is provided by Articles 180(2) and 193(1)(b) of the Constitution and cannot be challenged in Court. It asserted that Acts of Parliament prescribing educational requirements are extensions of the Constitution and not subject to challenge. The IEBC also claimed that the decision in **County Assembly Forum & 6 Others v Attorney General & 2 Others [2021] eKLR** was inconsistent with the Constitution. Additionally, the IEBC argued that the Petition failed to exhaust remedies

under Article 119 of the Constitution and that granting restraining orders would disrupt election preparations. The IEBC further argued that the term "notwithstanding" in section 22(2) reflected Parliament's intention to set elevated educational thresholds for Governors compared to Members of County Assembly.

The IEBC's written submissions, dated 12 July 2022, reiterated that the Court lacks jurisdiction to challenge the validity of constitutional provisions under Article 2(1). It argued that any Act of Parliament prescribing educational qualifications is in line with Articles 180(2) and 193(1)(b) of the Constitution and that such Acts are presumed to be constitutional. The IEBC referenced the decision in **Okiya Omtatah Okoiti v Director of Public Prosecutions; Inspector General of National Police Service & Another [2022] eKLR** to support the principle that legislation is presumed to be constitutional. It also argued that the Court should interpret the impugned section purposively and in a manner consistent with the Constitution's spirit. The IEBC opposed the Petitioner's interpretation and argued that setting educational standards for high offices, including Governor, is not discriminatory. The IEBC requested that the Petition be dismissed with costs.

Issues for determination

1. Whether the Court had jurisdiction over the dispute and if so, whether the Petition met the precision requirement.
2. Depending on (1) above, the principles in Constitutional and statutory interpretation.
3. The constitutionality of section 22(2) of the Elections Act.

Determination of the court

Before addressing the arguments of the parties, the court made reference to several decisions and laid down certain fundamental principles on jurisdiction. Citing the Court of Appeal decision in **Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others Civil Appeal No. 119 of 2017 consolidated with County Government of Embu & Another v Eric Cheruiyot & 15 Others Civil Appeal No. 139 of 2017,** for the position that jurisdiction must be acquired before a judgment is given. Therefore, citing the *locus classicus* **Owners of the Motor Vessel "Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1**, a decision rendered without jurisdiction was a nullity *ab initio*. Jurisdiction could not be conferred on a court by a party through its pleadings **(Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR),** and the issue can be raised at any time during the proceedings **(Jamal Salim v Yusuf Abdulahi Abdi & another Civil**

Appeal No. 103 of 2016 [2018] eKLR).

On the first issue, the court approached the question of jurisdiction on two limbs: the first being whether the Petitioner ought to have petitioned the Parliament under Article 119 of the Constitution and therefore the petition was caught up by the doctrine of exhaustion applied, and the second that the impugned section (Section 22(2) derived its mandate from Articles 180(2) and 193(1) (b) of the Constitution and therefore could not be challenged in accordance to Article 2(3) of the Constitution.

Analysing limb one, the court referred to the Petitioner's submission that the court had jurisdiction to handle the matter by virtue of Articles 22 and 258(1) of the Constitution. The Petitioner maintained that he was invoking the jurisdiction of High Court under Article 165(6) of the Constitution, hence, the applicability of the exhaustion doctrine did not arise.

The court took the position that that the doctrine of exhaustion required a party to be diligent in exhausting the available mechanisms for seeking redress of a grievance, making approaching the court a last resort. The court noted that there were several existing decisions pertaining to the powers of Parliament in exercising its legislative powers to accord redress to an aggrieved party. Having noted that there was no petition in the Parliament over the educational eligibility of persons seeking the elective positions of governors, the court nevertheless emphasised that the Petitioner herein sought interpretation of Articles 180(2) and 193(1) (b) of the Constitution as well as the constitutionality of Section 22(2) of the Elections Act. To that extent, the petition herein was distinguishable from the ***County Assembly Forum & 6 others v Attorney General & 2 others*** Petition Nos. E229, E226, E249 & 14 of 2021 (consolidated). Thus, by dint of Article 165(3) the High Court had jurisdiction to interpret Constitutional matters. The first limb of the jurisdictional sub-issue was hence dismissed.

On the second limb, the 2nd Respondent argued that all laws are derivatives of the Constitution; therefore, they cannot be challenged. The argument that all laws were normative derivatives of the Constitution was premised on Kelsen's Pure Theory of Law. The court's analysis began by noting that the Supreme Court in the decision of **Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR** dealt with the applicability of the Kelsen's theory into the 2010 Constitution. The court stated that although the theory is not to be considered as illogical, the 2010 Constitution was a fusion of both the general principles and statements of policy. Therefore, a different approach ought to be used in its interpreta

tion. Consequently, since the Constitution was of a transformative character then the 2nd Respondent's argument on jurisdiction could not hold and equally failed.

On whether the Petition met the precision threshold, the court held that Constitutional petitions ought to be pleaded with some level of precision and that any reference filed to the Constitutional Court, ought to set out, with a reasonable degree of precision, the complaint, the provision infringed and the manner in which the same had been infringed.

The Constitutional violations had to be discernible in the pleadings and the party had a Constitutional forensic duty to clearly set out the particulars of the Constitutional violations. In interrogating whether the petition passed the precision test, the court noted that the petition was founded on interpretation of Article 180(2) as read with Article 193(1) (b) of the Constitution. In paragraph 10, the Petitioner drew the Court's attention to the alleged inconsistency in Elections Act and the Constitution.

Further, the petition elaborated in paragraphs 35 to 40 the provisions infringed and the manner in which such violations occurred by stating how Section 22(2) of the Election Act was not consistent with the Constitution and by fronting the manner in which Article 180(2) as read with Article 193(1) (b) of the Constitution ought to be interpreted. The court held that the violations were apparent in the petition and therefore, the petition passed the precision test.

On the issue of constitutionality of section 22(2) of the Elections Act, the court highlighted the importance of interpreting the Constitution within the frameworks of the Constitution and the Supreme Court Act, noting that a holistic interpretation is one that captures context. It opined that the Constitution ought not to be interpreted in a formalistic approach, just like every other statute nor should it be interpreted using a positivist approach.

The transformative nature of the Constitution should be taken to account whilst interpreting the Constitution and that whilst subjecting the provision of a statute to the scales of the Constitution the three-tier test must be used in determining the constitutionality of a provision: the objectivity test of the limitation, the proportionality test and finally the effect of the limitation.

On the constitutionality of section 22, the court considered the two sub-issues for analysis pleaded by the Petitioner. First, the Petitioner contended that section 22 introduced an academic requirement for persons vying for the elective position

of County Governor over and above what had been provided in the Constitution. Second, after the Court in **County Assembly Forum & 6 Others v Attorney General & 2 Others (2021) eKLR** declared Section 22(1) (b) (ii) of the Elections Act unconstitutional for failure to conduct public participation, it then followed that the Section 22(2) was equally unconstitutional.

The court highlighted that Articles 180 and 193 of the Constitution provided in for the qualifications of a County Governor. Although Article 180(2) provided that for one to qualify as Governor they had to be eligible for election as Member of County Assembly, Article 193 further clarified the qualifications. Therefore, there was need for a harmonious interpretation of the two provisions, to observe the principle that neither of the two provisions destroys each other, but rather they sustain each other and give effect to the purpose of the Constitution.

The court noted that Article 180 of the Constitution provides the general eligibility whilst Article 193 provides for further qualifications, including the academic qualification, which was to be provided for by the Constitution or an Act of Parliament. The contemplated Act was the Elections Act No. 24 of 2011.

Section 22 sets out the qualifications for nominations of candidates and at the time of the hearing of the petition, section 22(1) (b) (i) and section 22(1) (b) (ii) of the Elections Act were both declared unconstitutional. Section 22(1) (b) (ii) of the Elections Act was declared unconstitutional in **County Assembly Forum & 6 others v Attorney General & 2 others case(supra**) whereas section 22(1)(b)(i) was declared unconstitutional in **Paul Macharia Wambui & 10 Others v The Speaker of National Assembly & 6 Others High Court at Nairobi Petition No. 28 of 2021 (as consolidated with Petition Nos. E549 of 2021, E077 of 2022, E037 of 2021 and No. E065 of 2021) (2022) eKLR** due to the National Assembly's failure to conduct public participation.

Nevertheless, the impugned section, introduced vide an amendment in 2017, was never declared unconstitutional. The court further noted that section 22(2) of the Elections Act was a stand-alone provision regardless of whether Section 22(1)(b) of the Elections Act stood or not. In other words, Section 22(2) of the Elections Act did not depend on or derive from or was not prevented or contradicted by Section 22(1)(b) of the Elections Act.

Nevertheless, the issue that remained outstanding was whether the impugned section introduced additional academic requirements to those set by the Constitution.

Since Section 22(2) of the Elections Act was in existence before 2017, the decisions in **County Assembly Forum & 6 Others v Attorney General & 2 Others case (supra) and Paul Macharia Wambui & 10 Others v The Speaker of National Assembly & 6 Others case (supra)** which only dealt with the constitutionality of the 2017 amendments did not relate to Section 22(2) of the Elections Act (the impugned section). However, in the view of the court, the decision in **County Assembly Forum & 6 Others v Attorney General & 2 Others case (supra)** had an impact over the impugned section.

The court noted that the declaring of section 22(1) (b) (i) and section 22 (1) (b) (ii) unconstitutional had an impact on section 22 (2). This was because the eligibility requirement for one to have an academic degree for vying for the Member of County Assembly position no longer existed, notwithstanding the re-introduction of the requirement of a degree for a person vying for the position of the County Governor.

The court held that the re-introduction created an avenue for differentiation and therefore ran contra the provisions of Article 180 (2) of the Constitution. The court agreed with the Petitioner that the impugned section, to the extent of calling upon those vying for the position of County Governor to possess a degree recognized by a university in Kenya regardless of whether such a requirement applies to the eligibility of an MCA, imposed additional academic requirements for County Governors than those set by the Constitution.

Finally, the court held that Article 180(2) as read with Article 193 of the Constitution provided that the qualification for the election of a County Governor was similar to the eligibility for election as a Member of County Assembly. Therefore, section 22 (2) contravened Article 180 (2) by creating a differentiation on the eligibility of the Member of County Assembly and the Governor.

Republic v Chebukati & 2 others Ex parte Wanjigi Miscellaneous Application E083 of 2022

In the High Court of Kenya at Nairobi

Coram: Ngaah J

Judgment dismissing application

Date: 1 July 2022

Regulation 47(1) of the Elections (General) Regulations-degree requirement under section 22 (2) of the Elections Act-whether a physical degree was required for purposes of section 22 (2) of the Elections Act

Summary of facts

The applicant in this case, Wanjigi, was nominated by his political party, Safina, as its presidential candidate for the August 2022 general elections. On 6 June 2022, Wanjigi presented his nomination papers to the Chairman of the Independent Electoral and Boundaries Commission (IEBC), the 1st Respondent, for registration as a presidential candidate. The 1st Respondent rejected Wanjigi's application on the grounds of insufficient supporters' signatures in Nairobi and Siaya counties, the absence of a nomination certificate for Wanjigi's running mate, and the lack of a university degree certificate for Wanjigi himself.

Dissatisfied with the 1st Respondent's decision, Wanjigi filed a complaint before the IEBC Dispute Resolution Committee, the 3rd Respondent. The 3rd Respondent upheld the 1st Respondent's decision, stating that Wanjigi failed to meet the registration requirements for the presidential position. Specifically, it was noted that Wanjigi did not comply with the statutory requirements as outlined in section 22(2) of the Elections Act and Regulation 47(1) of the Elections (General) Regulations, 2012. The 3rd Respondent determined that the degree required by section 22(2) of the Elections Act was a physical document and that Wanjigi's running mate lacked the necessary nomination certificate.

Wanjigi's application for judicial review, filed on 29 June 2022, sought orders of certiorari and mandamus. He requested the quashing of both the 1st Respondent's decision rejecting his application and the 3rd Respondent's decision dismissing his challenge. Additionally, Wanjigi sought an order compelling the 1st Respondent to gazette his name as a presidential candidate and include it on the ballot papers.

The application was supported by a statutory statement and affidavit sworn on 24 June 2022. The Respondents opposed the application, with the first two Respondents filing a replying affidavit and a preliminary objection. The 3rd Respondent's grounds of objection, retrieved from the judiciary's case tracking system, aligned with the position of the 1st and 2nd Respondents.

Determination of the court

The court's focus was on the 3rd Respondent's decision dated 17 June 2022, rather than the initial decision by the 1st Respondent. Judicial review, as explained by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374**, encompasses grounds of illegality, irrationality, and procedural impropriety. Proportionality, a more recent development, was also considered.

The applicant argued that the 3rd Respondent's decision was illegal for misinterpreting section 22(2) of the Elections Act. Section 22(2) requires that a candidate for the presidency must hold a degree from a university recognized in Kenya. The applicant contended that the physical degree certificate was not necessary, provided that the candidate could demonstrate eligibility for conferment of a degree. Wanjigi had presented course transcripts and a letter from Daystar University, indicating enrolment in a Bachelor of Arts in International Relations and Security Studies, and further, he was due to graduate in November 2022.

Counsel for Wanjigi cited **Janet Ndago Mbete v IEBC & Hassan Joho [2013] eKLR and Mable Muruli v IEBC [2013] eKLR,** arguing that a physical degree certificate was not required. The 3rd Respondent had noted that these cases were delivered before amendments to the Elections Act and Regulations, which now explicitly required submission of a physical certificate under Regulation 47(1) of the Elections (General) Regulations, 2012.

The 3rd Respondent referred to **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, which emphasised that the Elections Act and Regulations are derived from constitutional principles and must be interpreted accordingly. The 3rd Respondent differentiated between holding a degree and being eligible for conferment of one, concluding that the law required possession of a physical degree certificate.

The court underscored that judicial review is concerned with the decision-making process rather than the decision itself, as established in **Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 and R v Entry Clearance Officer,**

Bombay ex parte Amin [1983] 1 WLR 418. It cannot substitute its own opinion for that of the tribunal or reconsider the facts afresh, as affirmed in **OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others [2017] eKLR** and **Republic v Kenya Revenue Authority ex parte Yaya Towers Limited [2008] Misc. Civil Appl. No. 374 of 2006.**

The court concluded that the 3rd Respondent's interpretation of the law was within its mandate and did not warrant interference. The judicial review process is not an appeal, and the court's role is limited to reviewing the legality of the decision-making process rather than evaluating the merits of the decision itself. The application for judicial review was therefore denied.

Wanjigi v Chebukati & 2 Others Civil Appeal E404 of 2022

In the Court of Appeal at Nairobi

Coram: Makhandia, K M'inoti & HA Omondi, JJA

Judgment dismissing appeal

Date: 29 July 2022

Powers of the court in judicial review-whether decision to not accept Appellant's nomination was illegal, irrational and unreasonable-nomination requirements for running mates under Article 148 of the Constitution

Summary of facts:

On 12 July 2022, the Court heard the appeal concerning the nomination of Mr. Jimi Richard Wanjigi for the presidential election scheduled for 9 August 2022. The appeal was heard with the parties represented by learned counsel: Mr. Omwanza and Mr. Otieno for the Appellant, Mr. Gumbo for the 1st and 2nd Respondents, and Mr. Ndaiga and Mr. Mukele for the 3rd Respondent. Given the urgency, the Court rendered an extempore judgment on the same day, dismissing the appeal with costs and reserving the reasons for the judgment to 29 July 2022.

The dispute arose after the 1st Respondent, the gazetted returning officer, rejected the Appellant's nomination based on three grounds: (i) Lack of a university degree as required by section 22(2) of the Elections Act; (ii) Failure to meet the requirement of nomination by at least 2,000 voters from each of at least 24 counties as per section 23(1)(d) of the Elections Act; and (iii) Lack of a nomination certificate for the Appellant's running mate.

The Appellant challenged this decision with the 3rd Respondent, which upheld the 1st Respondent's decision. The Appellant then sought judicial review in the High Court, claiming that the decisions were illegal, irrational, unreasonable, biased, and violated his legitimate expectations. He cited **Janet Ndago Ekumbo Mbete v. IEBC & 2 Others [2013] eKLR** and **Mable Muruli v. Hon. Wycliffe Ambetsa Oparanya & 3 Others [2013] eKLR** as precedents ignored by the Respondents.

The High Court, under Ngaah J, dismissed the judicial review application on 1 July 2022, stating that judicial review is concerned only with the decision-making process and not the merits of the decision. The Appellant argued on appeal that the learned judge erred by not addressing the recognised grounds of judicial

review, including illegality, irrationality, unreasonableness, bias, and legitimate expectation.

He further contended that judicial review should now include merit review due to changes in the law, particularly the Constitution of Kenya, 2010 and the Fair Administrative Action Act. He cited **Republic v. PPARB ex parte Syner-Chemie [2016] eKLR, Republic v. PPRAB & Others ex parte Kenya Airports Parking Services Ltd [2019] eKLR, Child Welfare Society of Kenya v. Republic & 2 Others ex parte Child in Family Focus, Kenya [2017] eKLR,** and **Judicial Service Commission v. Njora [2021] KECA 366 (KLR).**

The Appellant also argued that the decisions were tainted by bias due to the chairperson of the 3rd Respondent having previously represented the 1st Respondent, relying on ***Leila Konchellah & Others v. Chief Justice & Others*** [2021] eKLR and ***Australian Timeshare and Holiday Ownership Council Ltd and Australian Securities and Investments Commission*** [2008] AATA 62.The 1st and 2nd Respondents opposed the appeal, arguing that the learned judge did not err, and reiterated that judicial review is limited to the decision-making process, not the merits. They cited cases such as **Orange Democratic Movement v. National Treasury & 3 Others [2019] eKLR, Energy Regulatory Commission v SGS Kenya Ltd & 2 Others [2018] eKLR**, **Kenya Pipeline Co Ltd v. Hyosung Ebara Co. Ltd & 2 Others [2012] eKLR,** and **John Florence Maritime Services Ltd & Another v. Cabinet Secretary, Transport & Infrastructure & 3 Others [2021] eKLR** to support their view. The 3rd Respondent aligned itself with the submissions of the 1st and 2nd Respondents, emphasizing that the Appellant had not demonstrated any bias on the part of its chairperson. Consequently, the 3rd Respondent also urged the dismissal of the appeal.

The Court reviewed the judgment of the High Court, the grounds of appeal, the record of appeal, and the submissions by learned counsel, along with the cited authorities. The primary issue was whether the Appellant's application disclosed grounds for judicial review. It was noted that the application, filed in the Judicial Review Division of the High Court, was supported by a statutory statement and verifying affidavit, which are prerequisites for judicial review. Leave was granted, and a substantive notice of motion was subsequently filed, indicating that the application met the criteria for judicial review.

Issues for determination

1. Whether the application addressed recognised grounds of judicial review whereas issues of illegality, irrationality, unreasonableness, bias and legitimate expectation were raised;
2. Whether the applicant was granted leave to commence judicial review proceedings while the application did not disclose grounds for judicial review; (iii)
3. Whether the court erred in finding that judicial review is not concerned with the merits of an impugned decision;
4. Whether the court failed to find that the 1st and 3rd Respondent had themselves concluded that the appellant was compliant as regards nomination by the prescribed number of registered voters in 24 Counties;
5. Whether the court erred in failing to hold that the appellant had satisfied the requirements of Article 148 of the Constitution regarding nomination of the running mate;
6. Whether the court erred in failing to decide and hold that the proceedings before 3rd Respondent were null and void on account of bias; and
7. Whether the court erred in failing to decide and hold that the 1st and 3rd Respondents were bound by precedent from superior courts.

Determination of the court

The Appellant argued that the learned judge erred in finding that the judicial review application did not disclose recognised grounds. The judge had stated that judicial review courts could disturb decisions by quasi-judicial bodies only if the decisions were tainted by grounds such as illegality, irrationality, and procedural impropriety. Proportionality had been accepted later as a ground for judicial review. The learned judge concluded that the Appellant had not substantiated the grounds of illegality and irrationality. However, the Court found that the Appellant's statutory statement and verifying affidavit adequately disclosed grounds for judicial review, including illegality, irrationality, unreasonableness, bias, and legitimate expectation. The Appellant's complaints included allegations of illegality in the qualification for nomination, irrationality in the rejection of his supporters, and bias due to a breach of natural justice.

The Appellant also cited violations of constitutional provisions, including Article 38 (political rights), Article 47 (fair administrative action), and Article 50 (fair hearing), highlighting the High Court's power to issue judicial review remedies

under Article 165(3)(b) of the Constitution as read with Articles 22 and 23.

The Court agreed that the Appellant's application disclosed grounds for judicial review and that the High Court should have decided on these grounds. It was noted that granting leave to apply for judicial review is based on demonstrating a prima facie case without delving into the merits. The purpose of granting leave is to filter out frivolous or undeserving applications.

In **Mirugi Kariuki v Attorney General [1990-1994] EA 156,** it was held that an applicant needs only to show a prima facie case for judicial review. Likewise, **Republic v County Council of Kwale & Another ex parte Kondo & 57 Others [1998] 1 KLR** emphasized that leave is granted if there is an arguable case.

The Court noted that once leave is granted, it cannot be retracted unless specifically challenged on appeal. The 1st and 3rd Respondents did not contest the grant of leave for non-disclosure of grounds.

The Appellant argued that judicial review should now encompass a merit review of the decision, citing cases such as **Communications Commission of Kenya v Royal Media Services & 5 Others [2014] eKLR, IEBC v National Super Alliance Kenya & 6 Others [2017] eKLR, Child Welfare Society of Kenya v Republic & 2 Others ex parte Child in Family Focus, Kenya [2017] eKLR,** and **Judicial Service Commission v Njora [2021] KECA 366 (KLR).** These cases reflect a shift towards a broader interpretation of judicial review under the Constitution of Kenya, 2010 and the Fair Administrative Action Act.

The Court agreed with the Appellant that the learned judge had erred by restricting judicial review to pre-2010 standards, as current constitutional and statutory frameworks support a more comprehensive approach to judicial review.

In the appeal before the court, the core issue was whether the Appellant's complaints were sufficiently justified to warrant overturning the decisions of the 1st and 3rd Respondents, who had determined that the Appellant did not meet the qualifications for presidential candidate registration. The Appellant argued that the decisions were unjustified and sought the court's intervention based on the merits of the case. The court, operating under the powers granted by section 3(2) of the Appellate Jurisdiction Act and Rule 33 of the Court of Appeal Rules, reviewed the decisions. It first considered whether the 1st and 3rd Respondents erred in disqualifying the Appellant for lack of a degree, as required under section 22(2) of the Elections Act. According to Article 82(3)(b) and Article 88 of the

Constitution, Parliament was tasked with legislating on election processes, including candidate nominations, and the 2nd Respondent was responsible for regulating these processes. Section 22 of the Elections Act mandates that a candidate for the presidency must hold a degree from a recognised Kenyan university.

Despite the Appellant's argument that a completion letter from Daystar University and other documents indicated he was as good as having a degree, the court found this insufficient. Regulation 47(1) of the Elections (General) Regulations explicitly requires a certified copy of a degree certificate. The Appellant's documents did not meet this requirement, as the completion letter from Daystar University merely confirmed ongoing studies, and the Commission for University Education's letter, while affirming the degree's recognition, did not authenticate an unawarded degree.

The court evaluated the precedents cited by the Appellant, including **Janet Ndago Ekumbo Mbete v IEBC & 2 Others and Mable Muruli v Wycliffe Ambits Oparanya & 3 Others,** finding them inapplicable due to amendments in regulation and differing factual contexts. The amendment in 2017 to Regulation 47(1), which necessitates a certified copy of the degree, was found to be correctly applied by the Respondents.

The Appellant also challenged the compliance with Article 137(1) of the Constitution concerning the support of at least 2,000 voters from each of a majority of counties. While the Appellant initially satisfied this requirement in terms of numbers, he was found deficient in the quality and verification of the supporting documents. The 1st Respondent identified anomalies in the documents, such as illegibility and incorrect sequencing, which led to the rejection of the nomination.

The court upheld the decisions of the 1st and 3rd Respondents, affirming that their actions were lawful and justified under the electoral laws and regulations. The rejection of the Appellant's nomination was not deemed illegal, irrational, or unreasonable, and the court confirmed that the requirements for nomination had not been adequately met. The Appellant contested the refusal by the 1st Respondent to nominate and register them as a running mate, arguing that the decision was irrational, illegal, and unreasonable. They contended that Article 148 of the Constitution only requires a presidential candidate to nominate a running mate and that there is no requirement for the running mate to be nominated by a political party. However, the court found this interpretation to be based on a selective reading of the relevant constitutional provisions.

Article 148 of the Constitution outlines the requirements for the nomination of a running mate. Clause 1 specifies that each presidential candidate must nominate a person who is qualified for election as President to be their Deputy President. Clause 2 states that there is no separate nomination process for the Deputy President and that Article 137(1)(d) does not apply to Deputy President candidates. Clause 3 mandates that the Independent Electoral and Boundaries Commission (IEBC) shall declare the nominated person as Deputy President if the presidential candidate is elected.

The court identified two key points about Article 148. Firstly, Article 148(1) requires that the running mate must be a person "qualified for nomination for election as President". This necessitates a reference to Article 137(1), which includes four qualifications: the individual must be a Kenyan citizen by birth, qualified to stand for election as a member of Parliament, nominated by a political party or be an independent candidate, and nominated by not fewer than 2,000 voters from each of a majority of the counties.

Secondly, Article 148 exempts the running mate from the requirement in Article 137(1)(d) for voter nomination from multiple counties but does not exempt the running mate from being nominated by a political party or meeting the other qualifications.

The court concluded that the decisions of the 1st and 3rd Respondents were in line with the Constitution and could not be deemed illegal, irrational, or unreasonable. The Appellant's claim of a breach of legitimate expectation was based on the assumption that the law would be consistently applied. The doctrine of legitimate expectation, as elaborated in **Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others [2014] eKLR,** requires that any expectation must be founded on a promise or practice by a public authority that is legally capable of being made. The court found no such promise or practice in this case.

Concerning the allegation of bias, the Appellant argued that the chairperson of the 3rd Respondent was biased due to their previous role as an advocate for the 1st Respondent. The court distinguished between actual bias, where a decision-maker has a financial or proprietary interest in the outcome, and apparent bias, which arises from the decision-maker's conduct suggesting a lack of impartiality. The test for apparent bias is whether a reasonable, fair-minded, and informed observer would have a reasonable apprehension of bias. This test was discussed in cases such as **Attorney General of the Republic of Kenya v Prof. Peter Anyang Nyongo**

& 10 Others, EACJ Application No. 5 of 2007 and R. v S (R.D.) [1977] 3 SCR 484.

The court also referred to **Kalpana H. Rawal v Judicial Service Commission & 2 Others [2016] eKLR** and **President of the Republic of South Africa v South African Rugby Football Union Case CCT No.16 of 1998,** noting that the Appellant had not provided sufficient evidence to establish a reasonable likelihood of bias. The mere fact of previous representation did not meet the threshold for bias.

Ultimately, the court found the Appellant's appeal to be without merit and dismissed it with costs awarded to the Respondents.

Jimi Richard Wanjigi v Wafula Chebukati & 2 Others Supreme Court Petition 19 (E022) of 2022

Supreme Court of Kenya

Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ

Judgment dismissing appeal

Date: 17 February 2023

Bias-failure to supply requisite number of supporters' signatures-requirement of a university degree

Summary of facts

This matter emanated from the judgement and decision of the Court of Appeal delivered on 12 July 2022. That the Appellant was nominated by Safina Political Party as its presidential candidate submitting his documents to the 1st Respondent the returning officer mandated for collection of presidential candidates' documents and list of voters nomination. That upon such presentation the 1st Respondent dismissed the Appellants documents on lack of owning a degree from a qualified university and lack to meet the 2,000 voters' threshold as required in the 24 counties and a lack of a nomination certificate from the Safina's Political Party running mate.

Aggrieved by the 1st Respondent's decision the Appellant lodged a claim with the 3rd Respondent challenging the validity of why the 1st Respondent declined to register him. On 17 June 2022, the committee reached a decision and dismissed the complaint on the grounds that: The Appellant did not comply with the requisites for registration to vie for the position of president in the general elections; The Appellant did not have sufficient supporters as required under the law; The Appellant did not submit a degree as is required under section 22(2) of the Elections Act as read with Regulation 47 (1) of the Elections (General) Regulations 2012; The degree envisaged under section 22(2) of the Elections Act as read with Regulation 47 (1) of the Elections (General) Regulations, 2012 connotes a physical document; and That the Appellant did not submit the nomination certificate in respect of his running mate to the returning officer. No orders of costs were made.

Aggrieved with the decision of the committee the Appellant commenced judicial review proceedings against the Respondents with leave of court seeking to quash the decision of the committee and an order of mandamus to have the IEBC

register his name as a presidential candidate on grounds of illegality, irrationality, unreasonableness, bias and legitimate expectations.

On irrationality and illegality, the Appellant averred that the decision of the 1st and 3rd Respondent was done without due regard to the principles of the Constitution. On un-reasonability the Appellant contended that 1st and 3rd Respondent acted ultra vires the Constitution, section 22 (2) of the Elections Act and Fair and Administrative Act for not being justifiably reasonable in a democratic state.

On bias, the Appellant held that the decision was marred with bias as the as the 1st Respondent appointed Mr. George Murugu as the chairperson of the Committee whereas he had acted for the 1st Respondent as a private advocate in High Court Misc. Application No. E033 of 2021 in which case leave was being sought to institute contempt proceedings against the 1st Respondent.

On legitimate expectation, it was the Appellants submission that the 1st and 3rd Respondent would act on their expectation as per the Constitution. The 1st and 3rd Respondent opposed the allegations on grounds that the Appellant did not adduce a certified copy of degree from a recognized university and that he did not present a list of at-least 2000 voters five days before registration as well as the fact that the law on bias has since changed since 2013 following an amendment.

The 3rd Respondent stated that it was properly constituted in accordance with article 252(1) of the Constitution of Kenya and section 11 and 12 of the IEBC Act. The learned judge dismissed the Application on grounds that, for a judicial review matter the court could not concern itself with the issues of appeal but rather the process at which the decision was arrived at.

Aggrieved with the decision of the High Court, the Appellant lodged an appeal with the Court of Appeal being Civil Appeal E404 of 2020 with ten grounds of appeal however the Court of Appeal summarised the grounds to two issues, whether the application before the High Court disclosed grounds for judicial review and whether if the grounds considered were meritorious for the Court of Appeal to interfere with the 1st and 3rd Respondent decision.

The Court of Appeal dismissed the Appeal on the following findings that on judicial review the judicial review court had the propensity to look into the process making decision and merits of a quasi-judicial administrative decision. On the second issue the Court of Appeal it was held that the Appellant did not adduce a certified copy of degree certificate from a recognized university and that further

he did not adduce the certificate of his running mate as required in law therefore the Appellant failed to meet the threshold of Article 137(1) as read with Section 23 of the Elections Act. Finally on bias the court held that the Appellant did prove any actual bias in applying the test of reasonable apprehension.

Being aggrieved with the decision of the Court of Appeal, the Appellant proceeded to the Supreme Court faulting the Court of Appeal for failure to upload the doctrine of stare decisis, failing to consider the import and effect of section 22 of the Elections Act, misapplying and misinterpreting Article 10 of the Constitution by finding that a regulation can amend a statute, misconstruing and misapplying the Appellants Constitutional rights with respect to Article 38, Failing to consider the misapplication of Article 83(3) as regards the Appellants political right and that administrative decisions ought to assist in election but not deny an eligible citizen to stand for election, misapplying Article 10 by allowing the 1st Respondent appoint a personal advocate to preside over the functions of the 2nd Respondent, misapplying the principle on costs by awarding costs against the Appellant having partially succeeded in the Appeal.

In response, the 1st and 2nd Respondents raised a preliminary objection as to the jurisdiction of the court and filed responses in opposition to the petition. It was the 1st and 2nd Respondent's contention that the Appeal did not raise any matter requiring the interpretation or application of the Constitution as contemplated in Article 163(4)(a) since the Articles raised were not issue neither decided by the courts below.

Further, it was contended that secondly the Appellant had not complied with the provisions of section 22 of the Elections Act and that the impugned precedence was set prior to the amendment of regulations 47(7) and the issue that the impugned precedence addressed was the definition of a graduate as opposed to who is the holder of a degree certificate.

The 1st and 2nd Respondent also contended that the Appellant was non-compliant with Article 137(1) as read with Section 23 of the Elections Act for failing to attain a minimum of at-least 2000 voters in a majority of the counties. Further, the 1st and 2nd Respondent argued that with regard to the Appellant's running mate, pursuant to Articles 148 and 137 of the Constitution, a presidential candidate as well as their running mate had to be persons who qualify for nomination for election as President. Consequently, clearance by the nominating political party was a prerequisite.

On the issue of bias, the 1st and 2nd Respondent contested that it was an after-thought and that the Appellants contestation did not meet the requirement of in the ***Gladys Boss Shollei case*** that stated that there must be reasonable apprehension of bias in the mind of a reasonable, fair minded and informed member of the public. The 3rd Respondent relied on its grounds of objection and written submissions to the Appeal, in full support of the 1st and 2nd Respondent submissions statin that the Appellant did not properly invoke the jurisdiction of the court and that the issues raised are not contemplated under Article 163(4) (a) of the Constitution and that on the issue of bias the Court of Appeal found that nothing had been placed before it to meet the objective test of bias.

Issues for determination

1. Whether this Honourable Court had jurisdiction to hear and determine the appeal under Article 163(4) (a) of the Constitution;
2. Whether the Court of Appeal erred in dismissing the appeal; and
3. Whether the Appellant was entitled to the remedies sought.

Determination of the court

Whether this honourable court has jurisdiction to hear and determine the appeal under article 163(4) (a) of the Constitution

Jurisdiction is a preliminary matter, and if the court lacks it, it need not address other issues. The jurisdiction of the Supreme Court was contested by the Respondents through preliminary objections. The dispute arose from the Appellant's attempt to register as a presidential candidate for the 9 August 2022 general elections. Although the elections were over by the time of the submissions on 18 October 2022, the Appellant sought clarity on the law for future reference.

The Respondents argued that the appeal did not involve constitutional interpretation or application as required by Article 163(4)(a). They claimed that the Appellant's arguments were unsubstantiated and did not qualify for the Supreme Court's jurisdiction. Additionally, the 3rd Respondent argued that the Appellant failed to meet the criteria for certification as a matter of general public importance under Article 163(4)(b) of the Constitution.Conversely, the Appellant contended that the appeal involved questions of constitutional interpretation and application, citing various constitutional articles and the Elections Act. The Appellant argued that the appeal challenges the enforcement of political rights under Article 38 and related provisions.

The Supreme Court's jurisdiction under Article 163(4) is confined to appeals involving constitutional interpretation or application. It cannot extend its jurisdiction beyond what is conferred by the Constitution or legislation. The Court's decisions in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others SC Application No 2 of 2011 [2012] eKLR, Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another, Supreme Court Petition No 3 of 2012 [2012] eKLR,** and **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others** Supreme Court Petition No 10 of 2013 provide guidelines on the jurisdictional scope of Article 163(4)(a). The court has previously held that it could only exercise jurisdiction over appeals that involve constitutional interpretation or application as resolved by lower courts.

In **Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others Supreme Court Petition 45 of 2018 [2020] eKLR**, the court emphasized that invoking constitutional provisions alone was insufficient; the appeal must directly address constitutional interpretation or application issues. Likewise, **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others Supreme Court App No 5 of 2014 [2014] eKLR** affirmed that constitutional issues must be apparent from the appellate court's reasoning.

The Court of Appeal, in its decision, addressed the Appellant's claims concerning qualification as a presidential candidate and dismissed the judicial review application. The Court found that the Appellant's grievances related to factual issues rather than constitutional interpretation. The Court of Appeal also addressed issues related to the requirements for candidacy under Article 137(1) and Section 22(2) of the Elections Act, along with regulatory compliance.

The Supreme Court concluded that the Appellant had not sufficiently demonstrated how the superior courts' decisions involved constitutional interpretation or application. The Appellant's issues primarily concerned factual evaluations rather than constitutional questions. As such, the appeal did not meet the criteria for jurisdiction under Article 163(4)(a), and the Court declined to exercise its jurisdiction.

Regarding costs, the court awarded costs to the Respondents, recognising that the appeal did not meet the jurisdictional criteria under article 163(4)(a) of the Constitution.

Walter Onchonga Mongare v Wafula Chebukati & 2 Others Constitutional Petition No. E318 of 2022

In the High Court of Kenya at Nairobi (Milimani Law Courts)

Coram: Mrima J

Judgment partially allowing petition

Date: 30 June 2022

Summary of Facts

The petition revolved around the issue of qualification to vie for election, wherein the Petitioner alleged that he qualified to vie for the presidential position in the August 2022 election while the Respondent averred that the Petitioner was not qualified on account of academic qualifications. The Petitioner sought conservatory orders restraining the Respondent from publishing the names of persons registered for the presidential position as well as printing of ballot papers as to that effect. The Petitioner averred that he was nominated by Umoja Summit Party as its Presidential candidate for the General election scheduled for the 9 August 2022 and that he was aggrieved by the 1st Respondent the National Returning Officer who revoked his nomination as a candidate for presidential election hence violated the Petitioner's rights and fundamental freedoms guaranteed under the provisions of Articles 1, 10, 27, 38, 47, 50, 81, 137 and 259 of the Constitution.

The Petitioner averred that his academic transcripts and the completion letter from the Daystar University coupled with the letter from the Commission for University Education were sufficient evidence that he is a holder of a degree and as such he had satisfied the requirements in Section 22(2) of the Elections Act.

The 1st Respondent stated that it was within the law that the revocation of the nomination was done and that the 1st Respondent has the mandate to recall the certificate of registration that was erroneously issued. The 1st Respondent stated that the Petitioner did not issue a certified copy of the degree and it was not certain if everything was subject to change and that further, there was a difference between an award of certificate of completion and completion of an academic programme.

The 1st Respondent stated that they should not be faulted for making decisions in law and that in differentiating decision in **Janet Mbete v IEBC & Hassan Joho**

& Another and Mable Muruli v IEBC [2013] eKLR, as relied on by the Petitioner, stated that the decisions were made in 2013 that required that parties render certified copies of their academic qualifications.

Issues of determination

1. Whether the Petitioner was a holder of a degree from a university recognized in Kenya.
2. Based on (i) above, whether the Petitioner was eligible to be nominated as a Presidential candidate.
3. Whether the decision by the 1st and 2nd Respondents to revoke the nomination of the Petitioner as a Presidential candidate infringed Articles 47 and 50 of the Constitution.
4. Whether the Petitioner's rights under Articles 27 and 38 of the Constitution were violated.

Determination of the court

The Court's findings addressed the issues raised in the petition as follows. First, it determined that the Petitioner did not hold a degree from a university recognized in Kenya. Consequently, this finding rendered the Petitioner ineligible for nomination as a Presidential candidate. Despite this, the Court found that the decision by the 1st and 2nd Respondents to revoke the Petitioner's nomination infringed Articles 47 and 50 of the Constitution. However, this constitutional breach did not affect the Petitioner's ineligibility for nomination. The Court also concluded that the Petitioner's rights under Articles 27 and 38 of the Constitution were not violated.

In its final disposition, the Court declared that the revocation of the Petitioner's nomination breached Articles 47 and 50 of the Constitution. The Court dismissed the remaining requests in the Petition and Notice of Motion. Given that the Petition had partially succeeded, it ordered each party to bear its own costs.

Dennis Gakuu Wahome v IEBC & Others Nairobi High Court Petition No. E321 of 2022

In the High Court of Kenya at Nairobi

Coram: Mrima J

Judgment dismissing petition

Date: 12 July 2024

Jurisdiction of the High Court over appeals from the IEBC DRC-whether the DRC violated the Petitioner's Article 50 rights-whether nomination of the 4th Respondent for the position of governor was in violation of Article 193 of the Constitution and section 22 (2) of the Elections Act

Summary of facts:

On 7 June 2022, Sakaja was cleared by the Nairobi County Returning Officer to run for the gubernatorial seat, having presented a Bachelor of Science in Management Degree from Team University in Uganda. Dissatisfied with this decision, Dennis Gakuo Wahome, the Petitioner, lodged a complaint with the Independent Electoral and Boundaries Commission's Dispute Resolution Committee (DRC), questioning the validity of Sakaja's degree qualification.

The DRC, after hearing the dispute, upheld the Returning Officer's decision, finding that he acted within the law in clearing Sakaja. This prompted Wahome to file the present petition, challenging the DRC's decision. The Petitioner contended that Sakaja did not possess a genuine degree certificate and argued that the failure of both the Returning Officer and the DRC to verify the authenticity of the degree was unlawful. Wahome further claimed that the DRC failed to conduct the necessary inquiries and improperly shifted the burden of proof to him.

The Petitioner sought various reliefs from the court, including declarations that the DRC's decision violated his right to a fair hearing, that the nomination of Sakaja was irregular and void, and orders quashing the Returning Officer's decision and removing Sakaja as a candidate for the 2022 election.

The Petitioner, through submissions by Mr. Nyamodi, raised three primary arguments: that the burden of proof was improperly shifted, that fair trial rights were not upheld, and that the 4th Respondent failed to meet the requirements of Article 88 of the Constitution on electoral disputes. On jurisdiction, Mr. Nyamodi argued

that this Court had the authority to hear the matter based on Articles 165(3) and (6) of the Constitution, citing **Diana Kethi Kilonzo v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR.** He also argued that decisions from the 2nd Respondent could be reviewed by the High Court under Article 165, citing **Mohammed Abdi Mohamud v Ahmed Abdullahi Mohammed & 3 others SCEP 7 & 9 of 2018.**

Regarding the issue of res judicata, the Petitioner contended that the 2nd Respondent is distinct from the Court, making the principle inapplicable. The Petitioner objected to the introduction of new evidence by the 4th Respondent, arguing this violated precedent set in **Republic v IEBC ex parte Wavinya Ndeti [2017] eKLR.** Additionally, the Petitioner challenged the 2nd Respondent's handling of evidence, particularly on the burden of proof, stating it shifted inappropriately between the parties. The Petitioner argued that the 2nd Respondent failed to make necessary findings, leaving key issues unresolved.

The Petitioner also asserted that the 4th Respondent did not provide adequate evidence regarding his degree, such as a complete graduation booklet or proof of classmates or lecturers. Furthermore, questions were raised about the authenticity of the degree certificate, citing inconsistencies, including when it was printed. Based on these points, the Petitioner argued that the 4th Respondent's clearance was invalid and cited **Dr. Thuo Mathenge v Nderitu Gachagua & 22 others [2013] eKLR.**

The 1st Respondent, through a Replying Affidavit by Mr. Owiye, defended the 3rd Respondent's decision to register the 4th Respondent, stating that the registration process was lawful and that no complaints were raised at the time. Mr. Owiye argued that the 2nd Respondent made its decision based on the evidence presented at the hearing, and that new evidence introduced by the Petitioner was inadmissible. He further argued that requiring the 1st Respondent to verify the qualifications of all candidates would be a logistical burden. The 3rd Respondent, in their submissions, maintained that they followed legal procedures and that their role was not to verify the authenticity of the 4th Respondent's degree but to ensure the documentation presented was in order.

Both the 1st and 3rd Respondents filed joint submissions, defending their actions and arguing that the dispute before the Court had evolved beyond what was originally presented to the 2nd Respondent. They emphasised that the 2nd Respondent acts as an adversarial body, not an inquisitorial one, and that the Court's jurisdiction was being improperly invoked in this case.

Issues for determination

1. Whether the jurisdiction of the Court has been properly invoked.
2. In the event issue (a) is answered in the affirmative, a brief look at the principles of constitutional interpretation.
3. Whether the proceedings before the DRC were conducted in contravention of Article 50(1) of the Constitution and the applicable principles on burden of proof.
4. Whether the nomination of the 4th Respondent to vie for the position for the Governor, Nairobi City County by the 3rd Respondent was irregular, null and void as the 4th Respondent does not possess the qualifications required by Article 193(1)(b) of the Constitution as read with Section 22(2) of the Elections Act.

Determination of the court

The court addressed the question of whether its jurisdiction had been properly invoked by considering several sub-issues. Firstly, it examined whether the matter was res judicata, whether the challenge to the impugned decision of the IEBC Dispute Resolution Committee should have been made strictly by appeal, and whether the petition met the required precision threshold.

To begin, the court reviewed the concept of jurisdiction, drawing on the Court of Appeal's decision in **Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others** and **County Government of Embu & Another v Eric Cheruiyot & 15 Others [2022] eKLR**, where it was affirmed that jurisdiction is fundamental and must be established before a court can make any determination. The doctrine of jurisdiction, as articulated by John Beecroft Saunders, requires that a court's authority to adjudicate matters must be clearly defined by statute, charter, or commission. The Supreme Court in In the Matter of ***Interim Independent Electoral Commission*** **[2011] eKLR** and ***Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 Others*** **[2012] eKLR,** reiterated that a court's jurisdiction is derived from the Constitution or legislation and cannot be extended beyond what is granted by law.

Turning to the sub-issues, the court first considered whether the matter was res judicata. It noted that the doctrine of res judicata, as enshrined in Section 7 of the Civil Procedure Act, prohibits the re-litigation of issues that have been previously decided by a competent court. The Supreme Court in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport** and **Infrastruc**

ture & 3 Others [2021] eKLR provided guidance on the application of res judicata, stating that the doctrine applies to constitutional petitions, but only in the clearest and rarest of cases. The Court reaffirmed that to invoke res judicata, the following must be proven: a final judgment on merit, the judgment was rendered by a court with jurisdiction, and the parties and issues must be the same.

In assessing whether the doctrine of res judicata applied, the court examined whether the issues in the current matter were identical to those in the previous suit. The Supreme Court observed that while the initial suit was a judicial review application, the subsequent constitutional petition raised additional issues. Therefore, the Court concluded that the doctrine of res judicata did not bar the current petition. Further, the Supreme Court elaborated on exceptions to the doctrine of res judicata, emphasizing that a court may make exceptions if not applying the doctrine would result in substantial injustice or if special circumstances warrant a different approach. The court highlighted principles from **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR** and **Okiya Omtatah Okoiti & Another v Attorney General & 6 Others [2014] eKLR,** which indicate that while res judicata prevents the re-litigation of matters, its application in constitutional cases is more restricted and should only be applied in clear and unequivocal cases.

The issue regarding whether the challenge to the DRC's decision should have strictly been by way of appeal was addressed by the Supreme Court. The Court had clarified in **Sammy Ndung'u Waity v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR** that the High Court was empowered to exercise jurisdiction when a party was aggrieved by a decision of the DRC. The apex Court had outlined two methods for challenging such decisions: through judicial review or under the High Court's supervisory jurisdiction. According to Black's Law Dictionary, 10th Edition, 'supervisory control' referred to the authority exercised by a higher court over a lower court, including prohibiting the lower court from exceeding its jurisdiction and reversing its actions. US Legal Inc. had defined 'supervisory jurisdiction' as the power of superior courts to oversee subordinate courts to ensure they operated within their jurisdictional limits and to prevent overreach. In **Mohd Yunus v Mohd Mustaqim (1983) 4 SCC 566,** the Indian Supreme Court had noted that the supervisory jurisdiction under Article 227 of the Indian Constitution was confined to ensuring that an inferior court or tribunal acted within its authority. The Court had emphasized that this jurisdiction did not extend to correcting mere errors on the record or minor legal errors.

The High Court of Australia in **Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1** had held that supervisory jurisdiction was a defining characteristic of the court that could not be overridden by statute. In Kenya, Article 165(6) of the Constitution had conferred the High Court with supervisory jurisdiction over subordinate courts and other bodies performing judicial or quasi-judicial functions, excluding superior courts.

The supervisory jurisdiction of the High Court was thus aimed at ensuring subordinate bodies operated within their prescribed powers. This jurisdiction allowed the High Court to not only quash or set aside impugned proceedings or orders but also to issue appropriate directions based on the case's facts and circumstances. The Court had confirmed that this jurisdiction was constitutionally protected and could not be removed by statute.

Supervisory jurisdiction was distinct from appellate jurisdiction, which involved reviewing and potentially altering decisions based on law and evidence. Unlike supervisory jurisdiction, appellate jurisdiction did not entail general oversight over lower courts but was confined to the specific matter at hand.

In the present case, there was no explicit legal provision for appealing DRC decisions, unlike decisions of the Political Parties Disputes Tribunal, which were appealable to the High Court and then to the Court of Appeal. The Court had suggested that this area might require legislative reform.

Consequently, the Court rejected the argument that challenging the DRC's decision could only be done through an appeal, finding this position legally untenable.

Regarding the precision threshold of the Petition, the Court had reiterated that the proceedings were initiated as a Constitutional Petition under Article 165(3) and (6) of the Constitution, among other provisions. This distinction set the proceedings apart from judicial review, though the Petition also sought orders similar to judicial review under Article 23(3) of the Constitution.

Courts had historically stressed the importance of clear pleadings in Constitutional Petitions. In **Anarita Karimi Njeru v Republic (1979) KLR 154,** it was underscored that a petition must establish a clear link between the aggrieved party, the alleged constitutional violations, and the manifestations of these violations. This principle was intended to provide a solid foundation for constitutional dispute resolution.

With the promulgation of the Constitution in 2010, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly known as the Mutunga Rules) provided detailed guidelines on petition contents. The Supreme Court in **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR** had reiterated that a Petitioner needed to clearly demonstrate the rights infringed and the basis of their grievance, as established in **Anarita Karimi Njeru v Republic (1979) KLR 154.**

The South African Constitutional Court in **Fredricks & Others v MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81 (CC)** described constitutional issues as encompassing disputes on the constitutionality of laws or conduct and issues related to the status, powers, and functions of state organs. Likewise, in the United States, a constitutional issue involved any matter challenging the protections set out in the Constitution.

Therefore, a constitutional issue was required to show a connection between the aggrieved party, the constitutional provisions alleged to be violated, and the manifestation of such violations. As articulated by Langa J in **Minister of Safety & Security v Luiters (2007) 28 ILJ 133 (CC),** the focus was not solely on the success of the argument but on whether it compelled the Court to address constitutional rights and values.

Upon reviewing the Petition, it was noted that it was structured into six parts: description of the parties, factual background, the Petitioner's locus standi and court jurisdiction, legal foundation, constitutional violations, and reliefs sought. The Petition effectively linked the aggrieved party, constitutional provisions, and alleged violations. It met the requirements of Rule 10(1) and (2) of the Mutunga Rules and aligned with the standards set in **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR,** thus warranting consideration on its merits.

The Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others [2012] eKLR** had confirmed that a Court's jurisdiction was conferred either by the Constitution or statute. In this case, the Constitution granted the Court supervisory jurisdiction over the issues raised.

Having addressed the sub-issues in favour of the Petitioner, the Court affirmed its jurisdiction over the matter and proceeded to examine the remaining issues.

The proceedings before the Dispute Resolution Committee (DRC) were scrutinised for whether they were conducted in contravention of Article 50(1) of the Constitution and applicable principles on the burden of proof.

Two sub-issues emerged from this query: first, whether the DRC properly managed the burden of proof; and second, whether the DRC's proceedings violated Article 50(1) of the Constitution.

To address whether the DRC correctly handled the burden of proof, the Court began by establishing the legal principles surrounding this issue. The Supreme Court had previously clarified the burden of proof in **Raila Amolo Odinga & Another v IEBC & 2 Others Presidential Election Petition No. 1 of 2017 [2017] eKLR**, stating that the burden of proof, or "onus probandi," is a legal duty placed on one party to prove the facts in dispute. The Court reiterated that the common law principle required the Petitioner to substantiate their claims with credible evidence, and this legal burden remained constant throughout the trial. The evidential burden, however, could shift depending on the evidence presented.

The Court noted that the legal burden of proof is fixed and rests on the party initiating the claim. In contrast, the evidential burden shifts based on the evidence presented by both parties. Once a Petitioner provides sufficient evidence to challenge an election, the burden shifts to the Respondent to counter this evidence.

The Court then reviewed the nature of the complaint before the DRC. The Petitioner had alleged that the 4th Respondent did not meet the constitutional and statutory educational requirements, claiming that the 4th Respondent's degrees were fraudulent. The Petitioner had also provided an affidavit detailing these allegations and requested that criminal proceedings be initiated against the 4th Respondent for fraud.

To determine whether the DRC had jurisdiction over these allegations, the Court assessed the DRC's handling of the burden of proof and the compliance with Article 50(1) of the Constitution. The DRC's process and the handling of evidence were crucial in establishing whether the proceedings were conducted fairly and in accordance with the law.

The jurisdiction of the Dispute Resolution Committee (DRC) is defined by Article 88(4)(e) of the Constitution and Section 74 of the Elections Act. According to Article 88(4)(e), the Independent Electoral and Boundaries Commission (IEBC) is tasked with settling electoral disputes related to or arising from nominations,

excluding those after the declaration of election results. Section 74 of the Elections Act further specifies that the IEBC is responsible for settling disputes arising from nominations, with a mandate to resolve such disputes within ten days, or before the relevant nomination or election date.

Additionally, the Political Parties Disputes Tribunal, established under the Political Parties Act, has jurisdiction over disputes between party members, between a member and a party, between political parties, between independent candidates and parties, and coalition partners, as well as appeals from the Registrar's decisions. The Tribunal's jurisdiction does not extend to disputes unless internal party resolution mechanisms have been attempted.

The Supreme Court has addressed the jurisdiction of the DRC, the Political Parties Disputes Tribunal, and election courts in several cases, including ***Silverse Lisamula Anami v. Independent Electoral and Boundaries Commission & 2 Others SC Petition No. 30 of 2018, Sammy Ndung'u Waity v. Independent Electoral & Boundaries Commission & 3 Others, and Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR.*** The DRC is thus empowered to handle election disputes except those arising after election results are declared or falling under the Political Parties Disputes Tribunal's jurisdiction. It is a quasi-judicial body, responsible for addressing allegations including academic qualifications of candidates.

In evaluating whether a complaint is proven, the standard of proof is crucial. The Supreme Court in **Presidential Election Petition No. 1 of 2017 Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR** has noted that the standard of proof in electoral disputes is higher than the balance of probabilities but lower than beyond reasonable doubt, with criminal allegations requiring proof beyond reasonable doubt.

In the case at hand, the DRC was tasked with evaluating allegations of criminal activities, including fraud and forgery, related to a candidate's academic qualifications. The evidence presented by the Petitioner included various documents and affidavits, which were ultimately deemed insufficient to meet the standard of proof beyond reasonable doubt. The DRC's judgment found that the Petitioner had not adequately proved the criminal nature of the allegations, nor provided sufficient evidence to shift the burden of proof to the Respondent. The Court concurred with the DRC's finding, affirming that the complaint lacked proof and that the DRC had appropriately handled the burden and standard of proof in its decision.

The issue under consideration is whether the proceedings before the DRC contravened Article 50(1) of the Constitution, which guarantees the right to a fair trial. The Petitioner argued that their fair trial rights were infringed when the DRC expunged supplementary affidavits filed on 12 and 15 June 2022. Article 50(1) ensures that disputes are resolved through a fair and public hearing before an independent and impartial tribunal or body.

The Supreme Court in **Raila Odinga & 5 Others v IEBC and 3 Others [2013] eKLR** outlined the legal position on admitting additional evidence filed outside statutory timelines. The court must ensure compliance with timelines and maintain fairness, considering the nature and impact of new evidence on the proceedings. Likewise, the Court in **Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another [2018] eKLR** emphasised procedural fairness in both criminal and civil cases, including the right to be heard, the right to legal representation, and the right to a public hearing.

In the present case, the DRC expunged the Petitioner's supplementary affidavits on the day of the hearing, opposing their inclusion. The DRC's decision was based on several factors, including the time-bound nature of the election dispute, the introduction of new evidence, and the sub-judice doctrine. The DRC noted that including the new evidence would affect the statutory timelines and the proceedings' integrity, particularly since the new evidence was already being contested in another court.

The Court concluded that the DRC's decision to expunge the affidavits did not infringe the Petitioner's fair trial rights under Article 50(1) of the Constitution. The Court's ruling was based on the need to maintain procedural integrity and the statutory deadlines.

Additionally, the Court addressed whether the nomination of the 4th Respondent by the 3rd Respondent was irregular. The 3rd Respondent, the Returning Officer, provided evidence showing compliance with legal requirements for nomination. The Court found that neither the Constitution nor the law imposes a duty on the IEBC to verify the authenticity of documents presented by candidates. The Court maintained that the IEBC and its officers do not have the mandate to conduct forensic analysis or additional verification beyond the documentation provided.

The Court reaffirmed that the 3rd Respondent did not err in clearing the 4th Respondent for the gubernatorial position and dismissed the Petition with costs.

Republic v Wavinya Ndeti & 4 Others Ex – Parte Gideon Ngewa Kenya & Kisilu Mutisya Judicial Review No. 3 of 2022

In the High Court of Kenya at Machakos

Coram: GV Odunga J.

Judgment dismissing application

Date: 18 July 2022

Authentication of university degree qualifications-burden of proof-whether IEBC was obligated to authenticate degree qualifications before clearing a candidate

Summary of facts:

The Applicants in this matter challenged the nomination and registration of the 1st Respondent herein, Wavinya Ndeti for the position of governor Machakos County on the grounds that despite the 1st Respondent's clearance, Wavinya Ndeti was not a holder of a degree recognised in Kenya as per the provisions of Section 22 of the Elections Act 2011.

This is because between September 1989 to July 1990, Wavinya Ndeti studied as a full-time student at South Bank University now London South Bank University and was awarded a Graduate Diploma on 12 July 1990 without having completed a first Degree yet a Graduate Diploma is a short course taken after completion of a first Degree. In a sudden turn of events, on 6 November 1992, Wavinya Ndeti purportedly obtained a Master of Science Degree (MSc) in Business systems analysis and design by the City University, London using the 1990 diploma in a Computer Science.

On 18 July 1995, she claimed to have obtained a Bachelor's Degree (BSc) in Computing Studies from South Bank University London as Wavinya Oduwole. According to the applicants, undertaking a degree after being awarded a master's degree in a closely related subject is impracticable.

Later, on 25 January 1996 and 26 July 1996, the 1st Respondent claimed to have obtained two Master's Degrees in Marketing and Strategic Information Designs from Heriot-Watt University as Petti Wavinya Oduwole. It was averred that from the above and taking into account the UK educational system, the 1st Respondent obtained a Master's Degree in 1992 and after three years obtained a Bachelor's

Degree in 1995 without a first Degree. Further, she also obtained two Master's Degree within 6 months of each other and after 6 months of being awarded a Bachelor's Degree.

It was the Applicants' position that on a keen look at the 1st Respondent's academic certificates, it is hard to ascertain who Wavinya Ndeti, Wavinya Oduwole and Petti Wavinya Oduwole were because in an affidavit of names submitted to the 2nd Respondent for clearance, she fails to confirm that Petti Wavinya Oduwole in her certificates is also her name. Therefore, in their Notice of Motion dated 28 June 2022 the ex parte applicants, Gideon Ndegwa Kenya and Kisilu Mutisya, sought several orders. First, they sought an order of Certiorari quashing the decision of the 2nd Respondent Dispute Resolution Committee dated 16 June 2022 in IEBC/DRC/CRGE/56/2022: Gideon Ndegwa Kenya & Another versus Hon. Wavinya Ndeti clearing the 1st Respondent to run for the position of Governor, Machakos County in the General Elections scheduled for 9 August 2022. They also sought an order of Mandamus compelling the 1st Respondent to verify her Bachelors and Master's degrees via a link used for verification of degrees issued by any institution in the United Kingdom. Further they prayed for an order of mandamus compelling the 2nd Respondent whether by itself, servants or agents to strike out the 1st Respondent's name from the list of cleared gubernatorial candidates to vie for governor, Machakos County in the General Elections scheduled for 9 August 2022. The applicants also prayed for an order of Prohibition restraining the 3rd Respondent, Commission of the University Education, from recognizing the academic qualifications of the 1st Respondent until investigations into the 1st Respondent's academic qualifications were conducted and a determination on their authenticity made. In addition, they prayed for an order of Mandamus be issued compelling the 3rd Respondent Commission of the University Education, to revoke the recognition of the 1st Respondent's Bachelor's and Master's Degree obtained in 1995 and 1992 respectively as well as the 1st Respondent's Graduate Diploma of 1990. Further, the applicants sought an order of Mandamus compelling the 4th Respondent, the Director of Public Prosecutions to order investigations and/or determine the authenticity and validity of the academic certificates presented by Wavinya Ndeti. Finally, they prayed for an order of Mandamus compelling the 5th Respondent's Department of Recognition, Equation and Verification to verify the academic credentials of the 1st Respondent.The 1st Respondent opposing the application averred that the instant Application was an abuse of the court process, an afterthought and merely political witch-hunt meant to derail my campaigns and to curtail her political rights and her entitlements to protection under the law.

According to the 1st Respondent, the Applicants having failed to prove and discharge the burden of proof at the Dispute Resolution Committee on their allegations of fraud and forgery, could not now purport to use these proceedings to attempt to fill the gaps in their case or invite this Court to sit as an investigative organ. She explained that the Dispute Resolution Committee rightly dismissed the Applicants' Complaints for not only want of jurisdiction but lack of merit as the Applicants never discharged the burden and standard of proof in regard to the allegations of fraud and forgery. Based on legal advice, she averred that allegations of fraud and forgery could not be proven on the basis of circumstantial evidence or baseless aspersions as the same must be proven through cogent and concrete evidence beyond a standard of reasonable doubt to warrant a finding on the same. However, no such materials have been placed before this Court to warrant such a finding or the grant of the orders sought herein.

According to the 1st Respondent, the Applicants have diverged from their appeal and have failed to demonstrate in what way the Dispute Resolution Committee erred in any way either in law and in fact in their decision rendered on 19 June, 2022 in IDRC/DRC/CRGE/56/2022; **Gideon Ndegwa Kenya and Another v Wavinya Ndeti.** According to her, the jurisdiction of this Court that has been invoked is appellate in nature and not original and hence the Applicants are limited and confined to the decision and materials that were placed before the Dispute Resolution Committee for hearing and determination.

It was the 2nd Respondent's position that the 2nd Respondent's mandate is specifically enshrined in the Constitution under Article 88 of the Constitution 2010 as read with Section 74 of the Elections Act, 2011 which mandate does not include authenticating academic certificates hence the 2nd Respondent together with its Dispute Resolution Committee lacks power to investigate and/or determine the validity or otherwise of the certificates presented by intending candidates as long as on the face of it, the candidate presents a prima facie valid document.

On behalf of the 4th Respondent, reliance was paced on Article 157(4) of the Constitution and it was contended that the Director of Public Prosecutions has no power to order investigations, but only to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct be that as it may, the DPP cannot in the alternative, as prayed by the ex parte applicant, arrogate to himself the power to determine the authenticity and validity of the academic certificates presented. Having considered the application, the affidavits both in support of and in opposition to the application, the grounds

of opposition as well as the submissions and authorities cited, the judge noted that one of the grounds for grant of judicial review relief is unreasonableness of the decision being challenged.

The judge relied in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** where the parameters of judicial review were set out by the Court of Appeal as follows;

> *Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision that has already been made; it can only prevent the making of a contemplated decision... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice, or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.*
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> *The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, that imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles*

> *mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is a wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.*

Equally, ***in R v Hangsraz Mahatma Gandhi Institute & 2 Others*** **[2008] MR 127** it was stated that:

> *Judicial Review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision-making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It had to be borne in mind and which had been reiterated by the court that it is not its role to substitute itself for the opinion of the authorities concerned. Therefore, the court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However, it would intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the Wednesbury sense; had acted in an unfairly manner and the applicant was not given a fair treatment.*

The court noted that it was now recognised that one of the grounds for grant of judicial review relief was unreasonableness of the decision being challenged. This was clearly a deviation from the traditional common law approach that what is to be considered is the process by which the decision is arrived at rather than the decision itself. An examination of whether or not a decision is unreasonable clearly

called for some measure of consideration of the merits of the decision itself though not in the manner contemplated by an appellate process.

The learned judge referred to the case of ***Republic v Kenya National Examinations Council ex parte Gathenji & others*** **Civil Appeal No.266 of 1996** where the court set out the parameters of judicial review as follows:

> *Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which already been made; it can only prevent the making of a contemplated decision. Prohibition is an order from the High Court directed to an inferior tribunal or body which*
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> *forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings*

In ***Municipal Council of Mombasa v Republic &Umoja Consultants Ltd*** **Civil Appeal No. 185 of 2001** the Court held that judicial review is concerned with the decision making process, not with the merits of the decision itself; the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.

The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision

Issue for determination

1. Whether the 2nd Respondent can investigate the authenticity of a university degree

Determination of the court

According to the Applicants the Dispute Resolution Committee failed to deal with their complaint stating that it had no jurisdiction to do so since the allegations raised disclosed suspicion as to the authenticity of the academic qualifications of Wavinya Ndeti. According to the 2nd Respondent, its mandate as enshrined in the Constitution under Article 88 thereof as read with Section 74 of the Elections Act 2011 did not include authenticating academic certificates hence the 2nd Respondent together with its Dispute Resolution Committee lack power to investigate and/or determine the validity or otherwise of the certificates presented by intending candidates as long as on the face of it, the candidate presents a prima facie valid document.

According to the 2nd Respondent, pursuant to Section 4 as read with Section 5 of the Universities Act No 40 of 2012, that mandate was a preserve of the Commission for University Education, the 3rd Respondent herein. Hence, no single piece of legislation bestowed upon the 2nd Respondent or its organs and/or committees the mandate to recognize and/or fail to recognize academic certificates of candidates. It was therefore clear that the powers to recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions rested with the 3rd Respondent.

The judge stated that the Applicants did not cite any statute that compels the 2nd Respondent to make a decision as regards the recognition or equation of university degrees. They however relied on Regulation 47 of the Election (General) Regulations 2012, which the judge did not find any power conferred upon the 2nd Respondent to recognise or equate university degree.

The judge associated himself with the decision of ***Mrima J in*** **Dennis Gakuu Wahome v The Independent Electoral and Boundaries Commission and others Petition E321 of 2022** found that the 2nd Respondent has no power to recognise or equate university degrees and therefore cannot be compelled to investigate the authenticity of a university degree that is already recognised by the 3rd Respondent. The judge found that the Applicants failed to meet the threshold for grant of orders sought. The Application was therefore dismissed.

POLITICAL RIGHTS OF MARGINALISED GROUPS AND MARGINALISED COMMUNITIES

Centre for Minority Rights Development (CEMIRIDE) & 2 Others v Attorney General & 2 Others; Independent Electoral and Boundaries Commission (Interested Party) Machakos Petition No E002 of 2022

In the High Court at Machakos

Coram: GV Odunga J

Judgement Allowing Petition

Date: 4 April 2022

Whether the Integrated Political Parties Management System (IPPMS)restricted political rights of marginalised groups and communities-whether there was a lack of public participation and civic education before introduction of IPPMS-whether IPPMS restricts rights of persons without internet due to lack of necessary infrastructure from enjoying political rights

Summary of the facts:

The Petitioners are a Civil Society Organisation focused on advocating for the recognition of minorities and indigenous peoples and their rights in political, legal, economic, and social processes in Kenya, as well as individual Kenyans from pastoralist indigenous communities. The 1st Respondent was sued in his capacity as the principal legal advisor to the Government of the Republic of Kenya, as provided under Article 156 of the Constitution of Kenya, 2010. The 2nd Respondent is a State Office tasked with regulating the formation, registration, and funding of political parties in accordance with the Constitution of Kenya, 2010, and the rule of law. The 3rd Respondent was the Cabinet Secretary for the Ministry of Information, Communication and Technology, responsible for the State department dealing with information technology, communication, and media. The Interested Party, the Independent Electoral and Boundaries Commission (IEBC or the Commission), was established by Article 88 of the Constitution and was responsible for managing the country's electoral processes and ensuring free, fair, and transparent elections. The Petitioners initiated this Petition on behalf of themselves and the public, aiming to actualise the human rights provisions of the Constitution of Kenya 2010 and protect the rights of minority and indigenous peoples.

They challenged the Integrated Political Parties Management System (IPPMS), which was launched on 10 November 2021 on the e-Citizen platform by the Office of the Registrar of Political Parties and the Ministry of Information, Communications, and Technology. The IPPMS was designed to manage political parties' membership registers and provide services such as checking membership status and joining or resigning from parties.

The Petitioners argued that the digitisation of these services adversely impacts the political rights of minorities and indigenous peoples, who face historical marginalisation and limited access to technology. They contended that the IPPMS exacerbates this marginalisation by further restricting access to political participation for those without reliable internet access. They highlighted census data showing low internet usage in areas predominantly inhabited by these communities, such as Turkana, Garissa, Wajir, and Bunyala.

The Petitioners also asserted that the government's lack of public participation and sensitisation before rolling out the IPPMS violated constitutional principles aimed at ensuring equitable access to services and rights for all citizens. They argued that the system's implementation without addressing these concerns undermines the Constitution's goals and exacerbates existing inequalities.

To support their claims, the Petitioners referenced various constitutional provisions, including Articles 2(5), 6(3), 10, 19, 20, 21, 27, 35(1)(a), 38(1), 48, and 56(a), as well as international human rights instruments such as the Universal Declaration of Human Rights (UDHR). They also cited the decision in **Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya 276/2003** and various provisions of the Political Parties Act 2011 to argue that the IPPMS's impact on minority and indigenous communities violates their constitutional rights and international human rights standards.

The Petitioners cited multiple international and regional instruments to support their claims. They referenced the International Covenant on Civil and Political Rights (ICCPR), highlighting Article 2(1) which mandates states to respect and ensure the rights recognised in the Covenant without discrimination. They also pointed to Article 2(3), which guarantees an effective remedy for rights violations, and Article 25, which ensures citizens' right to participate in public affairs. Article 26 further reinforces equality before the law and protection from discrimination.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was also cited, particularly Article 1(2), which obligates states to guarantee that rights enunciated in the Covenant are exercised without discrimination. Equally, the African Charter on Human and Peoples' Rights (ACHPR) was invoked, with emphasis on Article 3 (equality before the law), Article 9(1) (right to receive information), and Article 19 (equality before the law and respect for rights).

The Petitioners contended that the IPPMS violated several provisions of the Kenyan Constitution, including Article 6(3), which guarantees reasonable access to services, and Article 10, which mandates state actions to promote democracy and inclusivity. They argued that reducing the services of the Office of the Registrar of Political Parties to an online system limited the ability of minorities and indigenous communities to fully enjoy their political rights.

They also challenged the IPPMS under Article 27, which prohibits discrimination and mandates equal protection of the law, asserting that the system discriminates against those without access to technology. Article 35, which provides the right to access information held by the State, was cited as being compromised by the IPPMS, as it potentially restricts access to information to those with internet connectivity.

Article 38, which guarantees the right to participate in political activities, and Article 56, which imposes a duty on the State to implement affirmative action for minorities and marginalized groups, were highlighted as being infringed by the IPPMS. The Petitioners argued that the lack of technological access would prevent these communities from participating in political processes and the upcoming general elections. The Petitioners sought several reliefs: a declaration that the State is obliged to uphold the rights in the Bill of Rights, an order to suspend the IPPMS until adequate protective legislation is in place, and measures to ensure the enjoyment of political rights by minorities and indigenous peoples. They also sought any other orders the Court deemed just and appropriate, with costs to be in the cause. Affidavits from Nyang'ori Ohenjo, William Sipai, and Noah Kitarpei Matunge supported the petition, detailing the impact of the IPPMS on communities with limited technological access. They claimed that the IPPMS posed a risk to the political rights of minorities and indigenous groups, arguing that the system's implementation without adequate public participation and technological considerations violated constitutional and international rights. The Petitioners concluded that unless the IPPMS is declared unconstitutional, these communities would face ongoing discrimination and disenfranchisement.

In their submissions, the Petitioners contended that the central issue in their case was the violation of political rights and the right to participate in governance due to the implementation of the IPPMS. They argued that this system had a detrimental impact on minority and marginalized groups, infringing on their sovereignty and self-determination. The Petitioners claimed that the IPPMS, including online platforms like E-citizen, created significant barriers for these groups. They highlighted challenges such as limited internet access, system inefficiencies, and difficulties with party switching or voter registration.

The Petitioners noted that the IPPMS system led to violations of privacy and political rights, with individuals finding themselves registered in political parties without consent and facing lengthy processes to deregister. They asserted that these issues disproportionately affected those with limited internet access, further exacerbating existing inequalities. They maintained that the system's flaws impeded fair participation in political processes, especially for marginalized communities.

The Petitioners emphasised that the Constitution mandates affirmative action to ensure political participation for marginalized groups and argued that the lack of legislative and regulatory measures to protect these groups in the IPPMS implementation undermined their constitutional rights. They referred to various legal precedents and international agreements supporting their claim for a more inclusive approach and asserted that the judiciary should ensure the system's fairness and constitutional compliance.

They also criticised the lack of meaningful public participation in the IPPMS implementation, arguing that it led to systemic marginalisation. They called for the suspension of the IPPMS until a more inclusive and fairer framework was established. Lastly, the Petitioners requested that the Respondents bear the costs of the petition, claiming that the system's implementation and failures had caused significant harm to marginalized communities. The 1st and 3rd Respondents argued that the Application was an attempt to revive a previously denied petition and sought orders already refused by the court. They contended that the Applicants had not demonstrated how their participation was necessary for proper representation of their interests, given that the petition was a public interest case with a judgment in rem. They further claimed that the Applicants' arguments merely repeated the Petitioners' claims and did not present any exceptional circumstances warranting their inclusion. The Respondents also argued that adding the Applicants would delay the proceedings and increase litigation costs.

Jerome Ochieng, Principal Secretary in the State Department of ICT and Innovation, provided an affidavit highlighting the significance of digital technologies. He asserted that the IPPMS, a digital platform, was similar to other platforms used by Petitioners and that the use of digital platforms had not entirely replaced manual records. Ochieng contended that there was no constitutional violation or prejudice arising from the IPPMS and requested the dismissal of the petition with costs.

The 2nd Respondent opposed the petition with a replying affidavit from Daniel Kinuthia, Director of Compliance. Kinuthia cited **Nubian Rights Forum & 2 others vs. Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR** and **Republic vs. Independent Electoral and Boundaries Commission ex parte Gladwell Otieno & Anor [2017] eKLR** to support the argument that the IPPMS did not discriminate against minorities or indigenous communities. He referenced Section 33 of the Political Parties Act, which mandates the 2nd Respondent to maintain a register of political party members and verify membership lists. The affidavit explained that the IPPMS was developed to manage political party records efficiently, with involvement from stakeholders, and that manual registration options were also available.

Kinuthia also referenced Articles 38(1), 91(1)(a), and Sections 4A(a), 7(2)(a), and (b) of the Political Parties Act to argue that the IPPMS complied with constitutional and legal requirements. He stressed that interfering with the 2nd Respondent's mandate would undermine the statutory framework and disrupt legal timelines for party nominations. The 2nd Respondent requested that the petition be dismissed with costs.

The Interested Party, the Independent Electoral and Boundaries Commission (the Commission) opposed the petition on several grounds. It argued that the petition, as presented, did not disclose a cause of action against the Interested Party, rendering it legally defective, frivolous, and an abuse of court process, thus warranting dismissal with costs. The Commission further contended that the petition contravened established legal standards, including Section 34(da) of the Political Parties Act, Section 28A of the Elections Act, and Sections 23 and 24 of the Political Parties (Amendment) Act, 2022, which govern the maintenance of political party membership registers and the use of technology in nominations. The Commission asserted that the register maintained by the 2nd Respondent is the final record of party memberships, and the concept of using "other alternative means" for nominations is not legally supported.

The Commission argued that the Petitioners failed to meet the criteria for conservatory orders and that the orders sought would adversely affect the 2nd Respondent's ability to fulfil its legal duties, such as ensuring compliance with nomination laws and verifying membership lists. The Commission also noted that suspending the Integrated Political Parties Management System (IPPMS) would result in no legally accepted membership register, hindering lawful nominations.

In addressing claims regarding the impact of digitisation on minorities and indigenous communities, the Commission argued that these groups are not excluded from party primaries and that manual registration options are available. It claimed that suspending the IPPMS would impede the verification and certification of membership lists, potentially leading to unlawful nominations.

In response to allegations that the use of technology is unconstitutional, the Commission referenced several precedents, including **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR, Katiba Institute & 3 Others v Attorney General & 2 Others [2018] eKLR** and **Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC Nairobi Election Petition 14 of 2017.** These cases emphasise the importance of technology in maintaining electoral transparency and integrity. The Commission maintained that the use of technology, as mandated by the Political Parties Act, is essential for upholding electoral integrity and transparency.

The Commission also argued that the 2nd, 3rd, and 4th Interested Parties introduced new issues not raised by the Petitioners, specifically regarding the use of the IEBC register for party nominations. It maintained that only the certified party register is legally valid for nominations and that alternative means or registers are not legally recognised.

In conclusion, the Commission requested the court to dismiss the petition with costs, arguing that the Petitioners had not sufficiently demonstrated a breach of their rights or freedoms and that suspending the IPPMS would undermine the integrity of the nomination process.

Issues for determination

1. Whether by developing the IPPMS the state did restrict the rights of those who are unable to access internet services due to lack of the necessary infrastructure from fully enjoying their political rights.

2. Whether failure to engage in public participation and civic education with civil society organisations dealing with marginalised communities and their rights before launching the integrated political parties' management system deprived the communities of opportunities for self-expression in their political affairs.
3. Whether by developing the IPPMS the state did restrict the rights of those who are unable to access internet services due to lack of the necessary infrastructure from fully enjoying their political rights.

Determination of the court

The petition addressed the launch of the Integrated Political Parties Management System (IPPMS) on 10 November 2021 by the Office of the Registrar of Political Parties in conjunction with the Ministry of Information, Communications, and Technology (ICT) on the State's e-Citizen platform. The launch of this system, which was undisputed, aimed to manage political party records more efficiently and effectively, aligning with Article 82(1) of the Constitution. This article requires Parliament to enact legislation for the nomination of candidates and the regulation and supervision of elections and referenda.

The 2nd Respondent contended that, pursuant to Article 82(2) of the Constitution, the Political Parties Act was enacted to regulate political parties and ensure transparent nomination processes. Section 34 of the Political Parties Act mandates the 2nd Respondent to register, regulate, and supervise political parties, maintain a register of party members, and ensure no person is a member of more than one party. Section 34B(1) empowers the 2nd Respondent to use technology, specifically establishing a political parties management information system, to process party data. The 2nd Respondent argued that the IPPMS is legally grounded in the Political Parties Act, which prescribes in Section 38C that the register used for party nominations must be verified and certified by the 2nd Respondent.

The Petitioners did not dispute the need for the IPPMS but argued that it was developed without considering the necessary infrastructure to protect the fundamental rights of marginalized groups. They claimed that marginalized populations, comprising at least 20% of Kenya's population, lack internet access, which is the mode of operation for the IPPMS. The Petitioners contended that integrating services into an online system would disenfranchise Kenyan minorities and indigenous communities who have limited access to technology. They cited the 2019 Census Report, which highlights the marginalization of these communities

regarding internet access, leading to their exclusion from registering, joining, or changing political parties. Article 38 of the Constitution guarantees every citizen's right to make political choices, including forming or joining political parties. To exercise these rights, citizens must be able to choose their party affiliations freely and verify their party membership. The Petitioners argued that the IPPMS, as the sole means to check membership status, join, or resign from parties, restricts their rights under Article 38 due to their lack of internet connectivity.

Article 6(3) of the Constitution mandates that state services be accessible throughout the Republic, considering the nature of the service. The IPPMS aims to enhance service delivery efficiency, but the State must ensure it is available nationwide to uphold Article 38 rights. The Constitution's Bill of Rights, expressed in Article 19(1), requires that systems promoting service delivery also protect fundamental rights. Therefore, any system that limits rights cannot meet constitutional standards.

The State must ensure that systems like the IPPMS consider citizens' circumstances to avoid rights violations. The Constitution defines "marginalized community" and "marginalized group" in Article 260. Past cases, such as **Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya 276/2003** and **Rangal Lemeiguran & Others v Attorney General & Others [2006] eKLR,** emphasize the need to protect the rights of indigenous and marginalized groups.

Article 10 of the Constitution lists national values, including inclusivity and protection of the marginalized, which bind all state organs and officers. In **Independent Electoral and Boundaries Commission & Others v The National Super Alliance & Others Nairobi Civil Appeal No. 224 of 2017,** the Court of Appeal affirmed that Article 10(2) values are enforceable and not merely aspirational. These values, including human dignity and non-discrimination, must be immediately upheld. Article 56 requires affirmative action programs to ensure minorities and marginalized groups participate in governance and other spheres of life.

The Petitioners argued that the IPPMS development restricted rights for those without internet access due to inadequate infrastructure. Some parts of Kenya lack internet access, and the State must provide alternative systems if internet-dependent services are developed. The State cannot justify rights violations under the guise of efficiency.

Article 81(b) of the Constitution states that the electoral system should allow citizens to exercise their political rights under Article 38. While Section 34B(1) of the Political Parties Act requires the 2nd Respondent to establish a technology-driven system for managing party records, any such system must enhance, not curtail, Article 38 rights. The 2nd Respondent contended that political parties must ensure recruitment processes meet constitutional standards and do not discriminate against marginalized groups. The 2nd Respondent's role is to verify and certify party membership lists. The Petition challenged the 2nd Respondent's actions in developing the IPPMS, arguing that it unjustifiably restricted the Petitioners' rights. While the 2nd Respondent claimed that political parties could recruit members manually and digitally through the IPPMS, the Petitioners argued that IPPMS impacts sovereignty and self-determination rights under Article 1(2) of the Constitution, distinguishing it from other digital platforms.

The Petitioners also claimed that the IPPMS launch fell short of Article 35, which guarantees access to information held by the State. They argued that only privileged citizens with internet access would benefit from IPPMS information. The 2nd Respondent failed to provide evidence of public sensitization about membership status checking, party joining, and resignation options, focusing instead on political party awareness.

The court found that the 2nd Respondent failed to comply with Article 35 of the Constitution by not adequately informing the public about the available options related to the IPPMS. The court agreed that both the 1st and 2nd Respondents did not engage in sufficient public participation and civic education, depriving the Petitioners and their communities of opportunities for political self-expression. This failure was part of a broader issue where election management bodies tend to become inactive until elections approach, resulting in last-minute actions and disputes. The court criticized the lack of timely legislative reforms, training, and system upgrades, emphasizing the need for preparedness well before elections, which are constitutionally scheduled.

The court highlighted that the political class often calls for electoral reforms after elections, but these demands fade until close to the next election. This results in rushed amendments and a failure to meet constitutional requirements, as seen with the IPPMS. The court acknowledged that launching the IPPMS shortly before the election was poorly timed, supporting the Petitioners' concerns. It noted that the State did not adhere to Article 56, which requires measures to ensure marginalized groups can exercise their democratic rights.

The court agreed with the Petitioners that there is insufficient statutory or regulatory protection for marginalized communities, leading to their marginalization. It emphasized the State's obligation under Articles 10, 56, and 91 to enact provisions ensuring these rights are meaningful. The court asserted its role in addressing violations of rights and freedoms, especially for marginalized groups, referencing the State's duty to implement affirmative action programs under Article 56. It also emphasized that judicial power is derived from the people and must be exercised in their interest, balancing public and private interests through proportionality and equality of arms.

The court cited several cases to support its reasoning, including **Consumer Federation of Kenya (COFEK) v Minister for Information & Communications & 2 Others [2013] eKLR,** which highlighted the importance of public awareness and timing in implementing significant changes. It also referenced **State v Makwanyane & Another (CCT3/94) (1995) ZACC3** regarding the protection of rights, and **Fose v Minister of Safety & Security [1997] ZACC 6** for the concept of appropriate relief. Further, it mentioned **Hoffmann v South African Airways [2000] ZACC 17** and **Kate v MEC for the Department of Welfare, Eastern Cape [2005] 1 All SA 745 (SE)** in discussing the role of courts in enforcing constitutional rights. The case of **East African Cables Limited v The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR** was cited for principles of public interest.

The court acknowledged that the IPPMS had been beneficial to many Kenyans, allowing them to update their political party membership status. Therefore, suspending or reversing the system would not be in the public interest. The court declared that the State must observe and protect rights and freedoms under the Constitution, directing the Respondents to ensure these rights are fully enjoyed, particularly by minorities and indigenous peoples. The court awarded costs to the Petitioners, to be borne by the 2nd Respondent, and issued a judgment accordingly.

Reuben Kigame Lichete v Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party) (Constitutional Petition E275 of 2022)

In the High Court of Kenya at Nairobi (Milimani Law Courts)

Coram: AC Mrima, J

Judgment allowing petition

Date: 18 July 2022

Jurisdiction- principles of constitutional interpretation-reasonable accommodation-whether the IEBC violated the Petitioner's rights as a person with disabilities by refusing to approve his candidacy for the presidential election

Summary of facts

The Petitioner called upon the court to examine the manner in which the Independent Electoral and Boundaries Commission (IEBC) and the Returning Officer (the 2nd Respondent) declined to clear him to stand as a presidential candidate. The Petitioner raised two main grounds for this appeal. Firstly, he argued that the IEBC Dispute Resolution Committee (DRC) erred in upholding the decision of the Returning Officer to reject his clearance as a candidate. Secondly, the Petitioner contended that the Respondents failed to uphold the Constitution and the law by not considering his status as a person living with a disability (PWD), which he believed entitled him to an opportunity to stand for election. These grounds underscored the Petitioner's assertion that the decision to deny him candidacy was not only unjust but also unconstitutional, as it overlooked his rights and the provisions aimed at promoting inclusivity in the electoral process.

The Petitioner sought conservatory orders of barring the Respondents from processing the papers for the other presidential candidates for the 2022 General Elections. He deposed to the hardship he underwent as he sought the clearance by the Respondents claiming that their actions violated Articles 27, 38, 47, 54, 56, 83 and 137 of the Constitution and Section 11 of the Person with Disabilities Act (hereinafter the Disabilities Act), Sections 22, 23, 33 of the Elections Act (hereinafter the Act) and Regulations 16, 17 and 18 of the Elections (General) Regulations.

The Petitioner further contended that the Respondents infringed the Declaration of the Rights of Disabled Persons (1975), the Conventional and Optional Protocol on the Rights of Persons with Disabilities (2006), the International Covenant on Civil and Political Rights (1966), the Universal Declaration on Human Rights (1948), African Charter on Human and People's Rights (1981), African Charter on Democracy and Governance (2007).

The Petitioner sought several orders from the court in response to the actions of the Independent Electoral and Boundaries Commission (IEBC) and the Returning Officer, who declined to clear him as a presidential candidate. He requested a declaration that the Respondents had violated his rights as outlined in Articles 27 and 54 of the Constitution. Additionally, he sought an order of certiorari to quash the decision made by the IEBC and the Returning Officer, which stated that he did not qualify to proceed to the next level for registration as a presidential candidate. The Petitioner also requested a declaration affirming that his right to be treated with dignity, as provided under Articles 28 and 54(1) of the Constitution, had been violated by the Respondents.

Furthermore, he sought another order of certiorari to quash the decision of the IEBC delivered on 18 June 2022, which dismissed his complaint against the IEBC. The Petitioner requested an order of mandamus compelling the IEBC and the Returning Officer to accept his documents that complied with the requirements and to include his name among the other presidential candidates. He also sought an order of prohibition to prevent the Respondents from taking any further discriminatory actions against him.

In addition, the Petitioner requested a compensatory order as deemed fit by the court, along with exemplary and aggravated damages. He further sought an order to compel the IEBC to comply with affirmative action measures that would promote inclusiveness. The Petitioner also requested any other orders the court may find appropriate and asked for the costs of the petition, including interest, to be awarded to him.

In response to the Petition, the Respondents filed a joint reply and stated that prior to the DRC's and the Petitioner amended, they filed a Notice of Preliminary Objection on the Jurisdiction of this Court on the basis of exhaustion which was maintained even after the DRC delivered its decision. The Court directed that the objection and the Petition be heard together. The objection then mutated in the submissions to be that the Court lacked jurisdiction since there is no provision for an appeal from the DRC to the High Court.

Regarding the petition, the Respondents deposed that they complied with the law that guides the nomination of the candidates and on verification of the papers that the Petitioner presented it was established that he had not complied with the law fully in relation to the presentation of signatures from at least 24 counties in Kenya, hence disqualified. They further contended that the Petitioner lacked specificity and could not stand in law and that there was no identification as how the alleged rights were flouted.

On the prayers for mandamus, it was submitted that the threshold to grant said orders was not attained and further the Court usurped the role of DRC and in the end they prayed for the Court to dismiss the Petition.

Issues for determination

1. Whether the Court has jurisdiction over the dispute.
2. In the event issue (i) is answered in the affirmative, the principles of constitutional interpretation.
3. Whether the Respondents rightly exercised their mandates in declining to register the Petitioner as a Presidential candidate and in view of his disability.
4. What remedies ought to issue, if any?

Determination of the Court

The Court took note of the case of **Hon. Mike Mbuvi Sonko v The Clerk, County Assembly of Nairobi City & 11 Others Petition No. 11 (E008) of 2022,** which captured the aspects on jurisdiction and stated:

> *In Nyarangi JA's time-honoured words in the Owners of the Motor Vessel "Lillians" v. Caltex Oil Kenya Limited [1989] KLR 1, which were originally penned by the United States of America Supreme Court in 1915 in the case of McDonald v. Mabee, 243 U.S. 90,91 (1915), without jurisdiction a court has no power and must down tools in respect of the matter in question.*

The Court further acknowledged the case of **David Gakuu Dennis Gakuu Wahome v IEBC & Others (Unreported), Constitutional Petition No. E321 of 2022,** where the trial court rejected the preliminary objection made on jurisdiction following a judgment made in the case of ***Sammy Ndung'u Waity v IEBC & 3 Others*** Supreme Court Election Petition 33 of 2018 as that court made it clear that the High Court may exercise jurisdiction in the instance of a party being aggrieved by

a decision of the DRC. Additionally, the Supreme Court provided two approaches of mounting an issue in the High Court via judicial review in exercise of its supervisory jurisdiction and appellate jurisdiction.

To that effect, the court summed that the High Court has supervisory jurisdiction as indicated in Article 165(3)(b) and (6) of the Constitution to ensure that subordinate courts, tribunals, or quasi-judicial bodies act within their legal limits. When exercising this jurisdiction, the High Court can not only nullify the challenged proceedings, judgment, or order, but it can also issue directives to guide the lower court or tribunal on the appropriate course of action. This supervisory authority is constitutionally granted and cannot be overridden by statute.

This form of jurisdiction differs from appellate jurisdiction, which is the authority of a higher court to review and potentially alter the decisions of lower courts. Appellate jurisdiction involves examining both the law and the evidence, and it may be established by either the Constitution or statute. Unlike supervisory jurisdiction, appellate jurisdiction does not entail general oversight of the lower courts or tribunals but is confined to the specific case being reviewed.

In the current matter, the Court highlighted the title of the Petition which was brought pursuant to Articles 2(1), (5) and (6), 3(1), 10(1), (2)(b) and (c), 20(1) and (2), 21(1) and (3), 22(1) and (2), 23(3), 27(1) among other Constitutional provisions. As such the petition was properly placed before the Court granting it jurisdiction over the matter.

The Court referred to the case of **David Ndii & Others v Attorney General & Others [2021] eKLR,** that captured with precision how the Kenyan transformative Constitution ought to be interpreted, particularly on the second issue.

The four key principles for interpreting the Constitution discussed are essential for understanding its application and relevance in governance. Firstly, a holistic interpretation emphasizes that the Constitution should be understood in context, taking into account other provisions, historical background, current issues, and prevailing circumstances. This approach, often referred to as a "structural holistic approach," aims to bring the Constitution to life as intended by its framers.

Secondly, the non-formalistic approach suggests that the Constitution should not be interpreted merely as a statute. Instead, it calls for consideration of non-legal factors to foster a robust, patriotic, and indigenous jurisprudence, recognizing the unique socio-political landscape of the nation.

Thirdly, the constitutional theory of interpretation posits that the Constitution contains its own interpretive framework designed to protect and preserve its values, objectives, and purposes. Courts have a duty to provide guidance that advances the Constitution's aims, clarifies its intentions, and resolves contradictions within its text.

Lastly, the incorporation of non-legal considerations such as historical, economic, social, cultural, and political contexts is deemed critical for discerning the true meaning and values of constitutional provisions, particularly those related to human rights. Together, these principles contribute to a comprehensive understanding of the Constitution, ensuring that its interpretation aligns with the aspirations of the people it governs. Based on the above, a consideration of the next issues follows.

On the second issue, the Court asserted that the mandate of every Respondent in the nomination of candidates to stand for elections and in the resolution of pre-election disputes had been well captured by the Respondents in their disposition and submission. It further stated that despite it not having issues with the decision of DRC in relying on the Elections (General) Regulations, its focus primarily was on the manner in which the DRC dealt with the aspect of the Petitioner's disability. The Court recognised that the DRC appropriately captured the Petitioner's complaint regarding disability. By quoting three paragraphs specifically paragraphs 29, 30 and 31 it further acknowledged that the DRC's argument that the Complainant sought special treatment and consideration other than that envisaged in the law when it comes to compliance with the regulations as opposed to the international conventions invoked by him.

It was the Court's contention that the DRC faulted in disregarding the provision of the Disabilities Act and the Constitution, particularly Article 54 and relying only on Regulation 43 of the Elections (general) Regulations which grants discretion to IEBC to reject nomination papers. A cursory look of both the Constitution and the Disabilities Act indicates that there is a deliberate effort to ensure that PWDs achieve equal opportunities in life. The Court was of the view that the Petitioner's rights were infringed by the DRC based on the manner he was treated and the legal provisions relied upon. For instance, the Court highlighted that there was no indication that the Petitioner was accorded any assistance to overcome disability in complying with the election requirements. Other than that, there was no further indication that the Petitioner was accorded documents in braille or how the

Petitioner was to access the whole country with a view of collecting the signatures and copies of identity cards of his supporters and in ways to overcome the constraints that arise from his disability.

According to the Court, the DRC should have seized the opportunity in ensuring that the Petitioner who was a PWD in the presidential race was accorded a reasonable opportunity to participate in the Elections. Furthermore, the DRC ought to have acknowledged that despite the challenge on his part, the Petitioner had come up with the required number of signatures in his supporters albeit and slightly out of the regulatory timelines. However, the Petitioner was placed in an equal level with the rest of the presidential aspirants and there was no review on account of his disability. Subject to the foregoing, it was the Court's standing that the manner in which the DRC arrived at its decision was illegal to the extent that it was not based on the Constitution, the law or any other international instrument. This made said decision unfair, unreasonable, irrational and unproportional in the unique circumstances of the matter.

On the final issue, the Court directed that the foregoing discussion had resulted in the success of the amended Petition and that the Petitioner had proved that the DRC's decision was inconsistent with the Constitution and the Law. The Court cited cases that comprehensively discussed the most appropriate reliefs including ***Total Kenya Limited v Kenya Revenue Authority*** [2013] eKLR, ***Simeon Kioko Kitheka & 18 Others v County Government of Machakos & 2 Others*** [***2018***] eKLR and ***Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi*** HCCC No. 473 of 2006, [2008] 2 EA 311 where it was indicated that the court could fashion new remedies while protecting fundamental rights.

The court dismissed the Notice of Preliminary Objection dated 14 June 2022. It declared that the decision by the Independent Electoral and Boundaries Commission (IEBC) Dispute Resolution Committee in Complaint No. 038 of 2022, which rejected the Petitioner's candidacy, violated his rights under Article 54 of the Constitution and the Persons with Disabilities Act 2003. The court issued an order of certiorari to remove and quash the committee's decision, finding it unconstitutional. Furthermore, the court ordered a writ of mandamus compelling the IEBC to accept the Petitioner's nomination papers and consider them in line with the judgment, the Constitution, and the law. The court directed the Deputy Registrar to transmit copies of the judgment to the Clerks of the National Assembly and the Senate. Finally, the court ordered the Respondents to bear the costs of the petition.

Independent Electoral & Boundaries Commission & Wafula Wanyonyi Chebukati vs. Reuben Kigame Lichete & Attorney General (Civil Application No. E253 of 2022

In the Court of Appeal at Nairobi

Coram: W. Karanja, H. A. Omondi, and F. Tuiyott JJA

Ruling granting stay of execution

Date: 29 July 2022

Principles for the grant of a stay of execution-individual right to candidacy versus public interest in the conduct of an election-when does public interest outweigh individual rights

Summary of facts:

On 25 July 2022, the Court of Appeal delivered an extempore ruling, with the reasons for the decision now provided in accordance with Rule 34(7) of the Court of Appeal Rules, 2022.

The matter before the court involved a Notice of Motion dated 19 July 2022, filed by the Independent Electoral and Boundaries Commission (IEBC) and Wafula Wanyonyi Chebukati (jointly the applicants). The motion sought a stay of execution of the decree from the judgment delivered on 18 July 2022 by Hon. Anthony Mrima, J in ***Reuben Kigame Lichete v Independent Electoral and Boundaries Commission & Wafula Wanyonyi Chebukati*** **Constitutional Petition No E275 of 2022.** The application was brought pursuant to sections 3A and 3B of the Appellate Jurisdiction Act and Rules 5 (2) (b) and 44 of the Court of Appeal Rules, 2010. However, it should be noted that the current Rules of the Court are the Court of Appeal Rules, 2022, where Rule 5(2)(b) remains unchanged but the former Rule 44 is now Rule 46.

Reuben Kigame, the 1st Respondent, who is a person living with a disability, had sought to offer himself as a presidential candidate in the upcoming elections. His nomination was rejected by the IEBC (the 1st applicant) on 29 May 2022, citing non-compliance with the Elections (General) Regulations, 2012. Displeased with this rejection, Reuben Kigame lodged a complaint with the IEBC's Dispute Resolution Committee (DRC). On 18 June 2022, the DRC dismissed his complaint.

Subsequently, Reuben Kigame moved to the High Court via Constitutional Petition No. E275 of 2022, challenging the DRC's decision. The petition alleged violations of constitutional and legal rights, focusing on his status as a person with a disability and the failure of the IEBC and the 2nd applicant to uphold constitutional and legal provisions enabling his candidacy.

The High Court, in its judgment dated 18 July 2022, made the following orders: (a) Dismissed the notice of preliminary objection dated 14 June 2022. (b) Declared that the decision of the IEBC Dispute Resolution Committee in complaint No. 038 of 2022 violated the Petitioner's rights under Article 54 of the Constitution and the Persons with Disabilities Act, No. 14 of 2003. (c) Issued an order of certiorari to remove and quash the DRC's decision in complaint No. 038 of 2022. (d) Granted an order of mandamus directing the Respondents to accept the Petitioner's nomination papers and consider them in line with the judgment, Constitution, and the law. (e) Ordered the Deputy Registrar of the Court to transmit copies of the judgment to the clerks of the National Assembly and the Senate. (f) Ordered the Respondents to bear the costs of the petition.

The applicants, dissatisfied with this decision, filed a Notice of Appeal on 18 July 2022, indicating their intention to appeal against the entire decision. They sought a stay of the judgment. An affidavit sworn by Mr. Chrispine Owiye, Director of Legal Services at the IEBC, supported the motion, arguing that the appeal was arguable. He stated that the High Court's judgment came too late, as the list of supporters was due by 23 May 2022, extended to 25 May 2022; the names of registered candidates were published in the Kenya Gazette on 1 July 2022, and the ballots were printed starting 15 July 2022. Stopping the printing or altering specifications could delay the delivery of materials for the election.

The Attorney General, the 2nd Respondent, supported the motion.

Reuben Kigame opposed the motion, stating in an affidavit dated 22 July 2022 that the applicants had sought a stay orally immediately after the judgment, which was not granted. Instead, the Judge had directed the applicants to approach the Court of Appeal. He contended that the application was premature and lacked proper instructions. He also argued that the application was frivolous and did not consider the constitutional issues raised, including affirmative action for persons with disabilities and the need for legislative changes to support such candidates.

The 1st Respondent further pointed out that, following the judgment, the 2nd applicant publicly stated on Citizen TV that IEBC would respect the court's decision

and allow him to present his nomination papers. On 22 July 2022, a meeting was scheduled between him and the 2nd applicant, which he argued was inconsistent with seeking a stay on 19 July 2022.

The 1st Respondent maintained that the intended appeal did not present any arguable issues, as it did not address his unique situation as a person with a disability or the broader implications for constitutional rights and legislation. He emphasised the judgment's importance in highlighting serious constitutional issues related to Articles 27 and 54 of the Constitution, the Disability Act of 2003, and the need for new legislation. He argued that his candidacy was significant not just for him but for all persons with disabilities and the country's constitutional progress.

The 1st Respondent also noted that he had now met the constitutional requirements of Article 137 (1) (d) by securing the necessary number of supporters. He highlighted that the litigation had diverted time from his campaigning, and the main appeal was unlikely to be heard before the election date of 9 August 2022.

The Court considered the submissions by Mr. Gumbo for the applicants, Dr. Khaminwa for the 1st Respondent, and Mr. Weche for the 2nd Respondent.

The Court reaffirmed established principles for considering applications for stay of execution under Rule 5(2) (b), as summarised in **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR,** including the wide discretion of the Court, the need for an arguable appeal, and the necessity to balance the Appellant's rights with those of the Respondent. The Court also referred to **RWW v EKW [2019] eKLR,** which emphasised balancing the Appellant's right to appeal with the Respondent's entitlement to the fruits of their judgment.

In the High Court decision, Judge Mrima had noted that in **Free Kenya Initiative & Others v Independent Electoral and Boundaries Commission & Others Constitutional Petition No E160 of 2022** (unreported), the requirement to provide identity card copies of supporters was voided. The Judge found that Reuben Kigame had made commendable efforts despite his disability and that the signatures collected sufficed.

The applicants argued that the High Court's decree to accept the 1st Respondent's nomination despite not meeting the Article 137 (1) requirements amounted to judicially amending constitutional qualifications. The Court found this debate non-frivolous and deserving of further consideration.

The Court acknowledged the public interest in holding the election as scheduled and the potential chaos if the election date was postponed. It noted that the printers' communication indicated that any delay would affect the timely delivery of election materials. Balancing this with the 1st Respondent's political rights, the Court concluded that the public interest outweighed individual rights in this context.

Despite the 1st Respondent's desire for candidacy and his dissatisfaction with the relief provided, the Court decided that the overwhelming public interest in conducting the election as scheduled dictated the outcome.

Consequently, the Court allowed the application dated 19 July 2022. Costs were to be in the appeal.

INDEPENDENT CANDIDATURE

Free Kenya Initiative & 6 Others v IEBC & 4 Others; Kenya National Commission on Human Rights (Interested party), Constitutional Petition E160 of 2022

In the High Court at Nairobi (Milimani Law Courts)

Coram: Mrima, J

Judgment partially allowing petition

5 July 2022

Independent candidates- whether the requirement that independent candidates supply a copy of the supporters' identification cards and corresponding signatures was unreasonable and infringed on their civil and political rights-unfair discrimination-doctrine of laches

Summary of facts

Before the court were four petitions consolidated by an order issued on 6 June 2022, for purposes of an expedited hearing. Petition E160 of 2022 by the 1st to 7th Petitioners sought to challenge regulations 18(2) (c), 24(2) (c), 28(2) (c) and 36(2) (c) of the Elections (General) Regulations, 2012 (as amended in 2017).

It was submitted that the Regulations imposed a heavier burden on independent candidates to be cleared to run for elective position as compared to their counterparts in political parties and that the same denied them the opportunity to exercise their political rights as envisaged under Article 38 of the Constitution.

They submitted that the requirement was not there in 2017 and its introduction was meant to frustrate independent candidates and that the Political Parties Act was discriminatory as it did not allow them form coalition which is an act that contravenes Article 36 of the Constitution that allows the right and freedom to associate. They contended that forming coalitions was not a preserve of political parties only and that the Political Parties Act was discriminatory against the independent parties. Further, they argued that even their symbols extinguished upon participating in an election while those of political parties remained intact, which allowed political parties to keep building a brand, and created a discriminatory state of affairs.

It was also their contention that the denial by the IEBC to engage in election preparedness through the absence of a Liaison Committee was discriminatory. They therefore urged the court to find Regulation 24(2)(c), 28(2)(c), 32(2)(c) and 36 (2)(c) of the Elections General Regulations inconsistent with the Constitution, and therefore void and invalid in terms of article 2(4) of the Constitution. They also urged that the same should be struck off and that the 3rd Respondent should amend the Political Parties Act, 2011 to allow independent candidates to form coalitions in order to further their civic and political rights.

In Petition E219 of 2022, the 8th to 13th Petitioners contested the requirement to supply a copy of the supporters' identification cards and corresponding signatures for being unreasonable and infringing on their civil and political rights. The 8th to 13th Petitioners based their case on similar legal foundation to the 1st to 7th Petitioners and they prayed for a declaration that Regulations 18(2)(c), 24(2)(c), 28(2)(c), 32(2)(c) & 36(2)(c) of the Elections (General)Regulations were wholly unconstitutional and accordingly stood to be struck out from the body elections regulations. It was also urged that the impugned Regulations offended the Data Protection Act and the Registration of the Persons Act and were therefore null and void to the extent of these inconsistencies and consequently unenforceable.

In Petition E225 of 2022, the Petitioner challenged the requirement of presenting duly filled forms bearing the names, signatures, copies of the identity cards of a minimum of 2000 registered voters and an electronic list in Microsoft Excel sheet format. The Petitioner averred that the requirement imposed a logistical challenge that was prohibitive and discriminatory since it would make elections a very expensive affair and only for the rich. The Petitioner further averred that Regulation 18(2) (c) would give undue advantage some candidates and that under section 31 of the Data Protection Act, the IEBC was obligated to conduct a data protection impact assessment since there was a risk of unscrupulous use of data.

In Petition No. 22 of 2022, the 18th Petitioner argued that the requirement for an independent candidate to be backed by two individuals not affiliated with any political party and to provide a completed booklet and an Excel sheet of supporters with copies of their identification cards was unconstitutional, unjustified, and infringed upon his rights under Article 38 of the Constitution.

He contended that according to Articles 99, 137, and 193 of the Constitution, independent candidates were obliged to submit a minimum number of registered voters: 500 for Governor and Member of the County Assembly, 2000 for the Senate, and 1000 for the County Women's Representative. He argued that the mentioned

provisions did not necessitate supporters to provide copies of their identity cards along with their signatures.

The Petitioner cited **Peter Solomon Gichira v Independent & Boundaries Commission & another (2017) eKLR** where the court ruled that the requirement barring members of political parties from nominating an independent candidate, particularly in the case of independent Presidential candidates, was unconstitutional due to its violation of Article 27. The Petitioner also asserted that in **Timothy Maneno v Returning Officer Kibwezi West Nguu/Masumba Ward & 2 others (2012) eKLR,** the requirement for independent candidates to be cleared by the 2nd Respondent had been declared unconstitutional. Therefore, he argued that this requirement contravened Article 47(1) of the Constitution, which ensures fair administrative action, Article 27, guaranteeing equal protection and benefit of the law, and political rights under Article 38(3)(c) of the Constitution.

The court was asked to declare that the IEBC's requirement for the Petitioner and other independent aspirants/candidates to submit the names of their supporters along with copies of their identification cards bearing corresponding signatures/thumbprints was unconstitutional, null, and void, and in total violation of the Constitution of Kenya.

Additionally, the court was requested to declare that Regulation 12 of the Elections Regulations (General) Regulations of 2012, which required supporters of independent aspirants/candidates to submit copies of their identification documents (Identity Cards) with corresponding signatures/thumbprints for clearance, registration, and/or nomination purposes, was unlawful, unconstitutional, and null and void.

In response the 1st Respondent submitted that the petitions were instituted in bad faith since the impugned regulations that the Petitioners sought to have suspended had been in existence since 2012. It was asserted that the claim of discrimination was founded on blatant falsehood since section 7(2) of the Political Parties Act required a political party to be fully registered, recruit not fewer than one thousand registered voters from each of more than half of the counties, and then submit a list of the names, addresses, and identification particulars of all its members. It was therefore a requirement for both political parties and independent candidates to submit identification particulars of the voters who supported their nomination for an intended political seat and therefore there was no discrimination. The 1st Respondent also submitted that the allegation that the threat that the Petitioners would be locked out of an election was presumptive and not factual

and that the impugned Regulations were successfully used in the 2013 and 2017 elections without prejudice to the Petitioners. They urged the court not to allow the reversal of the impugned Regulations in light of the strict timelines since the elections timetable would be interfered with, thus occasioning a Constitutional crisis. Moreover, since the Regulations had been in the public domain for five months before the Petitioners challenged them in court, they had been indolent in coming to court. The 2nd Respondent submitted that they had the duty to protect the symbols of political parties and was required to certify that an independent candidate was not a member of a registered political party and a symbol intended to be used by an independent candidate in an election did not resemble the symbol of a registered political party.

The 2nd Respondent stated that under Article 92 of the Constitution, the benefits that accrued to members of political parties were not the same as those of independent candidates.

It was deposed that the 2nd Respondent had the statutory duty to protect symbols of political parties and was required to certify that an independent candidate in an election was not a member of a registered political party and that a symbol intended to be used by an independent candidate in an election did not resemble the symbol of a registered political party. It was her deposition that under article 92 of the Constitution, the benefits that accrued to persons who were members of political parties and independent candidates were not the same.

The 5th Respondent argued that pursuant to section 31 of the IEBC Act, the IEBC had power to make regulations and that the regulations had a general presumption of validity under the Constitution which was yet to be challenged. The A-G refuted the Petitioners' attempt to have a coalition as the definition of a coalition was an alliance of one or more political parties formed for the purpose of pursuing a common goal which was governed by a written agreement deposited with the Registrar.

The 5th Respondent further contended that the Petitioners had misconstrued the meaning of discrimination and that the orders sought were meant to unlawfully defeat and/or curtail the objects and purposes of the Election (General) Regulations, 2012 and the Independent Electoral and Boundaries Commission Act (No 9 of 2011).The Interested Party supported the Petitioners' submissions and specifically highlighted that the independent candidates were locked out of the Political Parties Liaison Committee being the forum for facilitating structured dialogue between the Registrar of Political Parties, IEBC and political parties.

Finally, the amicus curiae urged the court that the resolution of the dispute involved an elaboration of the concepts of "equality" and "unfair discrimination". The amicus submitted whether there was a breach of article 27 should be assessed on the backdrop of the peculiar circumstances of the Petitioner noting the Constitutional and historical context of development of Kenyan Politics in Kenya.

The court was asked to evaluate two main issues: firstly, whether a factual analysis of the provisions in question in relation to the Constitution lacked rationality, and secondly, whether those provisions could be deemed arbitrary or capricious given the specific circumstances. It was argued that this assessment highlighted the unfair advantage provided to candidates of political parties during nomination procedures, potentially discriminating against other political organizations or individuals. The amicus urged the court to assess the discriminatory nature of the impugned Regulations and their impact on the Petitioners. In doing so, the court was invited to consider the Petitioners' societal position, past patterns of disadvantage, and whether the discrimination targeted specific grounds. Additionally, it was emphasized that the court had to examine the purpose of the impugned Regulations to determine whether they were aimed at impairing the Petitioners in the electoral process or achieving legitimate societal goals. In conclusion, the amicus contended that if the Regulations amounted to differentiation, the Respondents should not be allowed to regulate arbitrarily or express preferences that served no legitimate purpose, as this would contradict the rule of law.

Despite being served, the National Assembly, Office of The Data Commissioner and the Principal Registrar of Persons, being the 3rd, 4th and 6th Respondents respectively and 2nd Interested Party did not take part in the consolidated petitions despite service.

Issues for determination

1. The principles of Constitutional interpretation.
2. Whether regulations 18(2) (c), 24(2) (c), 28(2) (c) and 36(2) (c) of the Elections (General) Regulations, 2012 contravene articles 2(4), 10, 27, 38(3), 83(3), 99, 137 and 193 of the Constitution.
3. Whether regulations 18(2) (c), 24(2) (c), 28(2) (c) and 36(2) (c) of the Elections (General) Regulations, 2012 (as amended in 2017) contravene article 31 of the Constitution and the Data Protection Act.
4. Whether the Political Parties Act should be amended to variously provide for independent candidates

Determination of the court

The court proceeded to lay out the foundation for constitutional interpretation, stating that the Constitution ought to be interpreted in a holistic manner. Holistic interpretation meant interpreting the Constitution within context.

Drawing from the canons of interpretation of our transformative Constitution, it emerged that the Constitutional design concerning political rights favoured a permissive approach rather than a restrictive one. Therefore, the Constitution intended that individuals' participation in elections was not unreasonably impeded.

The court highlighted four Constitutional interpretive principles that had emerged from the jurisprudence. Firstly, it was asserted that the Constitution had to be interpreted holistically, as stated in **In the Matter of the Kenya National Commission on Human Rights,** Supreme Court Advisory Opinion Reference No 1 of 2012. This meant understanding the Constitution in context and analysing its provisions alongside others.

Secondly, it was argued that the transformative Constitution did not support formalistic approaches to interpretation. This principle was emphasized in **Re Interim Independent Election Commission [2011] eKLR.**

Thirdly, it was noted that the Constitution provided its own theory of interpretation to safeguard its values and purposes. This point was raised in the concurring opinion of Retired CJ Mutunga in ***In Re the Speaker of the Senate & another v Attorney General & 4 others***, Supreme Court Advisory Opinion No 2 of 2013.

Fourthly, it was highlighted that non-legal considerations were crucial in interpreting the Constitution, as explained in the ***Communications Commission of Kenya*** case. This was exemplified in the concurring opinion of the CJ and President in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No 2B of 2014.**

Overall, the court stressed the importance of interpreting the Constitution in a manner that facilitated the social, economic, and political growth of Kenya, as mandated by the Supreme Court Act. Having set out the principles that guide Constitutional interpretation, the court considered the second issue: whether regulations 18(2)(c), 24(2)(c), 28(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017) contravene articles 2(4), 10, 27, 38(3), 83(3), 99, 137 and 193 of the Constitution.

The court reiterated that the Constitutional design in respect of political rights is to favour a permissive approach as opposed to a restrictive one. Therefore, it is the intent of the Constitution that as many as those willing to take part in elections are not unreasonably hindered.

The court proceeded to weigh the impugned provisions against the voter registration provisions in Kenya envisaged under Article 83 of the Constitution which outlines the requirements for voter registration and participation in elections or referenda. Article 83 states that individuals qualify for registration as voters if they meet certain conditions. Firstly, they must be adult citizens of the country. Secondly, they should not have been declared mentally unfit. Lastly, they must not have been convicted of any election-related offences within the preceding five years.

Furthermore, the provision specifies that a citizen eligible for voter registration can only be registered at a single designated registration centre. Additionally, it mandates that administrative arrangements for voter registration and election conduct should be structured to facilitate the rights of eligible citizens to vote or stand for election. These arrangements must not result in the denial of these rights to any eligible citizen.

The court noted that while the Constitution does not define a voter, section 2 of the Elections Act defines a voter as a person whose name is included in a current register of voters.

The procedure for voter registration in Kenya was outlined in the Elections (Registration of Voters) Regulations, 2012, referred to as the 'Registration Regulations.' Regulation 13 dealt with new registration, stating that individuals wishing to be registered had to complete an application in Form A and submit it to the registration officer for their constituency. Biometric data collection was also required during this process.

Additionally, Regulation 13A detailed the procedure for voter registration applications. Applicants were required to present their identification documents to the registration officer at their chosen registration centre. If deemed eligible, the officer issued Form A for completion. Once the form was returned and verified, the applicant's details were entered into the biometric voter registration system and the Voters Record Book, and an acknowledgement slip was issued upon registration.

Furthermore, the registration stage involved the collection of biometric data from the applicant. Once registered, the Independent Electoral and Boundaries Commission (IEBC) retained the voter's personal details and entered their name into the Register of Voters. Registered voters were eligible to vote and stand for election, as per the Constitution.

Regarding the requirement for independent candidates to provide copies of their supporters' national identity cards, it was essential to consider the background of the impugned regulations. These regulations were introduced through an amendment to the Elections (General) Regulations, 2012, under Legal Notice No. 72 of 2017. However, they were not enforced during the 2013 and 2017 general elections held under the 2010 Constitution.

Comparisons could be drawn with Constitutional amendment processes, such as the Punguza Mzigo Initiative and the Building Bridges Initiative (BBI), where no requirement existed for providing copies of supporters' identification documents. These initiatives collected signatures of registered voters without such a requirement. Additionally, various legislative provisions and definitions emphasised the need for particulars of identification documents rather than copies.

The challenge against the impugned Regulations included arguments that they were unnecessary and served no meaningful purpose. However, the comparison with constitutional amendment processes and other legislative provisions suggested otherwise. These comparisons highlighted that the signatures of registered voters could serve as sufficient proof of support, without the need for providing copies of identification documents.

Flowing from the above, it was apparent to the court that the impugned Regulations did not serve any meaningful purpose other than placing an unreasonable burden on the independent candidates.

On the issue of public participation, the court began by acknowledging that a robust discussion on public participation and consultation under Article 10 of the Constitution was conducted by a five-judge Bench in **William Odhiambo Ramogi & others v Attorney General & others Mombasa Consolidated Constitutional Petition Nos 159 of 2018 and 201 of 2019 (unreported).** The analysis began with the Constitution.

Article 2, among other things, declared the Constitution as the supreme law of the land binding all persons and State organs at both levels of government. It also provided that the Constitution's validity or legality was not subject to challenge, and any law inconsistent with it was void to the extent of that inconsistency. Furthermore, any act or omission contravening the Constitution was invalid. Article 3 imposed an obligation on every person to respect, uphold, and defend the Constitution. Article 10 outlined the national values and principles of governance binding all state organs, officers, and persons whenever interpreting or applying the Constitution, enacting laws, or making public policy decisions. The Constitution also mandated the alignment of existing laws at its promulgation. Section 7(1) of the Sixth Schedule stipulated that any law in force before the effective date continues in force but must be construed to conform with the Constitution.

Expanding on Article 10, the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others Civil Appeal No 224 of 2017; [2017] eKLR** held that Article 10(2) was justiciable and enforceable immediately. The values in Article 10(2) were deemed immediate, enforceable, and not aspirational. In **Robert N Gakuru & others v Governor Kiambu County & 3 others [2014] eKLR,** the High Court adopted a definition of public participation from a South African decision, emphasizing its importance in the legislative process. The Black's Law Dictionary defined 'consultation' as asking for advice or opinions, a more robust approach towards involving stakeholders. The Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR** endorsed the need for inclusivity and diversity in public participation, citing **Matatiele Municipality and others v President of the Republic of South Africa and others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).** In **Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR,** the High Court emphasized intentional inclusivity and diversity in public participation programs.

The importance of public participation was underscored by the Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra),** stating that it affords the public the opportunity to influence decision-makers. Facilitation of public participation is key in ensuring the legitimacy of laws, decisions, or policies reached. The Court also highlighted the adequacy of mechanisms used for public participation, citing **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR.** In **Mui Coal Basin**

Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others, practical principles were enumerated to ascertain if a reasonable threshold was reached in facilitating public participation. Despite the Petitioners raising concerns about lack of public participation, stakeholder consultations, and fair procedures, no Respondents or Interested Parties responded, rendering the issue uncontroverted.

On the issue of whether the impugned regulations discriminated against independent candidates as against the candidates who are nominated by political parties, the court was guided by various precedents. In **Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) Petition 56, 58 & 59 of 2019 (Consolidated), [2020] eKLR,** a multi-judge bench addressed the subject of discrimination under article 27. Referring to various judicial decisions, the bench outlined the meaning of discrimination. For instance, in **Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR),** discrimination was defined as differential treatment that fails to treat all persons equally when no reasonable distinction exists between those favoured and those not favoured. Equally, in **Peter K Waweru v Republic [2006] eKLR,** discrimination was described as affording different treatment to different persons based on their descriptions, resulting in restrictions or privileges not accorded to others.

The court emphasized that discrimination occurs when distinctions are made based on race, colour, sex, religious beliefs, or political persuasion, nullifying or impairing equality of opportunity or treatment. Article 27 of the Constitution prohibits any form of discrimination and advocates for non-discrimination as a fundamental right. However, not every differentiation amounts to discrimination; discrimination arises when equal classes of people receive different treatment without reasonable justification.

In assessing claims of unfair discrimination, the court in **EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another Petition 150 & 234 of 2016 (Consolidated)** established a two-stage analysis. Firstly, it examines whether the differentiation amounts to discrimination based on specified grounds. Secondly, it determines whether such discrimination is unfair, focusing on the impact on the complainant and others in similar situations. Unfair discrimination occurs when a law or conduct treats some people as inferior or perpetuates existing disadvantages without justification.Furthermore, the court observed that not every differentiation constitutes discrimination, highlighting

the need to distinguish between legitimate and impermissible differentiation. The bench also addressed specific cases where differential treatment was deemed unjustified, thereby infringing article 27 of the Constitution.

In assessing claims of discrimination, the court scrutinized the treatment of independent candidates compared to those nominated by political parties by the Independent Electoral and Boundaries Commission (IEBC). It observed that while the registration process for voters did not require the supply of identification document copies, independent candidates faced such a requirement for the first time. This differential treatment was deemed unjustified and infringed upon article 27 of the Constitution. The court noted that the IEBC already retained voter particulars, including National Identity Card or Kenyan passport details used in registration, making the additional burden on independent candidates unnecessary. This observation led the court to conclude that the regulations imposed by the IEBC contravened articles 2(4), 10, 27, 38(3), 83(3), 99(1)(c), 137(1)(d) and 193(1)(c) of the Constitution. Ultimately, the court concluded that discrimination prohibited by the Constitution is unfair discrimination, and that the differential treatment accorded to independent candidates was demeaning and perpetuated existing disadvantages without reasonable justification.

Penultimately, the court assessed whether the impugned Regulations violated section 31 of the Data Protection Act. The Petitioners contended that the requirement for copies of identity cards violated not only Article 31 of the Constitution but also the provisions of the Data Protection Act. Article 31 of the Constitution guarantees the right to privacy, including protection against unnecessary disclosure of personal information. The Data Protection Act, No. 24 of 2019, complements this constitutional provision by regulating the processing of personal data. It establishes the Office of the Data Protection Commissioner and imposes obligations on data controllers and processors.

The Data Protection Act outlines principles and obligations for personal data protection, including the requirement for data protection impact assessments in certain cases. The impugned regulations mandated independent candidates to collect personal data from supporters without proper consideration for data protection laws. This effectively designated independent candidates as data controllers and processors, contrary to the provisions of the Data Protection Act.

While the Commission may have legitimate reasons for requiring personal data, it must ensure compliance with the Constitution and the law. However, the Commission failed to provide a legal framework for the collection and protection of

such data, raising concerns about data security and retention. The absence of a data protection impact assessment further compounded these issues.

As a result, the court determined that the implementation of the impugned regulations infringed upon both the Data Protection Act and Article 31 of the Constitution. The manner in which independent candidates and the Commission handled the collection and retention of personal data did not adequately safeguard privacy rights as guaranteed by the Constitution and relevant legislation.

Finally, the court analysed whether the Political Parties Act ought to be amended to provide for independent candidates. The court declined to adjudicate on proposed amendments to the Political Parties Act concerning independent candidates, asserting that such matters fall within the purview of Parliament. In **Okiya Omtatah Okoiti & others v The Hon. Attorney General & others Nairobi High Court Constitutional Petition No. E090 of 2022 (as consolidated),** the court emphasized that its role is to resolve actual disputes, not engage in abstract discourse. Citing **John Harun Mwau and 3 others v Attorney General [2012] eKLR,** the court highlighted that its jurisdiction is exercised in the context of a controversy, not hypothetical issues.

The principles of mootness, ripeness, and justiciability were further elucidated in **Wanjiru Gikonyo & others v National Assembly of Kenya & 4 others Petition No 453 of 2015 [2016] eKLR.** The court emphasized that it cannot entertain hypothetical or academic interest cases and must refrain from premature adjudication. Ultimately, the duty to amend the Political Parties Act lies with Parliament, and the court reiterated its discretion to determine the appropriateness of addressing such matters. In conclusion, the court declined to accept the Respondents' arguments on the doctrine of laches. Guided by precedent such as **Metal Box Co Ltd v Currys Ltd and Kariuki Kiboi v Attorney General [2017] eKLR,** the court determined that there is no time limit for filing a Constitutional petition and that the Limitation of Actions Act does not apply to violations of rights and freedoms guaranteed in the Constitution. It emphasized that fundamental rights and freedoms protected under the Bill of Rights cannot be waived or acquiesced to, as there can be no estoppel against the Constitution. The court highlighted that respect for fundamental rights is a mandatory obligation on the State and all state organs, and no individual can relieve the state or any person of the obligation to respect the Bill of Rights.

The court issued the following orders: it declared that regulations 18(2)(c), 24(2)(c), 28(2)(c), and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended

in 2017), contravened various articles of the Constitution. Another declaration was made, indicating that the same regulations also contravened article 31 of the Constitution and the Data Protection Act. An order of certiorari was issued to bring into the High Court and quash the mentioned regulations. Lastly, considering this was a public interest litigation, the parties were to bear their own costs.

ENFORCEMENT OF THE ELECTORAL CODE OF CONDUCT

Sabina Wanjiru Chege v IEBC Nairobi Constitutional Petition E073 of 2022

In the High Court at Nairobi (Milimani Law Courts)

Coram: AC, Mrima J

Judgement allowing petition

Date: 4 April 2022

Electoral Code of Conduct- constitutional instruments vis-à-vis statutory instruments-Ways in which the Electoral Code of Conduct could be enforced-Whether the Electoral Code of Conduct's vested powers in the IEBC's Enforcement Committee to summon witnesses and conduct hearings was contrary to the Constitution

Summary of the facts:

The Petitioner, by way of a petition dated 11 February 2022, and a contemporaneous application, sought conservatory orders staying further proceedings before the Enforcement Committee.

The Petitioner stated that on 11 February 2022 she was summoned before the Enforcement Committee to attend a hearing on the grounds that it was seized of a report and material against her regarding violation of Clause 6(a) and (l) of the Electoral Code of Conduct. She was also served with a statement of breach indicative of the words allegedly uttered by the Petitioner at a public rally at Isibuye area within Vihiga County.

According to the Respondent, the issue of dispute is that the Petitioner claimed that the Jubilee Party, of which the Petitioner was a member, rigged the elections in 2017 and that there was intent to rig once again in the 2022. The Petitioner also claimed that the Respondent's voting system was foul and penetrable and the integrity of the electoral process would not be maintained.

The Petitioner therefore requested the investigatory report and material in support of the allegations before the Enforcement Committee and a proper procedure documenting the obligations of the Enforcement Committee as a quasi-judicial body. However, the Petitioner received contradictory responses.

The Petitioner stated that the requested investigations were commenced after 11 February 2022 after she had been summoned for hearing before the Enforcement Committee with reference to correspondence drafted to the Communications Authority of Kenya requesting for the NTV Clip aired on 11 February 2022.

The Petitioner contended that the Enforcement Committee commenced proceedings on its own motion without appointment of a chairperson and in so doing violated clause 6 and 15(1) of the Code of Conduct.

The Petitioner critiqued the framework of the complaint as it was designed in a manner that no response could be afforded the Petitioner hence violating articles 47 and 50 of the Constitution on fair hearing. She further contended that the Committee was not listed in the Constitution among the commissions that had the mandate to summon people in relation to violation of the Code of Conduct. Therefore, the Respondent Commission had only the investigative mandate, and any issue in dispute was to be raised with the courts of law.

The Petitioner further claimed that the Respondent had no jurisdiction to conduct judicial proceedings. This was because section 109(1) and (3) of the Elections Act obligated the Respondent to develop draft regulations and submit them to public participation and parliamentary approval before gazettement, which had not been done. She, therefore, contended that the Legal Notice No 139 of 2012 on the Rules of Procedure on Settlement of Disputes did not rise to the expectation of the statute.

The Respondent's case was that the Enforcement Committee was operational by dint of Gazette Notices Nos 430, 431, 432, 433, 434, and 435 published on 20 January 2022. They further submitted that the Petitioner was bound by the Electoral Code of Conduct and she was supposed to observe them since she was a Woman Representative and a member of the Jubilee Party.

The Respondent also asserted that pursuant to Article 252(1)(a) & (d) of the Constitution as read with section 107 of the Elections Act, the Respondent was empowered to conduct investigations and issue summons when there is a breach of the Electoral Code. The Respondent also stated that it heard the Petitioner's responses before dismissing them. It was also their case that the Rules of Procedure on Settlement of Disputes had been enacted through Legal Notice No 139 of 2012 pursuant to the provisions of the Elections Act and that Rule 4 applied to disputes or complaints arising from among others, violation of the Electoral Code of Conduct.

Counsel for the Respondent addressed whether the Respondent formulated Regulations to support the Electoral Code of Conduct. He clarified that Section 109 of the Election Act concerns the Rules of Settlement of Disputes, not Regulations. However, he observed that the Petitioner framed these rules as Regulations. Furthermore, he noted that Section 109(3) of the Elections Act permits the National Assembly to approve draft Regulations before Parliament deals with them under the Statutory Instruments Act. He highlighted that courts have previously examined these Regulations and found no issues with them. It was also asserted that the Respondent entertained the dispute as a quasi-judicial body exercising administrative powers rather than judicial powers.

Issues for determination

1. Whether the Enforcement Committee had the jurisdiction to entertain the violations of the Electoral Code.
2. Whether the Electoral Code was in force and if so, whether the Electoral Code was binding upon the Petitioner.
3. Whether the Respondent's Chairperson erred in chairing the sittings of the Enforcement Committee.
4. Whether the Respondent had formulated Regulations to guide the proceedings before the Enforcement Committee.
5. Whether the proceedings against the Petitioner before the Enforcement Committee were in violation of articles (1)(1), 2(1), 2(4), 3(1), 20(1), 22, 23, 24 (1) (a)-(e), 27, 33, 35(1), 35(3), 47(1), 47(2) and 50 of the Constitution.
6. Whether the Petitioner was entitled to any reliefs.

Determination of the court

In determining whether the ECC Enforcement Committee had jurisdiction, the court considered the following sub-issues: what jurisdiction is; constitutional instruments, statutes and schedules thereto and statutory instruments and the enforcement of the Electoral Code. The court began by restating the axiom that jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings. A party cannot couch jurisdiction through its craftsmanship or confer jurisdiction by consent. It was thus settled law that jurisdiction is either is existence or not.

The Electoral Code had a Constitutional basis as Article 84 (4) (j) provided for the Commission to be responsible for overseeing all referenda and elections, including those for elective bodies stipulated by the Constitution and others designated by Parliament, while also developing a code of conduct for candidates and parties participating in such elections. It is the Elections Act that fully envisages the Code of conduct and obligates anyone running for office to subscribe to the Code, failure to which they will not be allowed to participate in the electoral process. In Section 1(3), the Electoral Code of Conduct further reiterates the need for subscription. It provides that each political party and referendum committee must sign the Code through their registered officials, committing to uphold its provisions and ensure compliance from their members and supporters throughout elections and referendums. A reading of the Code showed that the Code of Conduct only applied to those who subscribed to it. Such include political parties, candidates and members of the referendum committees. Failure by a political party, a candidate and members of the referendum committees to execute and subscribe to the Electoral Code or any other breach of the Electoral Code constitutes offences.

The court examined the distinctions among Constitutional instruments, Statutes and Schedules, and Statutory instruments, aiming to classify the instruments involved in the case. It determined that Constitutional instruments, while not defined in the Constitution or law, are special instruments directly derived from the Constitution, bypassing legislative processes. This was exemplified in the case of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, known as the 'Mutunga Rules', crafted by the Chief Justice under Article 22(3) of the Constitution. The Sixth Schedule is an integral part of the current Constitution and has the same status as the provisions of the other articles although it is of a limited duration. On the other hand, statutes are products of Parliament or County Assemblies and must undergo specific legislative processes, with schedules being integral parts of statutes, as affirmed in the case of **Centre for Rights Education & Awareness v John Harun Mwau [2012] eKLR.** Regarding statutory instruments, they derive their authority from Acts of Parliament or county legislations, regulated by the Statutory Instruments Act No 23 of 2013. The Court's conclusion affirmed the hierarchy of legal instruments and their respective sources of authority, providing clarity on their classification and legal status within the Constitutional framework. The basis of the Rules of Procedure was section 109 of the Elections Act which accorded the Respondent the power to make regulations. Therefore, the Rules of Procedure on Settlement Disputes were a Subsidiary legislation or a statutory instrument.

On the issue of enforcement of the Code of Conduct, the court highlighted that both Constitutional and statutory provisions grounded the enforcement of the Code of Conduct. The Code of Conduct, rooted in Article 88(4)(j) of the Constitution, mandated all political parties, candidates, and referendum committees participating in elections or referenda to follow it. The court pointed out that the Elections Act No 24 of 2011 provided legal backing, specifically in Section 110, outlining the requirements for subscribing to and observing the Code of Conduct.

It was noted that the Code of Conduct served to promote free and fair elections and a climate of tolerance in political activities. It bound not only political parties and candidates but also leaders, office bearers, agents, and members of political parties or referendum committees. In the event there is breach and infringement of the Electoral Code of Conduct, the Commission has a duty to impose sanctions, and in the event the sanctions are not complied with the Commission may cancel the right of such political a political party or candidate in participating in the next election. Alternatively, the Commission may institute proceedings on its own motion or in consequence of any report proceedings at the High Court. Section 21 of the Elections Act provides that the Office of the Director of Public Prosecution has the powers to order for investigations and prosecute offences under the Electoral Code of Conduct. The court emphasized that failure to adhere to the Code of Conduct constituted offences, with penalties specified under the Election Offences Act No 37 of 2016.

The court explained that enforcement mechanisms for the Code of Conduct included actions by the IEBC, High Court proceedings initiated by the Commission, and prosecutions by the Director of Public Prosecutions. Additionally, the court mentioned that the Rules of Procedure on Settlement Disputes provided a framework for addressing violations of the Code of Conduct through complaints lodged with the Commission.

In interpreting and enforcing the Code of Conduct, the court highlighted that courts were required to consider Constitutional principles, including promoting the purposes, values, and principles of the Constitution, advancing the rule of law, and protecting human rights and fundamental freedoms. Additionally, the court emphasized that courts employed a purposive interpretation to reveal the true intention of legislative provisions, ensuring they aligned with Constitutional objectives and the broader legal framework.

The court affirmed that the Respondent, as one of Kenya's Constitutional commissions, operated under Article 248(2) of the Constitution and was established by Article 88(1). Alongside other commissions and independent offices, it was tasked, under Article 249, with safeguarding the people's sovereignty, ensuring democratic values, and upholding Constitutionalism. These bodies enjoyed financial and operational independence as outlined in Article 249.

Article 252 delineated the general functions and powers of these entities, granting them the authority to conduct investigations, recruit staff, and perform functions prescribed by legislation. Additionally, they could receive complaints from those eligible to initiate court proceedings under Article 22(1) and (2). Notably, only specific bodies, including the Kenya National Human Rights and Equality Commission, had the power to summon witnesses.

The Respondent lacked such authority and any law granting it such powers contradicted the Constitution, rendering it null and void. Nonetheless, the Respondent retained the ability to conduct investigations, involve Peace Committees, and refer matters to the Director of Public Prosecutions or the High Court.

On the contrary, the Enforcement Committee, established under the Electoral Code of Conduct, was empowered to summon witnesses and conduct hearings regarding Electoral Code breaches. However, this delegation of power by the Electoral Code of Conduct conflicted with the Constitution, specifically Article 2(4), rendering those provisions invalid. Consequently, sections of the Electoral Code of Conduct and related rules were deemed inconsistent with the Constitution and failed the three-tier-test established in **R v Oakes case [1986] 1 SCR 103.**

The court discussed whether the Electoral Code of Conduct was enforceable and binding on the Petitioner. It was established that the Electoral Code existed under the Elections Act Second Schedule. However, the court noted that there was no evidence proving that the Petitioner or the Jubilee Party had subscribed to the Electoral Code for the relevant election period. Additionally, there was no evidence of conviction for non-subscription, and the Petitioner was not officially nominated as a candidate yet. Consequently, the court ruled that the Electoral Code did not bind the Petitioner. Regarding the chairing of the Enforcement Committee by the Respondent's Chairperson, the court deemed the committee unconstitutional, rendering its proceedings null and void *ab initio*. Therefore, any discussion on the Chairperson's actions was deemed irrelevant.

The court addressed whether the Respondent had formulated Regulations for enforcing the Electoral Code. It was noted that while the Regulations were not explicitly labelled as such, the Rules of Procedure were published and fulfilled the requirements.

The court analysed whether the proceedings against the Petitioner before the Enforcement Committee violated various articles of the Constitution. The Committee's establishment was found to contravene the Constitution, leading to violations of articles 2(4), 3(1), 27(1), 35, 47, and 50. Additionally, the Petitioner was not provided with adequate evidence for her defence, further infringing on her Constitutional rights.

Finally, the court concluded that articles 2(4), 3(1), 27(1), 35, 47, and 50 of the Constitution were indeed infringed upon in this matter. Firstly, the establishment of the Enforcement Committee violated Article 2(4) as it contradicted Article 252. Additionally, the Respondent's failure to uphold the Constitution contravened Article 3(1), while Article 27(1) was infringed by denying the Petitioner equal protection and benefit of the law. Furthermore, inadequate evidence provision hindered the Petitioner's defence, contravening Article 35, and procedural irregularities breached Articles 47 and 50, compromising fair treatment and due process. These violations collectively undermined the Petitioner's Constitutional rights and fundamental principles of fairness and equality.

The court, after finding that most claims were sustained except for the infringement of Article 33 of the Constitution, indicated that it was tasked with determining appropriate remedies. It cited precedents such as **Total Kenya Limited v Kenya Revenue Authority [2013] eKLR** and ***S*imeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR** to assert its authority to fashion remedies beyond specific provisions. The court emphasized its power to innovate remedies to protect Constitutional rights, as stated in **Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi & another (No 473 of 2006, [2008] 2 EA 311) and Fose v Minister of Safety & Security [1977] ZACC 6).** Notably, it ordered that each party bear its own costs due to the Respondent's reliance on a precedent that upheld the legality of the Enforcement Committee.

The court then issued final orders. It declared the unconstitutionality of certain provisions of the Respondent's Electoral Code of Conduct (ECC), specifically sections 7, 8, 10, and 15 of the ECC under the Second Schedule of the Elections Act. Additionally, it declared unconstitutional parts of rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement Disputes, which establish and grant powers

to the Respondent's Electoral Code of Conduct Enforcement Committee. Furthermore, it declared the Summons and Statement of Breach issued to the Petitioner as unconstitutional. The court ordered the quashing of the mentioned provisions and documents associated with the Petitioner's case.

Independent Electoral and Boundaries Commission v Hon Sabina Wanjiru Chege Civil Appeal E255 of 2022

In the Court of Appeal at Nairobi

Coram: W. Karanja, J. Mohammed & Laibuta, JJA.

Judgment Disallowing Appeal

Date: 15 July 2022

Whether the Respondent was bound by the Electoral Code of Conduct-whether the Committee had jurisdiction to summon the Respondent, hear the complaint and make findings-whether the impugned parts of the Code were unconstitutional

Summary of facts:

The promulgation on 27 August 2010 of the Constitution of Kenya introduced significant constitutional, legislative, and governance reforms, including the establishment of the current electoral system designed to facilitate representation as outlined by the Constitution and statute law. This system was created to implement the Constitution and support the reformed electoral administration.

Chapter Seven of the Constitution outlines general principles for the electoral system (Article 81), mandates legislation on elections (Article 82), requires all candidates and political parties to comply with a code of conduct developed under Article 88(4)(j) (Article 84), and establishes the Independent Electoral and Boundaries Commission (IEBC) under Article 88. It also imposes a duty on political parties to adhere to the code of conduct (Article 91(1)(h)). To give effect to Chapter Seven, the Commission was established under Article 88(1) with prescribed functions and powers. Article 88(5) mandates the Commission to exercise its powers and perform its functions in accordance with the Constitution and national legislation. This includes the Independent Electoral and Boundaries Commission Act, 2011, which replicates the Commission's functions as set out in Article 88(4) of the Constitution. The Supreme Court of Kenya in ***County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) [2021] eKLR*** emphasised that the Constitution is the ultimate source of law and all other laws must conform to it.

The IEBC is one of the constitutional commissions established under Chapter Fifteen of the Constitution, with powers to conduct investigations either on its own

initiative or based on public complaints, and to perform functions prescribed by legislation in addition to those conferred by the Constitution (Article 252(1)(a) and (d)).

The Electoral Code of Conduct, prescribed under the Second Schedule to the Elections Act, 2011, applies to candidates and political parties contesting elections, as outlined in Article 88(4)(j) of the Constitution and section 110(1) of the Elections Act. The Commission, through its Electoral Code of Conduct Enforcement Committee, is empowered to enforce this Code pursuant to Article 252(1)(a) of the Constitution.

In the appeal at hand, the Committee had summoned the Respondent on 11 February 2022 as part of an investigation into remarks allegedly made by the Respondent on 10 February 2022, which were claimed to violate clauses 6(a) and (i) of the Code. The Respondent appeared before the Committee on 15 February 2022 but raised a preliminary objection regarding the Committee's jurisdiction. The Committee dismissed this objection, asserting its jurisdiction.

The Respondent subsequently petitioned the High Court (Constitutional and Human Rights Division) at Nairobi in Petition No. E073 of 2022, seeking various declarations and orders, including an order of certiorari to quash the Committee's summons, the statement of breach, and the proceedings. The High Court, in a judgment by A. C. Mrima, J., declared the Committee's actions unconstitutional, null, and void, and issued orders of certiorari to quash parts of the Electoral Code of Conduct and the proceedings of the Committee. The Court also ordered that the parties bear their own costs.

The Appellant appealed the High Court's decision, arguing that the Judge erred in finding that the Appellant lacked jurisdiction, that the Committee was unconstitutional, and in various other respects. The appeal was supported by written submissions from both parties and oral arguments during the hearing. The appeal court was tasked with reassessing the evidence and reaching conclusions, bearing in mind that it had not seen or heard the witnesses directly, as established in **Selle v Associated Motor Boat Co. [1968] EA 123.**

Issues for determination

1. Whether the Respondent was bound by the Code.
2. Whether the Committee had jurisdiction to summon the Respondent, hear the alleged complaint against her, make findings thereon, and possibly impose sanctions on her.
3. Whether the impugned parts of the Code were Constitutional.
4. Whether the Appellant was entitled to the relief sought in this appeal.
5. What orders ought this Court to make, including orders as to cost.

Determination of the court

In considering the appeal, the court grappled with the complex interplay between constitutional provisions, statutory laws, and procedural due process in the realm of electoral administration. The central issues revolved around the jurisdiction of the Independent Electoral and Boundaries Commission (IEBC) and its authority to enforce the Electoral Code of Conduct.

The court examined whether the Respondent was bound by the Electoral Code. It was observed that the legal force of the Code depended on the actual subscription by political parties and candidates for elective positions at both national and county levels. Section 110(1) of the Elections Act is pivotal in this context, mandating that "Every political party and every person who participates in an election or referendum under the Constitution and this Act shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule in such manner as the Commission may, subject to paragraph 6 of that Schedule, determine." Equally, paragraphs (1) and (2) of the Code stipulate its applicability to all participating political parties, candidates, and their officials.

The court also addressed the timing of the Code's application. Section 18 of the Elections Act specifies that the Code applies "in the case of a general election, from the date of publication of a notice of election until the swearing in of newly elected candidates." Given that the Respondent was not a candidate in the 9 August 2022 general elections, and considering that her political party was not joined in the proceedings, the court concluded that she was not bound by the Code. Consequently, the Committee lacked jurisdiction to investigate or take action against her.

The court further noted that the power to issue summons and examine witnesses is reserved for specific commissions and independent offices under Article 252(3) of the Constitution, including the Kenya National Human Rights and Equality Commission, the Judicial Service Commission, the National Land Commission, and the Auditor-General. The Respondent, as highlighted by the court, was correct in challenging the jurisdiction of the Committee, which was not one of the entities authorised to summon witnesses. The Committee's attempt to exercise such powers was found to be beyond its jurisdiction and inconsistent with the Constitution.

The court critically assessed Section 15(4) and (8) of the Elections Act, which purported to grant the Committee substantive prosecutorial and judicial powers. These provisions were deemed inconsistent with the Constitution, specifically Article 2(4), which declares any law inconsistent with the Constitution as void. The court cited **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR,** which underscored that jurisdiction is fundamental to the authority of any court or tribunal. If a tribunal lacks jurisdiction, any actions or determinations it makes are considered null and void.

Furthermore, the court invoked the principles established in **The Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (1989) KLR 1,** emphasising that a court or tribunal must have jurisdiction to make any decisions. The Committee's lack of jurisdiction to enforce the Code against the Respondent was thus deemed a fundamental flaw.

The court also referred to **Republic v Speaker of the Senate & Another Ex Parte Afrison Export Import Ltd & Another [2018] eKLR,** highlighting the natural justice principle that no one should be a judge in their own cause. The Committee's attempt to combine roles of complainant, investigator, prosecutor, and adjudicator was found to violate this principle.

The court found that the Respondent was not bound by the Code and that the Committee's actions were in violation of her right to fair administrative action under Article 47 of the Constitution. Consequently, the appeal was dismissed in its entirety, with costs awarded to the Respondent.

IEBC v Sabina Chege Supreme Court Petition No 23 (E026 of 2022)

Supreme Court of Kenya

Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ

Judgment partially allowing appeal

Date: 12 September 2023

Whether the Respondent was bound by the Electoral Code of Conduct-whether the Appellant had power to summon the Respondent and make findings on the complaint-whether the impugned parts of the Electoral Code of Conduct were unconstitutional

Summary of facts

This appeal dated 8 August 2022 was brought pursuant to Article 163(4) (a) of the Constitution, Section 15 (2) of the Supreme Court Act, 2011 and Rules 38 and 39 of the Supreme Court Rules, 2020.

It challenged the decision of the Court of Appeal (Karanja, J. Mohammed & Laibuta, and JJ.A.) in Civil Appeal No. E255 of 2022. The impugned decision upheld the decision of the High Court (Mrima, J.) in Constitutional Petition No. E073 of 2022.

Before the High Court, the proceedings were that the Respondent was served with summons from the Appellant and a subsequent statement of breach on alleged infringement of the Electoral Code of Conduct. It was the Petitioner's case that the remarks captured on the statement of breach was that the Respondent uttered words that would touch on the integrity of the electoral process and that the electoral process would be rigged eventually.

The Appellant appeared before the Enforcement Committee and raised a preliminary objection as to the jurisdiction of the committee which was dismissed by the Enforcement Committee on that particular date. Dissatisfied with the ruling of the committee the Respondent proceeded to the High Court challenging the proceedings of the committee as well as seeking staying of any further proceedings before the committee. The Appellant opposed the petition by stating that they were well endowed with authority to adjudicate matters of breach of Electoral Code having the right to summon witnesses, examine and arrest persons who have breached the Electoral Code.

The court then determined a number of issues allowing the Respondent's petition, by quashing the summons as well as the statement of breach and declared the committee as unconstitutional.

On the issue of jurisdiction of the Committee over breaches of the Electoral Code, the court determined that the Constitution vests authority to four entities to investigate, and summon witnesses. However, while the Appellant had the authority to investigate, this authority did not extend to summoning witnesses.

On the issue as to whether, the Chairperson had the capacity to chair the Committee, the Court decided that whether the chairperson declared their chairmanship or they do not, the running of the committee was a Constitutional dead horse. Consequently, the petition was allowed and reliefs granted.

At the Court of Appeal, the issues determined were as follows: whether the Respondent was bound by the Code; whether the Committee had jurisdiction to summon the Respondent, hear the alleged complaint against her, make findings thereon, and possibly impose sanctions against her; whether the impugned parts of the Code were unconstitutional; whether the Appellant was entitled to the reliefs sought in the appeal; and what remedies were appropriate under the circumstances, including orders as to costs.

On whether the Respondent was bound by the Electoral Code, the Court of Appeal found that it depended on the subscription of the political parties to the Code. However, once subscribed, the Code applied from when a notice of election had been issued, throughout the conduct of the election to the swearing in of the newly elected candidates.

The Respondent had not declared whether she would be running for an elective position on 9 August 2022. If the Respondent's Jubilee Party membership had been disclosed and the party had been joined to the proceedings, it would have shown that she was an official party member. Consequently, the Respondent was not bound by the Electoral Code of Conduct.

On whether the Appellant had the authority to summon the Respondent, the Court found that the Committee did not fall under the commissions named under article 252 (3) of the Constitution as having the power to summon witnesses. Therefore, it had no jurisdiction to summon witnesses.

On whether the impugned parts of the Electoral Code of Conduct were unconstitutional, the Court of Appeal found that to the extent that the Elections Act purported to confer on the Committee substantive prosecutorial and judicial or quasi-judicial powers not availed to the Appellant under the Constitution, the impugned provisions were inconsistent with Article 2(4) of the Constitution. Further, it was an infringement on both substantive and electoral due process and at variance with the Latin maxim *nemo judex in causa sua*, 'no one should be a judge in their own cause'. In the same vein, the court surmised that the wielding by the Commission of policing, prosecutorial and quasi-judicial powers offended the immutable principles of due process and violated the rule against bias.

The appeal was dismissed for lack of merit.

Aggrieved with the judgment of the Court of Appeal, the Appellant appealed to the Supreme Court on several grounds. First, the Appellant argued that the Court of Appeal misapplied and misapprehended paragraph 15 of the Second Schedule to the Elections Act by declaring it unconstitutional regarding the power to summon witnesses. Second, the Appellant contended that the court erred in declaring the Electoral Code Enforcement Committee unconstitutional for settling election disputes. Third, the court was said to have misinterpreted Article 252(3) by stating it only applied to the four listed entities, overlooking the power of other commissions to summon witnesses and investigate. Fourth, the court allegedly failed to consider that Articles 88(4) and 88(5) vested the Appellant with the mandate to prescribe a code of conduct for parties and candidates participating in elections. Finally, the Appellant claimed that the court did not adopt a holistic interpretation of the Constitution as an integrated document.

The Appellant sought several reliefs. Firstly, they requested that the instant petition (appeal) be allowed. Secondly, they sought to have the judgment of the Court of Appeal dated 15 July 2022 in Civil Appeal No. E255 of 2022 and the judgment of the High Court dated 4 April 2022 in Constitutional Petition No. E073 of 2022 set aside. Additionally, they requested any consequential and appropriate reliefs or further orders that the Court may deem just and expedient in the interest of justice. Lastly, they asked for the costs of this petition to be provided for.

The Respondent filed a cross-petition dated 9 September 2022 and submitted on 18 November 2022, seeking several declarations. They sought a declaration that turning the IEBC into a quasi-judicial body is unconstitutional and that the Appellant must remain an impartial and neutral body. They argued that clause 15(1-10), which turns the Appellant into a quasi-judicial body, was unconstitutional.

They asserted that, in matters of electoral disputes as envisaged in the Constitution, the IEBC should only act upon a trigger or complaint by a citizen or political party citing violations of the Electoral Code. The Respondent contended that where the IEBC acts suo motu and investigates a breach, the only mechanism available was to invoke the provisions of clauses 9, 10, 11, and 12 of the Electoral Code of Conduct. They claimed that clauses 7(a)(i) and (ii) and 8 of the Second Schedule to the Elections Act were unconstitutional insofar as they purported to confer on the Appellant the power to issue a formal warning. Additionally, they argued that the envisaged Committee on enforcement of the Electoral Code was illegal and exceeded the powers conferred on the IEBC by the Constitution. Lastly, they sought a declaration that the provisions of the Second Schedule purporting to establish a committee to enforce the Electoral Code, along with its composition and duties, were invalid and unconstitutional.

Issues for determination

1. Whether the Appellant had jurisdiction to summon the Respondent, hear the alleged complaint against her and make findings thereon;
2. Whether the impugned parts of the Code were unconstitutional;
3. Whether the Electoral Code of Conduct was binding upon the Respondent;
4. Whether the Respondent's Cross-Petition herein is incompetent.

Determination of the court

On the first issue, the Appellant argued that it is empowered under article 252(2) of the Constitution to investigate and summon witnesses. The Appellant argued that they had the mandate to settle disputes related to nominations excluding electoral petitions. Further, it was contended that the Appellant had the jurisdiction to settle any suspected or actual breach of the Electoral Code and that to declare that the Appellant did not fall under commissions stated in article 252(3) vested with the power to summon and investigate would be equal to stripping other commissions not stated under article 252(3) including the Appellant, of the powers to summon and investigate.

In response the Respondent stated that the Appellant lacked the capacity and authority to investigate and summon witnesses and that paragraph 15 (1-10) of the Electoral Code was an aberration and did not conform to the letter and spirit of the Constitution.

It is however not denied that the Appellant is a commission established under article 88(4) of the Constitution and the general functions of commissions are highlighted in article 252 of the Constitution asserting that they have the mandate to conduct investigations.

However, the bone of contention revolved around whether the Appellant had the right to summon witnesses. The Electoral Code makes provision for the Appellant to summon witnesses and that further the settlement disputes rules make provision for sanctions.

From both the High Court and the Court of Appeal it was determined that the power to summon and investigate is vested with the four commissions listed under article 252(3) and the attempt for the Appellant to arrogate itself power through another legislative instrument was not within the spirit of the Constitution. The Respondent alluded to the fact that the Appellant could investigate but to overstep the boundary and turn to an award- giving tribunal was not in conformity with the Constitution.

In determining whether the Appellant acted beyond its Constitutional mandate, the Supreme Court proceeded to state that it had always interpreted Article 88(4) of the Constitution to mean that the IEBC was vested with the authority to solve pre-election disputes, including nominations. The court proceeded to state precedent that delved into the principle of overlap as to function and efficiency. Placing reliance on the case of **Alnashir Popat & 7 others v Capital Markets Authority, Pet. No. 29 of 2019 [2020] eKLR**, the court addressed whether it was appropriate for the Capital Markets Authority (CMA) to hold both investigatory and enforcement roles. The court acknowledged the historical and social context of the Capital Markets Authority Act (CMA Act), noting that Section 11(3) grants the CMA extensive powers to maintain discipline within the capital markets. The court referred to the Canadian Supreme Court case **Brosseau v Alberta Securities Commission [1989] 1 S.C.R. 301,** which emphasized that administrative tribunals, such as securities commissions, are often tasked with multiple functions, including regulating securities, overseeing prospectuses, and enforcing the Act. The court highlighted that such overlapping functions are designed to ensure efficiency in managing securities markets.

The court agreed with the Respondent's view that the overlap of functions in Section 11(3)(cc)(h) of the CMA Act was necessary for effective and timely dispute resolution in the capital markets. It concluded that this overlap did not render the provision unconstitutional.

The court noted that Section 15(4) of the Second Schedule of the Elections Act empowers the Appellant's Enforcement Committee to issue summons and impose sanctions. The Rules of Procedure on Settlement Disputes similarly confer powers to the Appellant. The court emphasized that the Elections Act and its regulations are based on the principles found in Articles 81 and 86 of the Constitution and that any interpretation must be consistent with the Constitution, as highlighted in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Application No. 5 of 2014 [2014] eKLR,** and **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Petition No. 2B of 2014 [2014] eKLR.**

The court observed that the Elections Act and the Electoral Code of Conduct are intentionally designed to enable the IEBC to perform its constitutional roles under Articles 84, 88(4)(e), 88(5), and 252(1) of the Constitution. It stressed the importance of following legal mechanisms for dispute resolution and affirmed that the IEBC's power to conduct investigations, summon witnesses, and hear complaints was statutory and not unconstitutional. The court maintained that this overlapping mandate did not infringe upon the principle of natural justice, specifically the principle of ***nemo judex in causa sua*** (no man should be a judge in his own cause).

The court concluded that the Electoral Code of Conduct was constitutional and supported the Appellant's authority to enforce it. It rejected the lower courts' views that the IEBC acted beyond its jurisdiction by issuing summons and conducting hearings. The court confirmed that the IEBC has the authority to summon witnesses and conduct hearings regarding breaches of the Electoral Code, in accordance with Articles 88(4)(e) and 252(3) of the Constitution. The court reiterated that the Constitution must be interpreted purposively and holistically, with each clause reinforcing the others.

On whether the Electoral Code of Conduct was binding on the Respondent, the Appellant argued that the Code was binding under Section 110 of the Elections Act and paragraph 1(2) of the Code. However, the Respondent disputed this, claiming she did not offer herself for elective office and thus could not have subscribed to the Code in 2022 as she was not a candidate.

Section 110 of the Elections Act specifies that all political parties and individuals participating in elections or referendums must subscribe to and observe the Electoral Code of Conduct. Additionally, the Second Schedule of the Elections Act outlines that the Code binds every political party, candidate, leader, office bearer, agent, and member of a political party participating in an election.

Article 84 of the Constitution reinforces the requirement for candidates and political parties to comply with the Electoral Code. Given these provisions, the Code is mandatory for all participants in elections or referendums.

The court noted that the Respondent made the alleged statements on 10 February 2022 but was not a candidate at that time. The Appellant claimed that the Respondent was a member of the Jubilee Party, which participated in the 2022 elections, suggesting that she would be bound by the Code if this was true. However, the Appellant did not provide evidence to confirm that the Jubilee Party subscribed to the Electoral Code during the relevant period or that the Respondent was a member or official of the party. As the evidence was inconclusive, the court found that the Respondent could not be held liable in this case.

The court reviewed the competency of the Respondent's Cross-Petition, which was dated 9 September 2022 and included eleven grounds and seven reliefs. The Appellant challenged its competency, arguing that neither the Supreme Court Act nor the Supreme Court Rules allow for the filing of a Cross-Petition in response to an appeal. It was also contended that the Cross-Petition was incompetent because it was filed without the required Record of Appeal, as per Rule 47(2)(b) of the Supreme Court Rules 2020. The Respondent did not address this objection.

The court referred to *Black's Law Dictionary*, which defines a cross-appeal as a request by an Appellant for a higher court to review a lower court's decision, a definition adopted in **Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others ([2019] eKLR.** In contrast, a cross-petition is defined as a claim by a defendant against a non-party to the action, as clarified in **Communications Commission of Kenya & 3 Others v Royal Media Services Limited & 7 Others ([2014] eKLR.** The court distinguished between cross-appeals and cross-petitions, stating that the former is for counter-appealing in an appellate process, while the latter is used in original jurisdiction cases. The Supreme Court Rules only provide for cross-appeals.

Additionally, the Cross-Petition was filed without the mandatory Record of Appeal, as specified in Rule 47(2)(a) and (b). The court reiterated the importance of adhering to these requirements, as seen in previous cases like **Senate & 3 Others v Speaker of the National Assembly & 10 Others ([2023] KESC 7.** Due to the failure to comply with these rules, the court concluded that the Cross-Petition was incurably defective.

The court issued the following orders: The Appeal partially succeeded in affirming that the IEBC had jurisdiction to summon, hear complaints, and make findings regarding breaches of the Electoral Code as per Article 88(4)(e) of the Constitution. It also succeeded in confirming the constitutional validity of the Electoral Code of Conduct. However, the Appeal was dismissed in so far as holding the Respondent liable. The Cross-Petition was struck out. Each party was directed to bear its own costs incurred in the Supreme Court, the Court of Appeal, and the High Court. Additionally, the court directed that the sum of Kshs. 6,000 deposited as security for costs be refunded to the Appellant.

ELECTION CAMPAIGN FINANCING REGULATION

Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & another (Interested parties) Consolidated Constitutional Petitions No. E540 & E546 of 2021

In the High Court of Kenya at Nairobi

Coram: A.C. Mrima, J.

Judgment partially allowing petition

Date: 5 May 2022

Principles of constitutional and statutory interpretation-whether Article 88 (4) (i) Regulations are constitutional instruments or statutory instruments-whether Election Campaign Financing Regulations 2016 and 2020 complied with the Constitution and the law-whether sections 12, 18 and 19 of the Election Campaign Financing Act 2013 require National Assembly approval before implementation

Summary of Facts:

The 1st and 2nd Petitioners petition concerned the power donated to the IEBC to make Regulations under Section 29(1) of the Election Campaign Financing Act ("the ECF Act"). The 1st and 2nd Petitioners contended that the aforementioned section is unconstitutional to the extent that it requires mandatory approval of the National Assembly.

They therefore argued that as a result of the foregoing unconstitutionality, the actions by the National Assembly in failing to approve the Regulations made by the IEBC in the years 2016 as well as 2020, were unreasonable and unlawful.

It was the 1st and 2nd Petitioner's case that the requirement under Section 29 of the ECF Act resulted in absence of rules regulating election campaign financing contrary to sections 5 and 15 of the ECF Act which obligates the IEBC to make rules to regulate election campaign financing and the limits thereon of not less than twelve months to a general election. Further, it was the 1st and 2nd Petitioner's case that Section 29 (1) of the ECF Act is inconsistent with Article 88 (4) of the Constitution which bestows the IEBC the responsibility to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election.

The 1st and 2nd Petitioners stated that the impugned section has the unconstitutional purpose and effect of shifting the Constitutional responsibility to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election under Article 88 (4)(i) from the IEBC to the National Assembly.

The substratum of the 3rd and 4th Petitioners' case was largely as urged by the 1st and 2nd Petitioners save that they contended *inter alia* that the Regulations under Article 88(4)(i) of the Constitution were statutory instruments and not Constitutional instruments.

It was further their case that taking into consideration the provisions of the Preamble, Sections 3(1), 4, 11 and 13 of the ECF Act and the failed attempt by the IEBC to get the Regulations approved, the National Assembly failed to exercise its Constitutional mandate and statutory authority in 2016, 2017, 2018, 2019, 2020 and 2021 when it did not to invite or summon the IEBC to either provide the Committee on delegated legislation with any information relevant to the Implementation of the ECF Act or to receive recommendations from the Committee on modifications necessary to make the Regulations more effective and efficient.

Moreover, they urged that the failure by the National Assembly to approve the Regulations within the timelines contravened Section 15 of the Statutory Instruments Act of 2013 and Article 259(8) of the Constitution.

They asserted that the National Assembly's purported rejection of the Regulations was inoperative since they had come into force by dint of Section 15(2) of the Statutory Instrument Act.

Finally, in respect of the amendment of Section 1 of the Electoral Campaign Financing Act that inserted Section 1A suspending the entire Act, it was the Petitioner's case that the National Assembly acted *ultra vires* and in contravention of Articles 2(2), 10(1), 73(1) and 2(c) and 94(4) of the Constitution.

The Law Society of Kenya supported the Petition through the Replying Affidavit of Florence Wairimu Muturi, sworn on 1 February 2022. Muturi asserted that decisions made by the Commission under its Constitutional mandate as per Article 88(4)(i) were not subject to examination or the Statutory Instruments Act. She argued that Section 29(1) of the Election Campaign Financing Act, 2013, which necessitates mandatory approval by the National Assembly for regulations made by the IEBC under Article 88(4)(i) concerning campaign expenditure limits, was

contradictory to Article 88(4)(i), redundant, and therefore unconstitutional. Muturi contended that regulations made by the IEBC under Article 88(4)(i) were not statutory instruments subject to parliamentary oversight as defined by the Statutory Instruments Act, and that the annulment of the Gazette Notice violated the principle of separation of powers and was unconstitutional. The Law Society reiterated its position in written submissions dated 31st January 2022, highlighting the independence of the IEBC as upheld by the Supreme Court in relevant cases, emphasising the necessity for Constitutional bodies to operate free from undue interference.

The Community Advocacy and Awareness Trust (Com-Trust), represented by Executive Director Daisy Amdany through a Replying Affidavit sworn on 8 February 2022, supported the Petition. Amdany described Com-Trust as a non-governmental, non-profit organisation focused on advocating for the interests of marginalised and vulnerable community members, particularly women. She affirmed that under Article 88(4) of the Constitution, read alongside Sections 5 and 18 of the ECF Act, the IEBC was responsible for regulating campaign expenditure. Amdany claimed that the IEBC had attempted to fulfil this obligation in 2016 and 2020, but the 2nd and 3rd Respondents had obstructed the implementation of the Regulations. Com-Trust argued that the regulation of campaign financing was a Constitutional function of the IEBC, not subject to the Statutory Instruments Act, 2013, or National Assembly approval. Amdany warned that failing to establish these regulations would limit electoral participation to the wealthy, excluding the poor and marginalised, and thus discriminating against women. She contended that the Regulations were necessary to address historical injustices against women in politics, as outlined in Articles 10, 27, 38, 81, and 100 of the Constitution. Com-Trust urged the Court to rule that Article 88(4)(i) Regulations were not statutory instruments requiring parliamentary approval. These arguments were reiterated in Com-Trust's written submissions dated 8 February 2022.

The 1st Respondent made its case through the Replying Affidavit of Mr. Chrispine Owiye, its Legal Services Director, deposed to on 1 February 2022. He deposed that Kenya's pre-2010 Constitutional framework had weak campaign regulations, with no organ empowered to regulate campaigns. As a result, Kenya's political culture was marked by corruption and political expulsions, particularly during elections. The issue was addressed by the Constitution of Kenya Review Commission, which recommended in its final report that the IEBC should set maximum campaign spending limits to ensure fairness.

Referring to the Krieger Report, Mr. Owiye stated that the lack of rules regulating campaign funds had adverse effects on the 2007 elections. He added that the Committee of Experts on Constitutional Review noted the importance of having a ceiling on campaign spending to promote good governance, enhance transparency, and reduce grand corruption. Consequently, the 2010 Constitution introduced changes under Articles 88(4)(i) and 88(5), mandating the 1st Respondent to undertake a regulatory role.

Mr. Owiye further stated that the Elections Act, in Section 109, empowers the 1st Respondent to make regulations regarding campaign financing during elections or referendums. He also cited Sections 5, 12, 18, 19, and 29 of the ECF Act. Based on these provisions, the 1st Respondent drafted the Election Campaign Financing Regulations 2016 and referred them to the National Assembly for review and approval but has yet to receive feedback. Consequently, the 1st Respondent could not publish the Regulations due to the National Assembly's inaction.

Despite this, the 1st Respondent published the spending limits as envisaged by Sections 5, 12, 18, and 19 of the ECF Act. However, Parliament later amended the ECF Act by inserting Section 1A, which suspended the Act's application. Regarding the Campaigns Regulations 2020, Mr. Owiye deposed that after the 1st Respondent published Gazette Notice No. 8024 and submitted it to the National Assembly, the Committee on Delegated Legislation recommended annulment due to delays, drafting errors, lack of public participation, and pending proposals to amend the ECF Act.

Mr. Owiye concluded that Section 29 of the ECF Act limits the 1st Respondent's power to make regulations. The 1st Respondent reiterated its case through written submissions dated 11 March 2022. It identified issues for determination, including the interpretation of Section 29 of the ECF Act vis-à-vis Section 11 of the Statutory Instruments Act, and the distinction between regulations made under Section 29 of the ECF Act and ceilings created under Sections 12, 18, and 19.

On the first issue, it was submitted that the enactment process of regulations under the ECF Act is a two-step process: the 1st Respondent prepares draft regulations and submits them to the National Assembly for approval, and the approved regulations are then tabled in the National Assembly. It was argued that requiring the 1st Respondent to submit draft regulations before Parliament was unique and an unreasonable constraint on the 1st Respondent's Constitutional functions. The 1st Respondent asserted that the regulations should have been approved with or without amendments.

On the second issue, it was submitted that while Section 29 empowered the 1st Respondent to draft regulations, these needed Parliamentary approval to be legally compliant. However, the spending and contribution ceilings under Sections 12, 18, and 19 did not require such approval. Counsel for the 1st Respondent, Mr. Ocholla, emphasised that the wording of Sections 12, 18, and 19 of the ECF Act was mandatory, as indicated by the use of 'Shall'.

Support was drawn from the case of **Diana Kethi Kilonzo & Another v Independent Electoral and Boundaries Commission & 10 Others [2013] eKLR,** where it was noted that Constitutional bodies should be allowed to discharge their mandates without undue interference. Regarding the place of Gazette Notices vis-à-vis Parliamentary approval, the Court was referred to **Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others [2014] eKLR,** which concluded that the National Assembly overstepped its mandate by quashing Gazette Notices issued by the SRC.

The 1st Respondent maintained that it, not Parliament, had the final authority on gazetting election campaign finance ceilings. It was argued that if Parliament was aggrieved by the Gazette Notice, it should have challenged it in Court rather than annulling it without authority. In conclusion, Mr. Ocholla requested that the implementation of the annulled regulations under Section 29 of the ECF Act be postponed to the next general elections, given the election timelines.

The 2nd and 3rd Respondents, the National Assembly and the Speaker of the National Assembly respectively, opposed the Petition through the Replying Affidavit of Jeremiah Ndombi, the Deputy Clerk of the National Assembly, deposed on 31 January 2022. Ndombi deposed that under Articles 94(5) and 95(5)(b) of the Constitution, the National Assembly's mandate includes exercising oversight over state organs, including approving Regulations made by the IEBC. He argued that this oversight function is a core democratic role of Parliament, enhancing democracy and accountability. According to him, the power to regulate is delegated to the IEBC through statute, as per Article 94(5) of the Constitution.

Ndombi stated that Regulations made under Section 29(1) of the ECF Act and other rules for implementing Sections 12, 18, and 19 of the Act are statutory instruments subject to the Statutory Instruments Act. He noted that various legal regimes regulating Kenyan politics, including the Elections Act and the IEBC Act, have developed rules considered and approved by Parliament. He also asserted that the National Assembly had not shown impartiality, bias, or conflict of interest when considering these Regulations.

In response to the Petitioners' contention that the annulment and rejection of the 2016 Draft Election Campaigns Regulation was irregular, Ndombi deposed that the Committee on Delegated Legislation rejected it for contravening Section 5 of the ECF Act and Section 13(a) of the Statutory Instruments Act. He stated that the suspension of the ECF Act's operation through Section 1A was due to the lack of enforceable Regulations during the 2017 elections. He explained that new Regulations must be made for each general election due to changing political circumstances.

Ndombi argued that the IEBC unjustifiably delayed the Regulations, contrary to Section 5(a) of the ECF Act and Section 13 of the Statutory Instruments Act, and the 2020 Regulations contained errors. He also criticised the IEBC's unprocedural publication of contribution and spending ceilings on 9 August 2021 and failure to ensure public participation.

In conclusion, Ndombi stated that the Petitioners' claim that Regulations came into operation upon Parliament's failure to approve them was incorrect, as the Regulations did not comply with the Statutory Instruments Act and ECF Act requirements. The 2nd and 3rd Respondents urged the Court to dismiss the Petition with costs.

In written submissions dated 18 March 2022, the 2nd and 3rd Respondents reiterated their position. They argued that under Article 88(4)(1) of the Constitution, the IEBC's responsibility to conduct elections must be prescribed by an Act of Parliament and cannot be interpreted to allow the IEBC to develop laws without Parliamentary oversight. Counsel for the 2nd and 3rd Respondents, Miss Otieno, reiterated that any subsidiary legislation from the ECF Act is a statutory instrument subject to the Statutory Instruments Act. She argued that the IEBC does not have the power to create "Constitutional instruments" as claimed by the Petitioners.

Rebutting the claim that Section 29 of the ECF Act was unconstitutional, it was submitted that delegation of powers to a state organ is allowed under Article 94(5) of the Constitution, making Section 29 a valid exercise of that power. The National Assembly's responsibility is to ensure submitted Regulations meet the parameters set out in the Statutory Instruments Act. Support was drawn from **Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 Others [2018] eKLR,** which discussed the requirements for statutory instruments.

It was argued that the Regulations did not meet these requirements, and the Petitioners had not shown how the impugned section violated their rights. In conclusion, it was submitted that the consolidated Petitions were not merited and should be dismissed with costs.

The Attorney General opposed the Petition and the application through Grounds of Opposition dated 14 January 2022. Referring to Articles 1(1)(2), 94(1)(5), and 95(3) of the Constitution, Section 29(1) of the ECF Act, and Section 11 of the Statutory Instruments Act, it was argued that the National Assembly retains the ultimate legislative authority to make provisions having the force of law and can alter previous or present statutes or statutory instruments as needed. The 4th Respondent aligned with the 2nd and 3rd Respondents, stating that the draft Election Campaign Financing Regulations, 2020, published by the 1st Respondent, required parliamentary consideration and approval.

The 4th Respondent asserted that Gazette Notice No. 8024, which published the spending and contribution limits, was null and void because it depended on the enactment of the Election Campaign Financing Regulations, 2020, which the National Assembly revoked. Regarding the application, it was argued that the Petitioners had not met the strict criteria of Article 23(3)(c), which requires relief for conservatory orders to be granted only when there is a prima facie case and when a right or fundamental freedom in the Bill of Rights is alleged to have been denied, violated, infringed, or threatened.

The 4th Respondent prayed that the consolidated Petitions be dismissed with costs to the Respondents. In written submissions dated 3 March 2022 and further oral submissions by its Counsel Miss Mutindi, the 4th Respondent reiterated the case of the 2nd and 3rd Respondents. They argued there was no public participation, the submission was late, had drafting errors, and were thus null. The citation read "Campaign Financing Regulations, 2016," whereas the heading read "Campaign Finance Regulations 2020."

The Respondent maintained that the 2016 Regulations could not be relied on for the 2022 general elections as Sections 12, 18, and 19 of the ECF Act require fresh rules on election campaign financing to be published 12 months before a general election. To emphasise the importance of public participation, **British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others [2019] eKLR** was cited, where the Court of Appeal highlighted the entrenchment of public participation and consultation since the promulgation of the 2010 Constitution.

Miss Mutindi, in her oral highlights, argued there is no concept of Constitutional Instruments in the Kenyan legal framework, stating it is foreign to the 2010 Constitution. In conclusion, she claimed that the National Assembly involved the public in declining the Regulations.

Issues for determination

1. Principles of Constitutional and statutory interpretation.
2. Whether the Regulations contemplated under Article 88(4)(i) of the Constitution are 'Constitutional instruments' or 'statutory instruments'.
3. Whether the Election Campaign Financing Regulations, 2016 and the Election Campaign Financing Regulations, 2020 complied with the Constitution and the law.
4. The constitutionality of section 29(1) of the Election Campaign Financing Act in respect to whether Parliament usurped the powers of the Independent Electoral and Boundaries Commission in requiring the mandatory approval of the Regulations by the National Assembly.
5. Whether Sections 12, 18, and 19 of the Election Campaigns Financing Act, 2013 require the approval of the National Assembly as a condition precedent to implementation.
6. What remedies, if any, ought to issue.

Determination of the court

Principles of Constitutional and statutory interpretation

The principles of Constitutional and statutory interpretation are grounded in the supremacy of the Constitution, as established by Article 2(1), which asserts that the Constitution is the supreme law and binds all persons and state organs. Article 259(1) mandates that the Constitution be interpreted in a manner that promotes its purposes, values, and principles, advances the rule of law, human rights, and fundamental freedoms, permits the development of the law, and contributes to good governance. This purposive approach ensures that interpretation aligns with the broader objectives and values embedded within the Constitution rather than adhering to a formalistic or literal interpretation.

A holistic interpretation of the Constitution is essential, reading it as an integrated whole with each provision sustaining and complementing the others to avoid internal conflict and uphold coherence. This approach is reinforced by jurisprudence, such as in the case of **Communications Commission of Kenya v Royal**

Media Services Limited [2014] eKLR, where the court emphasized that the Constitution should be read as a unified document.

When interpreting statutes, courts must consider the purpose and effect of the legislation to ensure it aligns with Constitutional objectives and does not produce unconstitutional outcomes. This was highlighted in the case of **R v Big M Drug Mart Ltd [1985] 1 SCR 295,** where the purpose and effect of the statute were pivotal in determining its constitutionality. The proportionality test is a critical tool for assessing any limitation on rights, requiring that the objective of the limitation be significant, the means reasonable, and the effects proportionate to the objective, as established in **R v Oakes [1986] 1 SCR 103.**

Public interest and legal history also play a vital role in interpretation, ensuring that laws serve the collective aspirations of society and reflect the legal traditions and historical context of the jurisdiction. This was underscored in the case of **John Harun Mwau v Independent Electoral & Boundaries Commission [2013] eKLR,** where the court considered the broader public interest and historical context in its interpretation.

In summary, the principles of Constitutional and statutory interpretation require a purposive, holistic, and context-sensitive approach, ensuring that laws align with the Constitution's broader objectives and values, uphold public interest, and reflect the legal history and traditions of the jurisdiction. This approach is critical in maintaining the supremacy of the Constitution and ensuring that all laws serve the collective aspirations of society.

Whether the regulations contemplated under Article 88(4)(i) of the Constitution are 'Constitutional instruments' or 'statutory instruments'

The second issue under consideration pertained to whether the Regulations under Article 88(4)(i) of the Constitution should be categorized as Constitutional instruments or statutory instruments. Article 88 establishes the Independent Electoral and Boundaries Commission (IEBC) and delineates its functions, including the regulation of campaign expenditure by candidates or parties in elections. The Petitioners argued that the Regulations under Article 88(4)(i) qualify as Constitutional instruments similar to rules made by the Chief Justice under Article 22(3), the Supreme Court under Article 163(8), and the Salaries and Remuneration Commission under Article 230(4)(a). They contended that these Regulations derive their legitimacy directly from the Constitution and do not require parliamentary approval.

In contrast, the Respondents asserted that the Regulations are statutory instruments. They maintained that these Regulations are created under the authority of an Act of Parliament and must adhere to the legislative processes outlined in national law.

The court referred to a previous case, **Hon. Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission, Nairobi HC Pet E073 of 2022,** where it distinguished between Constitutional instruments and statutory instruments. Constitutional instruments are not explicitly defined in the Constitution but derive their basis and legitimacy directly from it without needing parliamentary approval. Examples include the rules made by the Chief Justice for protecting rights and fundamental freedoms under Article 22(3), known as the ***Mutunga Rules***, which derive their authority directly from the Constitution and are not considered statutory instruments.

Statutory instruments, on the other hand, derive their authority from an Act of Parliament. They include Regulations, orders, and guidelines made under powers conferred by a parent statute. These instruments must comply with legislative processes provided in the Constitution and national law, including parliamentary approval.

In this context, the court examined whether the Regulations under Article 88(4)(i) have any bearing on elections. Citing various legal definitions and precedents, the court reiterated that elections are a process encompassing multiple stages, including voter registration, candidate nomination, campaign regulation, and the declaration of results. The Regulations in question, which aim to control election spending, are integral to this electoral process.

The Supreme Court of Kenya in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017 eKLR],** stated that elections are a holistic process involving many stages such as voter registration, candidate nomination, campaign activities, and the final declaration of results. Equally, the High Court in **Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others [2013 eKLR],** emphasized that an election is an elaborate process that includes several stages, all of which must comply with the law to ensure the validity of the election.

Given that Article 82(1)(d) of the Constitution mandates Parliament to enact legislation to regulate and supervise elections, the court concluded that the power to make these Regulations was intended to be exercised through legislative means.

Consequently, the court held that the Regulations under Article 88(4)(i) are statutory instruments. They are to be made in accordance with the Elections Act and the Election Campaign Finance Act, which empower the IEBC to formulate such Regulations. Thus, the court rejected the Petitioners' argument that the Regulations are Constitutional instruments and affirmed that they are statutory instruments, subject to the legislative processes outlined in national law.

Whether the Election Campaign Financing Regulations, 2016 and the Election Campaign Financing Regulations, 2020 complied with the Constitution and the law

Under the 3rd issue, the court examined the Election Campaign Financing Regulations, 2016 (referred to as 'the 2016 Regulations') and the Election Campaign Financing Regulations, 2020 (referred to as 'the 2020 Regulations'), to assess their compliance with the Constitution and the Statutory Instruments Act. This legislation mandates rigorous standards for the creation, scrutiny, publication, and implementation of statutory instruments, including requirements for public consultation, clear drafting for legal effectiveness, and mechanisms for parliamentary oversight. Specifically, Section 4 of the Act outlines the objectives, including mandatory consultations (Section 5), and provisions for parliamentary scrutiny (Part IV).

Regarding the 2016 Regulations, originally drafted by the Commission and submitted to the National Assembly for approval, the court noted that they were not returned by the National Assembly. Despite this, the Commission published the regulations under Sections 5, 12, 18, and 19 of the ECF Act. However, Section 1A of the ECF Act subsequently suspended the application of these regulations. Despite this, the Regulations were published under provisions of the Election Campaign Financing (ECF) Act, which had been amended to defer its application to a subsequent election cycle.

In the case of the 2020 Regulations, the Commission prepared and submitted them to the National Assembly, but they were subsequently revoked due to procedural deficiencies identified by the National Assembly's Committee on Delegated Legislation. These deficiencies included delays in submission, drafting errors, and inadequate public consultation, which contravened statutory and Constitutional requirements. The National Assembly's Committee on Delegated Legislation found that the Commission had unjustifiably delayed the submission and failed

to meet statutory requirements for consultation and public participation. Consequently, the Committee recommended the annulment of the 2020 Regulations and the associated limits published in Kenya Gazette No. 8024 of 9 August 2021. The National Assembly adopted this recommendation, revoking both the regulations and the Gazette Notice.

Throughout its judgment, the court underscored the importance of public consultation in statutory processes, citing relevant case law to support its reasoning. In **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR,** the court emphasized the justiciability and enforceability of public participation under Article 10(2) of the Constitution. Likewise, in **Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others [2016] eKLR,** the court highlighted the role of public participation in the law-making process and the duty of lawmakers to consider public input. Further, in **Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A)**, the court discussed the preservation of human dignity and self-respect through public participation in governmental decision-making. Lastly, in **Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 Others [2010] ZACC 5,** the court underscored the integral role of public engagement in democratic legitimacy and informed decision-making.

The court upheld the National Assembly's decisions to reject both the 2016 and 2020 Regulations as lawful, emphasizing the necessity of adhering to legal and procedural requirements, including public participation, in formulating statutory instruments.

Whether Section 29(1) of the Election Campaign Financing Act in respect to whether Parliament usurped the powers of the Independent Electoral and Boundaries Commission in requiring the mandatory approval of the Regulations by the National Assembly.

The Court noted that whereas Article 88(1) of the Constitution establishes the IEBC, Article 88(4) specifically mandates the IEBC to conduct and supervise elections and referenda in Kenya. The Constitution further and specifically, under Article 88(4)(i), grants the power to regulate the amount of money that may be spent by or on behalf of a candidate or party in any election to the IEBC and not to Parliament.

By requiring the approval of the draft Regulations before gazettement, Section 29(1) of the ECF Act places itself in the shoes of the IEBC to the extent that what will eventually be gazetted will be what the Parliament would have come up and not the IEBC. There is, hence, confusion on the accountability aspect of the Regulations. That in effect amounts to Parliament usurping the role of the IEBC.

The Court held that compliance with Article 88(4)(i) of the Constitution and the Statutory Instruments Act, therefore, calls upon the IEBC to come up with the Regulations, publish them in the Gazette, and then transmit them for parliamentary scrutiny.

Therefore, as Section 29(1) of the Election Campaigns Finance Act seems to have placed the cart before the horse, the provision is not only contrary to Article 88(4)(i) of the Constitution, but also creates unnecessary conflict and confusion in the manner statutory instruments ought to be dealt with under the law. The impugned provision also creates an unjustified special category of statutory instruments.

The Court thus held that the net effect of the provision is that it does not promote the values and principles of governance relating to good governance, integrity, and accountability. The provision does not also pass the test in the ***R. v Oakes*** case since its effect is to inhibit Constitutionalism. Having said so, the Court found that Section 29(1) of the ECF Act is contrary to Article 10(2)(c) and 88(4) of the Constitution.

Whether Sections 12, 18, and 19 of the Election Campaigns Financing Act, 2013 require the approval of the National Assembly as a condition precedent to implementation.

The court addressed whether Sections 12, 18, and 19 of the Election Campaigns Financing Act, 2013 (ECF Act) necessitate the National Assembly's approval prior to their implementation. Section 12 of the ECF Act mandates that the Commission set limits on various types of contributions, including total contributions and those from a single source, and must do so at least twelve months before a general election. Section 18 requires the Commission to establish spending limits for candidates, political parties, and referendum committees, taking into account factors like geographical features and population density, also twelve months before an election. Additionally, Section 19 stipulates that the Commission must define authorized campaign expenditures, such as venue costs and publicity materials, well in advance of the election.

The court highlighted that these sections can only be implemented following the enactment of the relevant election campaign financing regulations. The absence of these regulations previously led to the enactment of Section 1A of the ECF Act, which suspended its application. The enactment of any Act of Parliament involves an elaborate process including public participation and parliamentary approval before it receives Presidential assent. Likewise, the Statutory Instruments Act requires that any statutory instrument undergo public engagement and parliamentary scrutiny.

The Commission must implement Sections 12, 18, and 19 in accordance with the statutory regulations, adhering to Article 47 of the Constitution, which mandates fair administrative action. This includes ensuring that limits are set through a process that includes public consultation, as these decisions impact the public and must be made in a procedurally fair manner. Although the Commission is required to undertake public engagement, it is not necessary for the resulting limits to receive further parliamentary approval.

This approach is supported by judicial interpretations, including **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; 2017 eKLR,** where the Court of Appeal affirmed that the values espoused in Article 10(2) of the Constitution are enforceable and immediate. The importance of public participation in law-making was further reinforced in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others, [2018] eKLR,** which underscores the necessity of involving the public in legislative processes. Additionally, the South African cases **Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A)** and ***P*overty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5** illustrate that public participation is integral to democratic governance and ensures decisions are well-informed and legitimate.

The court concluded that while the Commission must engage the public in setting the spending limits under Sections 12, 18, and 19, these limits do not require further approval from the National Assembly. Consequently, the court answered the issue in the negative.

Reliefs

Finally, the court considered what reliefs ought to issue following the partial success of the consolidated petitions. The Petitioners failed to demonstrate that regulations under Article 88(4)(i) of the Constitution are Constitutional instruments and that the 2016 Regulations became effective by operation of law. However, they succeeded in proving other issues. The court concluded that the regulations under Article 88(4)(i) are statutory instruments, not Constitutional instruments. There was no public participation in enacting the Election Campaign Financing Regulations, 2016 and 2020. The National Assembly did not violate the Constitution by suspending the operation of the ECF Act via Section 1A or by annulling and revoking the 2016 and 2020 Regulations and the spending limits in Gazette Notice No. 8024. Additionally, the IEBC did not violate the Constitution by issuing Gazette Notice No. 10723. Section 29(1) of the ECF Act was found unconstitutional as it contravenes Articles 10(2)(c) and 88(4) by requiring parliamentary approval before gazettement. Furthermore, the court determined that spending limits in Sections 12, 18, and 19 of the ECF Act do not require parliamentary approval but must undergo appropriate public engagement.

The court called upon the IEBC to promptly develop Regulations under Article 88(4)(i) of the Constitution to ensure the necessary regulations and spending limits are in place, thereby promoting Constitutionalism. The final judgment issued the following declarations: the regulations under Article 88(4)(i) are statutory instruments; Section 29(1) of the ECF Act is unconstitutional; the spending limits in Sections 12, 18, and 19 do not require parliamentary approval but need public engagement. The rest of the prayers in the consolidated petitions were disallowed, and each party was to bear its own costs.

REGULATION OF POLITICAL PARTIES

Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others (Interested Parties) (Petition E043, E057 & E109 of 2022)

In the High Court of Kenya at Nairobi

Coram: H.I. Ong'udi Judge E. Maina Judge D. Ogembo JJ

Judgment partially allowing petition

Date: 20 April 2022

Constitutionality of sections 2, 4A, 6(2)(a), 7(6), 14A, 22, 31, 34, 38A, 40(3), 41(2) of the Political Parties (Amendment)Act, 2022 and the proposed amendments to sections 28(1) and 28A of the Elections Act-public participation-whether Political Parties (Amendment) Act 2022 was ambiguous, uncertain, imprecise and overbroad-reliefs

Summary of the facts:

The 1st Petitioner is a male adult of sound mind, a citizen of Kenya residing in Meru County, and a member of Chama cha Kazi Party of Kenya, seeking to vie for the position of Senate Member of Parliament for Meru County. The 2nd Petitioner, Katiba Institute, is a constitutional research, education, litigation, and advocacy institute established in 2011 to promote constitutionalism within Kenya. The 3rd Petitioner, AFRICOG, is an independent, non-profit organisation providing research and monitoring on governance and public ethics in both public and private sectors, aiming to address structural governance issues in East Africa and foster a civil society response to governance and corruption problems in Kenya. The 4th Petitioner, ICJ-Kenya, is a non-governmental, non-profit, member-based organisation focusing on the development, protection of the rule of law, democracy, governance, promotion of human rights, and safeguarding the independence of the Judiciary and the legal profession. The 5th Petitioner, KHRC, is a national non-governmental organisation dedicated to entrenching a human rights and democratic culture in Kenya. The 6th Petitioner, Usawa Kwa Wote Party, is a national political party registered under the Political Parties Act, 2011, with objectives including promoting fairness, equity, political participation, and human rights as provided in the Constitution of Kenya.

The 1st Respondent, Attorney General, is the Principal legal officer of the National Government, holding office under Article 156(6) of the Constitution. The 2nd Respondent, Speaker of the National Assembly, is the head of the National Assembly established under Article 106(1) of the Constitution of Kenya. The 3rd Respondent, Speaker of the Senate, is the head of the Senate established under Article 106(1) of the Constitution of Kenya. The 1st interested party, Registrar of Political Parties, is an office established under Section 33 of the Political Parties Act No 11 of 2011 with functions detailed in Section 34 of the Act. The 2nd interested party, IEBC, is a constitutional commission charged with overseeing electoral processes in Kenya, established under Article 88 of the Constitution of Kenya. The 3rd interested party, Azimio La Umoja, is a political party registered under the Political Parties Act, 2011. The 4th interested party, Jubilee Party of Kenya, is also a political party registered under the Political Parties Act, 2011. The 5th interested party is a male adult of sound mind and a citizen of Kenya.

The Consolidated Petitions

In the case brought by the 1st Petitioner under Petition No E043 of 2022, dated 2 February 2022, several orders were sought. These included a declaration that the Political Parties Act as amended by The Political Parties (Amendment) Bill, 2021, was inconsistent with the Constitution, specifically Articles 10, 38, 91, 92, and 260. The Petitioner argued that the amendment to Section 34 of the Act, which increased the powers of the Registrar of Political Parties, usurped the role of the IEBC as per Article 88(4)(d) and (c) of the Constitution. The petition also sought a declaration that the entire amendment was unconstitutional and an order declaring the Political Parties (Amendment) Act, 2022, invalid, illegal, null, and void. The petition challenged various sections of the Act, arguing that they introduced inconsistencies with the Constitution, including broad powers given to the Registrar of Political Parties, lack of adequate public participation, and changes that affected political rights and the nomination process.

The 2nd to 5th Petitioners, through Petition No E057 of 2022, dated 8 February 2022, sought declarations that the Political Parties (Amendment) Act, 2022, was void due to violations of constitutional and statutory requirements for meaningful public participation as outlined in Article 10 of the Constitution. They argued that the Senate's refusal to accept written comments in formats other than electronic delivery was an unjustifiable limitation on the right to public participation, violating Articles 10, 27, and 33. They also challenged Sections 2 and 10(1) of the

Act for being imprecise and overbroad, Section 22 for removing the obligation of the Auditor-General to audit political party accounts, and Section 4 for making gender parity and representation discretionary rather than mandatory. The Petitioners contended that the amendments undermined the reliability and credibility of the election process and sought an injunction against implementing the Act for the 2022 general election.

The 6th Petitioner, through Petition No E109 of 2022, dated 17 March 2022, sought declarations that Sections 28(1) and 28A of the Elections Act, 2011, were unconstitutional for discriminating against candidates seeking to join other political parties after party primaries, thus denying equal protection and benefit of the law as per Article 27 of the Constitution. The Petitioner argued that these sections unfairly restricted candidates' rights to join political parties and participate in the elections, and contended that they violated Article 38(3)(c) of the Constitution. The petition also sought to ensure that candidates could join other political parties or run as independents without restriction, as allowed under Article 85(a) of the Constitution.

The 1st Respondent, Kennedy Ogeto CBS, filed a replying affidavit on 15 February 2022. He argued that the petition was outside the court's jurisdiction under article 165(3)(d)(i) of the Constitution. According to him, the petition did not challenge the constitutionality of the Political Parties (Amendment) Act 2022 (the impugned Act), but rather sought an alternative interpretation of various constitutional articles. It failed to specify how the impugned Act was inconsistent with the Constitution or how it violated rights under the Bill of Rights. Ogeto claimed that the impugned Act complied with the Constitution and was intended to implement articles 91 and 92 of the Constitution effectively. He asserted that section 2 of the Political Parties Act as amended recognised political coalitions, and article 260 provided sufficient definition for political parties. Ogeto argued that coalition political parties did not contravene the Constitution and that individual rights to form political parties under article 38 were unaffected. He contended that the exemption of coalition parties from certain sections of the Political Parties Act was justifiable, as these parties had already complied with the Act. Additionally, he argued that section 14A did not infringe articles 47 and 50, as it provided fair notice and an opportunity to be heard. Section 40(3) aimed to ensure internal dispute resolution before referring matters to the Political Parties Dispute Tribunal. Ogeto also noted that a replying affidavit and grounds of opposition related to Petition E109 of 2022, which was consolidated with other petitions, had become outdated.

The 2nd Respondent, Michael Sialai CBS, responded on 15 February 2022. He detailed the legislative process of the Political Parties (Amendment) Bill (National Assembly Bill No. 56 of 2021), which underwent its first reading on 2 December 2021 and was reviewed by the Justice and Legal Affairs Committee (JLAC). The Bill aimed to amend the Political Parties Act 2011 to address overlaps between the Registrar of Political Parties and the Independent Electoral and Boundaries Commission (IEBC), enhance political party management, and implement various constitutional articles. Sialai noted that public participation was conducted as required, but no memoranda were received from the Petitioners. The JLAC engaged with stakeholders and considered their feedback, which led to several amendments to the Bill. The Bill was passed by the National Assembly on 5 January 2022, and the Senate passed it without amendments on 26 January 2022. Sialai summarised the objectives and amendments of the impugned Act, including changes to the definition of political parties, nomination processes, and party mergers. He argued that the Act did not violate constitutional principles or the rights guaranteed under the Constitution. He asserted that the Petitioners had not demonstrated how the Act was unconstitutional or met the criteria for conservatory orders.

The 3rd Respondent, Jeremiah Nyegenye CBS, filed a replying affidavit on 15 February 2022. He acknowledged that the Political Parties (Amendment) Bill was published on 26 November 2021 and passed through the legislative process, including public hearings in the Senate. The Bill was reviewed by stakeholders and passed by both Houses of Parliament. Nyegenye asserted that the amendments, including changes to the definition of political parties and nomination processes, did not infringe on constitutional rights. He argued that the Act did not limit the right to form political parties under article 38 or affect the constitutional functions of the 2nd Interested Party. He noted that extensive public participation was conducted, meeting the requirements of article 118 of the Constitution. Nyegenye contended that the Act provided a legal framework for coalitions and did not violate multi-party democracy or fair election principles.

In response to Petition E043 of 2022, the 1st Interested Party, through an affidavit sworn by Ann Nderitu MBS on 15 February 2022, indicated that the process leading to the enactment of the contested Act had commenced immediately after the 2017 general elections and had involved consultations with key stakeholders. The 1st Interested Party argued that the amendment of Section 2, which included the concept of a coalition political party, did not improperly expand the definition but clarified what constituted a political party, aligning it with the description

under Part 3 of Chapter Seven of the Constitution. It was noted that coalitions had been in existence since the 2002 general elections, and the amendment was intended to address challenges related to coalition political parties, such as the inclusion of their names on ballot papers and the selection of deputy candidates from constituent parties. Furthermore, the amendment was seen as facilitating the regulation and supervision of coalition political parties, requiring them to adhere to Article 91 of the Constitution.

The 1st Interested Party pointed out that mergers and coalitions were already recognized under Sections 10 and 11 of the Act before these amendments and that the process for a party to enter into a coalition would still be governed by the party's constitution. It was asserted that the amendments did not involve any delegation of political rights under Article 38. The affidavit further stated that party ideology was addressed under Sections 14 and 27 of the 2011 Act and that the new amendments brought clarity to the concept of ideology, which had not been previously defined. It was argued that the Petitioner had failed to demonstrate any contravention of Article 91(2) of the Constitution by the inclusion of a statement of ideology.

Regarding the registration process of coalition political parties, the 1st Interested Party maintained that a party must first be registered as a political party before forming a coalition political party, and requiring them to undergo the registration process again would be unreasonable and unjustified. It was suggested that the Petitioner should address concerns about the coalition process with their respective coalition party since the 1st Interested Party had no control over how parties entered into coalitions. Additionally, it was noted that the Third Schedule of the Act and the Petitioner's respective party constitution were intended to address any divergent views among members, and the issue raised by the Petitioner was considered an internal dispute raised in the wrong forum. The Petitioner was also said to have failed to appreciate the significance of Section 7 of the impugned Act, the Third Schedule, and other relevant regulations.

Regarding public participation, the 1st Interested Party argued that the parties affected by coalitions were registered members of the party rather than the public. It was stated that Section 40 of the Act provided a detailed process for challenging decisions made by the 1st Interested Party, and the Petitioner had failed to specifically demonstrate how Article 47 of the Constitution would be violated as alleged. The affidavit also stated that the Petitioner had failed to appreciate the importance of Section 14A (2) of the impugned Act, which required a political

party to conduct a hearing on allegations of deemed resignation. It was contended that the 1st Interested Party was not usurping the powers of the 2nd Interested Party, as the two were distinct but maintained a symbiotic relationship. The affidavit highlighted that the regulation of political parties fell under the purview of the 1st Interested Party, in accordance with Article 92, and that it had collaborated with the 2nd Interested Party in offering training to party agents. It was argued that Section 38E of the Political Parties Act was a necessary amendment to ensure proper supervision of political parties during the nomination process and that the amendment to Section 40 was not discriminatory, as the law required each political party to have an internal dispute resolution mechanism, in line with Article 159(2)(c) of the Constitution.

On the amendment to Section 41 of the Act, the affidavit stated that the changes were informed by the need for electoral processes to be concluded swiftly, emphasizing that litigation must have an end. Additionally, the amendments to Sections 27 and 28 of the Elections Act were deemed essential, as the 1st Interested Party was the custodian of registered party members. The affidavit also asserted that public participation had taken place, with the 1st Interested Party having held meetings to inform the public about the proposed amendments, some of which had come from the public, key stakeholders, and government agencies.

Regarding Petition No. E057 of 2022, the 1st Interested Party filed Grounds of Opposition on 15 February 2022, arguing that the Petitioners had failed to plead with specificity the alleged constitutional violations and had not demonstrated the unconstitutionality of the amended provisions. It was also contended that allowing the application at this interim stage would significantly impede the operations of the 1st Interested Party's office, and that the presumption of constitutionality for legislation could not be overturned without a full hearing.

In response to Petition No. E109 of 2022, the 1st Interested Party, through a replying affidavit sworn by Joy Onyango on 23 March 2022, reiterated that the petition was incompetent, bad in law, and an abuse of the court process. The 1st Interested Party argued that the petition was res judicata, citing previous cases such as **Maendeleo Chap Chap Party & 2 others v Independent Electoral and Boundaries Commission & another [2017] eKLR** and **Council of County Governors v Attorney General & another [2017] eKLR,** where similar legal issues had been fully settled by courts of competent jurisdiction. The affidavit further stated that the 1st Interested Party was established under Section 33 of the Political Parties Act, 2011, with the mandate to regulate political party nominations, which were

integral to

the conduct of elections and had to be performed within specific legal timelines to protect the rights of all Kenyans. The 1st Interested Party's role in verifying party membership lists and issuing certified party membership registers to political parties was attributed to amendments in the Political Parties Amendment Act 2022, which were informed by lessons learned from the 2017 general elections and stakeholder consultations. The challenge to Section 28A of the Elections Act 2011 was deemed to be framed in general terms, lacking specific particulars to demonstrate inconsistency with the Constitution.

The 2nd Interested Party, in its response to Petitions E043 of 2022 and E057 of 2022, filed a replying affidavit through Chrispine Owiye, Director of Legal and Public Affairs, on 17 March 2022. The 2nd Interested Party stated that public participation had been conducted during the development of the Bill, with the 2nd Interested Party submitting a memorandum to the Senate. The memorandum highlighted potential conflicts between the timelines in the Bill and the Elections Act, as well as concerns about the usurpation of the 2nd Interested Party's constitutional mandate by the 1st Interested Party. However, it was acknowledged that Parliament was not obligated to adopt these proposals. In response to Petition No. E109 of 2022, the 2nd Interested Party argued that the petition was incurably defective, incompetent, and without merit, as it did not disclose reasonable grounds to warrant the relief sought by the 6th Petitioner. The 2nd Interested Party further asserted that the petition was framed in a manner that did not disclose constitutional issues, as required by the principles established in **Anarita Karimi Njeru v Republic (1979) eKLR,** and that the court lacked jurisdiction due to the doctrine of res judicata, given that the impugned sections had already been addressed in **Council of County Governors v Attorney General & another [2017] eKLR.**

The 3rd Interested Party, in its Grounds of Opposition to Petition E109 of 2022, filed on 27 March 2022, argued that the petition was an abuse of the court process, violating Section 7 of the Civil Procedure Act, which embodies the principle of res judicata and the doctrine of issue estoppel. The 3rd Interested Party pointed out that the issues raised in the petition, specifically regarding the constitutionality of Section 28 of the Elections Act, 2011, had already been heard and determined by the court in **Council of County Governors v Attorney General & another; Petition No. 56 of 2017, [2017] eKLR** and **Maendeleo Chap Chap Party & 2 others v IEBC & another Petition No. 179 of 2017, [2017] eKLR,** leaving the court devoid of jurisdiction. In response to the 1st Petitioner's petition in Petition E043 of 2022,

the 3rd Interested Party, through an affidavit sworn by Junet Mohammed on 11 March 2022, argued that the petition lacked merit as the Petitioner had not met themet the threshold for the grant of any declaratory orders under Articles 22 and 23 of the Constitution, and had not demonstrated any harm that would justify the orders sought. The 3rd Interested Party contended that granting the orders would interfere with the election cycle and disrupt the statutory timelines and guidelines set by the IEBC. It was further argued that the impugned Act provided legal mechanisms for political parties to register as coalitions and participate in elections, promoting equality and recognizing coalition political parties as fundamental vehicles in the political process. The 4th Interested Party, through a sworn replying affidavit filed by Wambui Gichuru, Executive Director, responded to Petition No. E043 of 2022 and Petition No. E057 of 2022. Gichuru stated that there had been adequate public participation in the amendment of the Political Parties Act. She noted that the National Assembly had gazetted the Political Parties Amendment Bill 2021 on 26 November 2021. In line with article 118 of the Constitution and Standing Order 140(5) of the Senate Standing Orders, the Committee had invited the public to submit written memoranda on the Bill and had announced public hearings. Among those who had responded were the 2nd to 5th Petitioners.

Gichuru countered the Petitioners' claim that the term "coalition political party" introduced something new, explaining that coalition politics and mergers were already covered under section 2 of the Political Parties Act, 2011. This section defined a coalition as an alliance of two or more political parties formed for a common purpose, governed by a written agreement deposited with the Registrar. She also asserted that the Act's inclusion of citizen associations in the definition of a political party promoted the spirit of article 36 of the Constitution. The Act allowed for mergers and coalitions, aligning with articles 36 and 38 of the Constitution, which guarantee the right to form political parties. Gichuru highlighted that the 4th Interested Party was a product of a merger of several parties.Regarding the claim that indirect and direct party nominations limited citizen involvement, she argued that these processes were conducted under the Political Parties Act, 2011 and governed by party rules. Every candidate had the constitutional freedom to join any party and adhere to its rules. She asserted that internal party decisions were to be made through a party referendum. Finally, Gichuru contended that the insertion of section 4 of the Amendment Act did not contravene article 91(1)(f) of the Constitution when read with articles 27 and 91(1)(f) and section 26(1)(a) of the Political Parties Act, 2011. She argued that the Act aimed to promote democracy and should not be dismissed due to short-term po litical interests.

The 5th Interested Party, supporting Petition No. E043 of 2022 and Petition No. E057 of 2022, filed a sworn replying affidavit dated 11 March 2022. He argued that the passage of the Political Parties (Amendment) Act, 2022 violated article 10 of the Constitution regarding public participation, affecting his right to make political choices under article 38. He claimed that public participation required meaningful opportunities for citizens to engage in the law-making process and that the 7-day comment period provided by the Senate was insufficient, especially as submissions were only allowed via an undisclosed email.

He asserted that once the Bill became law, it altered the essence of the right to form a political party. Although the Act defined a political party as an association of citizens, a coalition political party did not meet the same registration requirements. He claimed that coalition parties, registered upon presentation of a coalition agreement, could disenfranchise existing party members and create confusion. He also criticized the Act for amending the Elections Act, 2011, suggesting that public participation was insufficiently conducted to conceal such amendments. He expressed concern that the requirement for the 1st Interested Party to certify nomination rules would infringe upon the autonomy of political parties. Additionally, he noted that the process of joining or resigning from political parties was overly rigorous and could marginalize those without access to modern technology. The firm of Mutuma Gichuru & Associates, representing the 1st Petitioner, filed written submissions dated 23 March 2022. The submissions addressed whether the definition of a political party in the Political Parties (Amendment) Act, 2021 was consistent with articles 260, 91, and 92 of the Constitution. Counsel argued that the Act's new definition of a political party violated constitutional principles, relying on cases such as **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (Supreme Court Petition No 10 of 2013**) and **Pharmaceutical Manufacturers Association of SA & another; In re Ex Parte President of the Republic of South Africa & others [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).**

Counsel further contended that amendments to section 34 of the Act increased the powers of the Registrar of Political Parties, conflicting with article 88(4) of the Constitution. They argued that the exemption of coalition political parties from certain registration requirements violated article 27 and was discriminatory. Counsel also claimed that public participation was inadequately conducted, citing the case of **Robert N Gakuru & others v Governor Kiambu County & 3 others [2014] eKLR** and others to argue for the importance of meaningful public engagement in law-making.

Counsel for the 2nd to 5th Petitioners, Christine Nkonge, filed submissions dated 16 March 2022. She emphasized the necessity for precise statutory language, citing cases such as **Keroche Industries Limited v Kenya Revenue Authority and 5 others Nairobi HCMA No 743 of 2006 [2007] 2 KLR 240** and **Katiba Institute & 3 others v Attorney-General & 2 others [2018] eKLR.** Nkonge argued that vague or contradictory statutes violate constitutional principles and disrupt the rule of law.

She further contended that the amended Act threatened Kenya's multi-party democracy and could lead to a one-party state. She highlighted inconsistencies between the Act and the Elections Act regarding the formation and regulation of coalition political parties. Nkonge argued that the Act's provisions could undermine the election process and deprive citizens of their right to free and fair elections. Additionally, she criticized the amendments' impact on indirect party nominations and public participation, citing various cases to support her arguments.

The firm of Muchoki Kangata Njenga and Company Advocates, representing the 6th Petitioner, filed submissions dated 28 March 2022. They addressed the doctrine of res judicata, distinguishing the 6th Petitioner's case from **Council of Governors v Attorney General [2017] eKLR**. They argued that the current case was different in scope and involved issues not previously adjudicated.

Counsel argued that the Elections Act should provide equal opportunities for all candidates, regardless of their party affiliation or independent status. They claimed that the provisions of sections 28(1) and 28A of the Elections Act were discriminatory, limiting the time for party nominations compared to independent candidates. Counsel supported their position with cases such as **CKC & another v ANC [2019] eKLR** and others, arguing that the impugned provisions unfairly advantaged independent candidates and restricted the rights of party-nominated candidates.

In the submissions of the 1st Respondent, Mr Kennedy Ogeto, the Solicitor General, raised several issues on 28 March 2022. The first issue was whether the consolidated petitions breached the principle established in **Anarita Karimi Njeru v Republic [1979] eKLR,** which requires constitutional petitions to be pleaded with reasonable precision. The second issue concerned the constitutionality of various sections of the Political Parties Act, as amended by the Political Parties (Amendment) Act 2022, and sections 28(1) and 28A of the Elections Act 2011.

The third issue was whether there was a violation of constitutional and statutory requirements for public participation in the enactment of the Political Parties (Amendment) Act 2022.

Mr Ogeto argued that the petitions were vague and ambiguous, citing **Anarita Karimi Njeru v Republic, Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR,** and Rule 10(2) of the Mutunga Rules. He contended that the petitions failed to demonstrate how the impugned provisions of the Political Parties Act violated the Constitution or affected rights and freedoms under the Bill of Rights. He suggested that the Petitioners were merely expressing their legislative preferences and interpretations of the Act and the Constitution, rather than addressing legal issues.

Mr Ogeto also cited **Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi v Commissioner of Domestic Taxes & 2 others [2014] eKLR** and **Bidco Oil Refineries Ltd v Attorney General & 3 others [2013] eKLR** to argue that the court should not question the wisdom of legislation or interfere with statutory provisions unless there is clear unconstitutionality. He denied that the definition of a political party to include coalition parties was vague or unconstitutional and disputed the claim that such a definition was inconsistent with the Constitution.

Regarding the distinction between coalition political parties and ordinary political parties, Mr Ogeto acknowledged similarities but emphasised that coalition parties must express their intentions as required by the impugned Act. He argued that coalition parties do not take away individual rights to form political parties and that they meet constitutional requirements.

On the issue of multiparty democracy, Mr Ogeto argued that the Act did not necessarily undermine it but rather allowed political parties to benefit from cooperation while maintaining their independence. He also addressed concerns about indirect party nominations, arguing that such processes were governed by party constitutions and nomination rules, which should comply with the Political Parties Act.

Mr Ogeto asserted that the jurisdiction of the High Court to interpret constitutional issues should not be exercised for speculative or hypothetical scenarios and that the Petitioners had not demonstrated how the amendments would disrupt the electoral process. He argued that there was no requirement for retrospective application of the amendments and that the Independent Electoral and Boundaries Commission (IEBC) would apply the law on nomination rules.

Regarding sections of the Political Parties Act, Mr Ogeto contended that they did not violate constitutional requirements for diversity, gender inclusivity, or the roles of political parties. He supported the amendment of section 14A of the Act, stating it aligned with constitutional provisions and ensured fair procedures for deemed resignations.

On the issue of public participation, Mr Ogeto argued that there was extensive public involvement in the enactment of the Act, with sufficient opportunities for the public to present views. He maintained that the Petitioners had not shown how the participation process was inadequate.

In the submissions of the 2nd Respondent, Mr Mbarak Ahmed raised similar issues, including the effectiveness of public participation, the impact of coalition political parties on multiparty democracy, and the implications of indirect party nominations. He argued that the public participation process was sufficient and that the Petitioners had not proven their case, citing **Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR** and **Council of Governors and 3 others v The Senate & 53 others [2015] eKLR.** He urged the dismissal of the petitions based on the argument that the Petitioners had failed to establish the unconstitutionality of the Act. The 3rd Respondent's submissions, filed by Counsel Wangechi Thanji on 28 March 2022, primarily reiterate the arguments presented in their replying affidavits. On the issue of public participation, the 3rd Respondent referenced **Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR,** asserting that short notice does not inherently undermine public participation. They also cited **Merafong Demarcation Forum and others v President of the Republic of South Africa and others (CCT 7 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)** to argue that the extent of public participation is context-specific and should be determined accordingly. Counsel referred to **Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others [2013] eKLR,** which held that the absence of specific views in legislation does not invalidate the enactment. Additionally, they invoked ***Doctors for* Life International v Speaker of the National Assembly and others (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC),** emphasizing that courts should be cautious in interfering with parliamentary procedures. They contended that legislation is presumed constitutional unless a clear breach of the Constitution is demonstrated, referencing **Commission for Implementation of the Constitution – Parliament of Kenya & another High Court Petition No 454 of 2012 and Law Society of Kenya vs Attorney General & 2 Others [2013] eKLR.**

The 1st Interested Party's submissions, filed by JK Kibicho and Company Advocates on 28 March 2022, focused on the roles assigned under the Political Parties Act, 2011. Counsel argued that amendments to the Act concerning political parties are within constitutional bounds. They asserted that the involvement of the 2nd Interested Party in regulating nominations and the 1st Interested Party in supervising these processes aligns with their constitutional and statutory mandates. Counsel cited **Anarita Karimi Njeru v Republic [1979] eKL**R to argue that the challenge to the definition of political parties lacks specificity.

Counsel defended the exemption of coalition parties from certain compliance requirements, citing **Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others [1987] 1 SCC 424.** They contended that the amendments aimed to clarify the definition of political parties and ensure democratic participation, referencing **Tinyefuza v Attorney General Constitutional Appeal No 1 of 1997 UGCC3.**

The 2nd Interested Party's submissions, prepared by G & A Advocates LLP on 28 March 2022, addressed whether the Political Parties (Amendment) Act, 2022 involved adequate public participation. Counsel argued that public participation was sufficiently conducted as per articles 10(2)(a) and 118(1)(b) of the Constitution, despite not all views being accepted. They cited **Merafong Demarcation Forum and others v President of the Republic of South Africa and others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC)** to support this.

Counsel emphasized that Parliament's discretion in facilitating public participation is case-specific, supported by **Commission for The Implementation of the Constitution v Parliament of Kenya & 2 others [2013] eKLR.** They also defended the legislation's adherence to constitutional principles by citing **Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Government of Nairobi & 3 others [2013] eKLR and Okiya Omtatah Okoiti v County Government of Kiambu [2018] eKLR.**

In response to Petition No E109 of 2022, Ashitiva Advocates LLP argued that the challenge to sections 28 and 28A of the Elections Act is res judicata, referencing **Council of County Governors v Attorney General & another [2017] eKLR and John Njue Nyaga v Attorney General & 6 Others [2016] eKLR.** They argued that

these provisions align with constitutional principles and aim to manage electoral processes effectively, supported by **Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR** and **Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others [1987] 1 SCC 424.**

The submissions by the 3rd Interested Party were made by Paul Mwangi and Company Advocates on 27 March 2022. They argued that public participation was indeed conducted prior to the enactment of the impugned Act, and some Petitioners participated in the process. They contended that it was the Petitioners' responsibility to demonstrate that the opportunity to present views and participate was obstructed. Relying on cases such as **Diani Business Welfare Association & others v County Government of Kwale Petition No 39 of 2014 [2015] eKLR, Metropolitan PSC Sacco Union Limited & 25 others v County of Nairobi Government & 3 others Petition 486 of 2013, Republic v County Government of Kiambu Ex Parte Robert Gakuru & another [2016] eKLR**, and **Ndegwa v Nyandarua County Assembly & another Petition E011 of 2021 [2021] KEHC 299 (KLR),** counsel argued that public participation varies by circumstance, emphasizing the need for a reasonable opportunity rather than requiring every member to provide oral views.

Counsel asserted that the legislature has discretion in conducting public participation, citing **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others [2013] eKLR.** They argued that simple acts like public forums, radio broadcasts, and newspaper advertisements were sufficient. The 3rd Interested Party noted that stakeholders had opportunities to present their views both orally and electronically, and that the Petitioners benefited from this process.

On the issue of the constitutionality of Sections 2, 4, 22, 24, and 34 of the impugned Act, counsel, referring to **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Petition No 453 of 2015 [2016] eKLR, Bwana Mohammed Bwana v Sivano Buko Bunaya & 2 others [2014] eKLR,** and **Rose Nafula Wanyama v Nusra Nasambu Chibanga & another [2020] eKLR,** argued that the court should not entertain hypothetical scenarios. They emphasized that the legislature's understanding of people's needs should be presumed, relying on cases such as **Hamdard Dawahkana v Union of India AIR [1960] 554, US v Butler 297 US [1936],** and **R v Big M Drug Mart Ltd [1985] 1 SCR 295**. The court was urged to respect the presumption of constitutionality of statutes and not to suspend the enactment of the Act without proof of its unconstitutionality.

Counsel argued that the interpretation of the Political Parties Act by the Petitioners disregarded the Act's framework, which governs political parties' operations, including nominations, formations, and dispute resolutions. They emphasized the principle of presumption of constitutionality and referenced **Council of County Governors v Attorney General** for support. The argument continued that the broad definition of political parties in the impugned Act promotes inclusivity rather than discrimination and adheres to the Constitution's provisions, such as Articles 92 and 260.

Counsel argued that the new definition of a political party does not conflict with Article 91 of the Constitution. They noted that coalition parties must still meet registration requirements and that the Act's amendments do not inhibit the formation or operation of political parties. They also argued against the notion that the amendments undermine multi-party democracy, stating that they enhance political party freedoms.

Counsel addressed concerns about indirect nominations, asserting that each political party's internal rules govern nominations, which are constitutional and not subject to court interference. They cited several cases and articles supporting this stance and argued that the amendments to section 31 of the Act do not prevent auditing of political party accounts.

On the issue of the Registrar of Political Parties usurping the role of the IEBC, counsel contended that the amendments do not compromise IEBC's independence. They also argued that the Act's implementation does not undermine election reliability and that there is no justification for barring the Registrar and IEBC from enforcing the Act.

Regarding dispute resolution, it was argued that coalition internal mechanisms do not limit the Political Parties Dispute Tribunal's jurisdiction. Counsel stressed that legislative limits on appeal levels are common and aligned with timely electoral dispute resolution.

Finally, counsel addressed the constitutionality of sections 28(1) and 28(A) of the Elections Act, arguing that these sections are not unconstitutional and that prior cases have settled similar issues. They concluded that the impugned Act was enacted transparently and procedurally, safeguarding political parties and the public.

The 4th Interested Party's submissions, filed by Mbugwa, Atudo & Macharia Co Advocates on 28 March 2022, addressed similar issues: the adequacy of public participation, the constitutionality of amendments, and the impact of indirect nominations. They contended that the Act followed due process, including adequate public participation, and that the modifications to political party definitions and nomination processes did not contravene the Constitution. They supported their arguments with case law and public participation guidelines.

The 5th Interested Party's submissions, filed by Kinyanjui Njuguna & Co Advocates on 21 March 2022, focused on whether public participation was adequate and if the amendments were constitutional. Counsel argued that the Respondents failed to provide sufficient time for public participation and that the principles of Article 10 of the Constitution were not upheld. They contended that the rushed process undermined the law's constitutionality and referred to various cases to support their claims.

Issues for determination

1. The constitutionality of the following sections; 2, 4A, 6(2)(a), 7(6), 14A, 22, 31, 34, 38A, 40(3), 41(2) of the Political Parties (Amendment)Act, 2022 and the proposed amendments to sections 28(1) and 28A of the Elections Act No 24 of 2011.
2. Whether there was public participation prior to the enactment of the impugned amendments.
3. Whether the Political Parties (Amendment) Act, 2022 was ambiguous, uncertain, imprecise and overbroad.
4. Whether the Petitioners were entitled to the orders sought.
5. Who shall bear the costs of the petitions.

Determination of the court

In determining the constitutionality of Section 2 of the Political Parties Act, the court considered three key issues raised by the Petitioners and the fifth interested party. These included the definition of a political party to include ideology and the introduction of coalition political parties, the legality of indirect party nominations, and whether the introduction of ideology in the definition of a political party violated constitutional provisions, the Petitioners, particularly the 1st Petitioner, argued that the inclusion of coalition political parties in the definition of a political party under Section 2 of the Political Parties (Amendment) Act violated Articles 91 and 260 of the Constitution.

They submitted that this expansion would infringe on their right to belong to a political party of their choice, without necessarily being part of a coalition. Counsel for the Respondents countered this argument by stating that the Petitioners had failed to show how this new definition was unconstitutional, noting that the previous Political Parties Act already provided for coalitions. The Respondents also contended that the creation of coalition political parties enhanced democracy and political discipline, as provided for under Section 10 of the Political Parties Act 2011.

The Petitioners further argued that coalition parties could undermine democracy by contravening Article 4(2) of the Constitution, which declares Kenya a multi-party democratic state. In support of this argument, they relied on the cases of In the Matter **Speaker of the Senate & Another Reference No 2 of 2013 (2013) eKLR** and In the Matter of the **Kenya National Commission on Human Rights (2014) eKLR,** where the courts emphasized the need to consider unintended unconstitutional consequences of legislation. However, the court found that coalitions had always existed in Kenyan law and cited the example of the Jubilee Political Party, which was a coalition of several parties, such as The National Alliance (TNA) and United Republican Party (URP). The court noted that the difference in the new law was that coalition parties would now retain their individual identities rather than dissolve. The court held that this amendment simply formalized the practice and did not infringe on political rights under Article 38 of the Constitution.

On the issue of indirect nominations, the Petitioners argued that this process denied party members their right to directly nominate candidates, thus violating their political rights under Article 38 of the Constitution. Counsel for the Respondents rebutted this, stating that political parties are expected to have rules and regulations governing the nomination process, as outlined in their constitutions. The court cited **Samuel Owino Wakiaga v ODM & 2 others (2017) eKLR** and **Thomas Ludindi Mwadeghu v John Murutu & Another (2017) eKLR,** affirming that political parties have internal procedures for selecting delegates, and this did not violate members' political rights.

On the inclusion of ideology in the definition of a political party, the Petitioners argued that this was unconstitutional. However, the court noted that ideology was not a new concept and already existed under Article 91 of the Constitution, which outlines the basic principles a political party should uphold. The court further referred to ***In Re Interim*** **Independent Election Commission [2011] eKLR** and ***Communications Commission of Kenya & 5 others v Royal Media*** **Services**

Limited & 5 others [2014] eKLR, noting that constitutional interpretation must promote the development of the law in a manner that advances democratic governance. The court held that the requirement for political parties to have an ideology would strengthen democracy, provided the ideology did not violate the prohibitions outlined in Article 91(2) of the Constitution, such as being based on race, religion, or ethnicity.

The court found that there was no inconsistency between the definition of a political party under Section 2 of the Political Parties (Amendment) Act and the Constitution. The court also determined that the concept of ideology, as well as the introduction of coalition political parties, did not infringe on constitutional rights. The Petitioners' argument that these provisions undermined multipartyism was dismissed as speculative. The court found no violation of political rights or democratic principles under the Constitution. Additionally, the court held that indirect nominations were not unconstitutional, as each political party had its own delegate system enshrined in its constitution, ensuring compliance with Article 38. The court further relied on **Centre Human Rights and Awareness v John Harun Mwau & 6 others (2012) eKLR** and **Tinyefuza v Attorney-General Const Pet No 1 of 1996 (1997 UGCC 3)** to affirm its interpretation of political rights and democratic governance.

Counsel for the 2nd to 5th Petitioners submitted that Section 4A of the Political Parties Act, which uses the word "may" instead of "shall," violated Article 27 of the Constitution as it could lead to gender discrimination. In opposition, counsel for the 4th interested party referred to **Henry N Gichuru v the Minister for Health the Kenyatta National Hospital Board [2002] eKLR,** where Justice Kuloba held that "shall" does not always imply a mandatory action. The court noted that several cases, including **Jacob Nyandega Osoro v Chief Justice of Kenya & another [2018] eKLR,** held that "may" can sometimes mean "shall," depending on the context, as seen in Article 22(3)(c) of the Constitution. Additionally, in **Chadwick Okumu v Capital Markets Authority [2018] eKLR,** Mativo J. ruled that "may" could either provide full discretion or impose a duty to act, depending on statutory requirements. Mativo J. referred to the Indian case **India Official Liquidator v Dhanti Dhan [1977] 2 SCC 166,** where the court examined the circumstances under which the word "may" conferred a duty. This approach was further supported by **Engineers Board of Kenya v Jesse Waweru Wahome & 5 others [2015] eKLR.** The court concluded that the word "may" in Section 4A must be interpreted in line with Articles 27 and 91 of the Constitution, affirming the constitutionality of the provision.

In regard to Section 6(2)(a), the Petitioners argued it was unconstitutional for requiring political parties to submit a statement of ideology. The court dismissed this argument, stating that the Registrar of Political Parties, as established by law, has the authority to receive and safeguard such documents under Section 34 of the Political Parties Act.

Concerning Section 7(6), the Petitioners and the 5th interested party contended that it was discriminatory as it exempted coalition political parties from the requirements of Sections 5 and 6. They relied on the case **Andrews v Law Society of British Columbia [1989] 1 SCR 321** to support their claim. However, the court found that since coalition political parties are composed of parties that have already been registered, they do not require further compliance with these sections. The court ruled that there was no discrimination, and the exemption was valid.

Regarding the deletion of Section 31(3) of the Act, the court found that this deletion, which exempted political parties from auditing requirements, was in conflict with Article 229 of the Constitution. While counsel for the 1st Respondent argued that this deletion aligned with Article 229(4)(f), the court determined that the amendment removed the constitutional obligation for the Auditor General to audit political parties receiving public funds, thus rendering it unconstitutional. Section 38E of the Political Parties Act requires political parties to notify the Registrar of Political Parties of specific details, such as the method, date, venue, and list of members for nominations, at least ten days before the nominations. The Petitioners argued that this provision usurped the powers of the Independent Electoral and Boundaries Commission (IEBC). However, the court found no usurpation, stating that the Registrar's role was limited to publishing the information on its website without making any decisions. The court further referred to Section 27 of the Elections Act, which mandates that political parties submit their nomination rules to the IEBC, confirming that the powers of the IEBC had not been affected.

The Petitioners also challenged Section 40(3) of the Political Parties Act, arguing that it was discriminatory because it did not subject coalition political parties to the jurisdiction of the Political Parties Disputes Tribunal. The court, however, found that a coalition political party falls within the definition of a political party under the Act, and thus, disputes involving coalition political parties are subject to the Tribunal's jurisdiction under Section 40(1)(c). Therefore, the court held that the Petitioners' claim could not be sustained.

Regarding Section 41(2) of the Political Parties Act, the Petitioners argued that it was unconstitutional for denying disputants the right of appeal to the Supreme Court. The court disagreed, stating that under Article 163(4) of the Constitution, the right to appeal to the Supreme Court is not automatic but subject to conditions. The court cited **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR,** where the Supreme Court emphasised that appeals must involve matters of general public importance to be certified for hearing by the Supreme Court. Consequently, the court found Section 41(2) to be constitutional, as it aligns with the requirements for Supreme Court appeals under the Constitution and the Supreme Court Act.

In examining the discrimination of political party candidates under Sections 28(1) and 28A of the Elections Act, the court addressed arguments from various parties. Counsel for the 2nd and 3rd interested parties argued that the issue had been previously adjudicated in **Council of Governors v Attorney General [2017] eKLR,** asserting that the matter could not be relitigated. In contrast, the 6th Petitioner contended that the doctrine of res judicata did not apply as they were not a party to the earlier case.

Section 28(1) of the Elections Act mandates that political parties submit a membership list to the Commission at least 120 days before a general election and 45 days before a by-election. The Commission is responsible for publicizing these lists. Section 28A, newly introduced, does not alter these timelines.

The 6th Petitioner argued for aligning the timelines for political party candidates with those for independent candidates under Article 85(1) of the Constitution. This would provide additional time for candidates to switch parties after losing in party nominations. The court referred to Council of Governors where Mativo J held that the relevant provisions serve a compelling state interest in managing the electoral process efficiently, rather than accommodating individual interests of candidates seeking to change parties post-nomination. The ruling highlighted that such laws are in line with constitutional requirements for credible and transparent elections, and must support the IEBC's mandate to manage elections effectively.

The court found it impractical to align the timelines for political party candidates with those for independent candidates due to several factors. Political party nominations often involve disputes, necessitating sufficient time for their resolution. Additionally, maintaining discipline within political party activities requires adherence to set timelines. Furthermore, the IEBC's schedule for preparing electoral

materials, such as voter registers, ballot papers, and training of officials, underscores the need for compliance with these timelines. Consequently, the court determined that Sections 28(1) and 28A of the Elections Act do not constitute unfair discrimination against political party candidates, as asserted by the 6th Petitioner.

The court examined the issue of public participation concerning the enactment of the amendments to the electoral laws. The 1st, 2nd to 5th Petitioners, and the 5th interested party raised concerns about the adequacy of public participation before the amendments were enacted. Their arguments were based on two main points: they contended that the time allowed for public input was insufficient and that submissions were restricted to email only, with no provision for written submissions. They cited several cases in support of their position, including ***Robert N* Gakuru & others v Governor Kiambu County & 3 others [2014] eKLR, Doctors for Life International v Speaker of the National Assembly & others 2006 (12) BCLR 1399 (CC),** and ***In the Matter of the* National Land Commission [2015] eKLR.**

The Respondents and the 1st to 4th interested parties contested these claims, arguing that there was sufficient public participation. They referred to cases such as **George Ndemo Sagini v Attorney General & 3 others [2017] eKLR** and **British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Alliance & another (Interested Parties) [2019] eKLR** to substantiate their argument.

Public participation is enshrined in articles 10(2)(a) and 232(1)(d) of the Constitution as a fundamental principle of governance. Article 259(1)(a) mandates the interpretation of the Constitution to advance its values and principles. The Supreme Court of Kenya in **British American Tobacco Kenya, PLC v Cabinet Secretary for The Ministry of Health & others [2019] eKLR** articulated the principles for effective public participation, highlighting that it must be genuine and not merely a formality. Public participation should involve reasonable notice, opportunities for both written and oral submissions, and be purposeful.

The court reviewed the evidence provided, including the replying affidavit of Ann Nderitu, the Registrar of Political Parties, which detailed the consultative process beginning in 2017. This process included multiple stakeholder meetings and the preparation of a report dated 14 November 2019 addressing various electoral issues. Further engagements occurred from 2020 to 2021, involving meetings with political party representatives and consultations on draft bills.

The court noted that the National Assembly and the Senate both conducted public hearings, with the Senate's procedures aligning with COVID-19 health protocols by accepting only electronic submissions. The court found that the public participation process was extensive, spanning several years, and adequately met constitutional requirements. Consequently, the court dismissed the Petitioners' claims of insufficient public involvement before the enactment of the amendments.

Finally, the court addressed whether the Political Parties (Amendment) Act, 2022 was ambiguous, uncertain, imprecise, and overbroad enough to warrant its striking out in its entirety. The 2nd to 5th Petitioners argued that the introduction of the term "coalition political party" into the Political Parties Act created vagueness and ambiguity, rendering the statute incoherent and unconstitutional. They supported their claims with references to **Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR, Keroche Industries Ltd v Kenya Revenue Authority & 5 others [2007] 2 KLR 240,** and **Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR.**

The 1st Respondent countered that there was no vagueness or incoherence in the definition of a coalition political party. They argued that the Petitioners had not justified their assertion that political parties could not merge due to shared ideologies. The court referred to **Osborne v Canada (Treasury Board) [1991] 2 SCR 69** and **Katiba Institute & another v Attorney General & another [2017] eKLR,** which defined vagueness as a lack of precision that renders a law incapable of being interpreted with clarity.

The court found that the amendment creating the coalition political party did not affect the definition of a political party as per articles 260 and 91 of the Constitution. The distinction between a political party and a coalition political party was deemed clear. Thus, the court did not find any ambiguity or uncertainty in the amendments.

Regarding the timing of the amendments, which were made less than six months before the general elections, the court noted that no law prohibits amendments within this timeframe. The court also observed that the amendments did not disrupt the electoral process or impact public interest adversely. The Kreigler report's recommendations were considered, and it was noted that the amendments did not contravene its guidelines.

The court concluded that the 2nd to 5th Petitioners failed to prove that the amendments were vague or uncertain. The court upheld the constitutionality of the Political Parties (Amendment) Act, 2022, except for specific sections.

The court's findings were as follows: Sections 2, 4A, 6(2)(a), 7(6), 14A, 22, 34(da), (fa), (fb), (fc), and (fe), 40(3), and 41(2) of the Political Parties (Amendment) Act, 2022 were upheld as constitutional. Additionally, sections 28(1) and 28A of the Elections Act were found to be constitutional. However, the deletion of section 31(3) of the principal Political Parties Act was deemed unconstitutional. Section 34(fd) was also found unconstitutional because it addressed the regulation of political party nominations, which is the mandate of the Independent Electoral and Boundaries Commission, not the Registrar of Political Parties. The court further concluded that the public participation process prior to the enactment of the amendments was consultative, meaningful, and reasonable.

The petitions were dismissed except for the issues related to sections 31(3) and 34(fd), and each party was ordered to bear its own costs.

IDENTIFICATION OF VOTERS

Kenya Human Rights Commission & Others v IEBC & 2 Others HCCHR Petition E306 of 2022

In the High Court at Nairobi (Milimani Law Courts)

Coram: M Thande, J

Judgement Allowing Petition

Date: 4 August 2022

Whether the decision not to deploy a manual register was in compliance with the law-whether the court could mandate the use of manual register in the identification of voters

Summary of facts

The Petitioners were aggrieved by a notice issued by the 2nd Respondent Wafula Chebukati that the 1st Respondent (IEBC) would not use the manual or printed register of voters in the conduct of the general elections on 9 August 2022 (the General Elections). That the said directive would infringe on the political rights of eligible voters on account of lack of fingerprints or technological failure.

The Petitioners cited Section 44(a) of the Elections Act and Regulation 69 of the Elections (General) Regulations stating that the process of voter identification using a manual register is deeply entrenched in our laws and therefore the 2nd Respondent could not purport to do away with the manual register completely as it will be a violation of our statutes.

The Petitioners stated that the issuance of the notice contravened the rights of eligible voters to vote and contravened the legitimate expectation that the General Elections shall be conducted in strict adherence to the Election law and that the notice contravenes Articles 27, 38, 81, and 83 of the Constitution. The Respondents, on the other hand, opposed the Petition stating that Section 44(a) of the Elections Act provides that the first mode of the identification of voters is electronically by way of the Kenya Integrated Elections Management System (KIEMS) through the KIEMS Kit and that the Petition is premised on a misapprehension of the role of technology in the identification of voters at the polling stations.

The Respondents stated that it was decided in the case of **National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** (the NASA Case) and by the Court of Appeal in **National Super Alliance (NASA) Kenya v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR** (the NASA Appeal) that the place of a complementary system and usage of a printed voter register must be used within the meaning and interpretation of the law and that it must be the last resort upon failure of the KIEMS Kit. That the provision was made to curb any misuse of the voter register and to safeguard the electoral process and advance the credibility of the electoral process and outcome.

The Respondent further submitted that the use of the KIEMS Kit was mandatory as envisaged under Section 44 of the Elections Act in the identification of voters and that a complementary system is meted out necessitating the printing out of manual registers 7 days prior in every polling station so that in the event where there is total failure of the KIEMS Kit, the complementary manual register be put to use.

The Respondents also made a response to the 1st Interested Party submissions stating that the 1st Interested Party had the mandate to exercise its authority over Communication and that it had no authority exercisable over the conduct of Elections and therefore it has no relief to be sought in intervening circumstances.

Issues for determination

1. Whether the 1st Respondent's decision not to deploy the printed register at the polling station to identify voters in the forthcoming general elections is in compliance with the law.
2. Whether the Court could direct the 1st Respondent to deploy the manual register in identification of voters.

Determination of the Court

The court first addressed itself to whether the decision not to deploy the printed register at the polling stations was in compliance with the law. In considering the Constitutional provisions, the Court stated that under Article 38, every citizen is empowered with political rights, one being the right to be a registered voter, the right to vote in an election or referendum, and finally the right to be a candidate for public office or office within a political party of which a citizen is a member and the right to hold office.

And that in the pursuit of ensuring every right to vote is safeguarded there will be administrative measures to ensure the provision of systems to facilitate voting and to that effect, the 1st Respondent is enjoined under Article 86 to ensure that the systems should be simple, accurate, verifiable, reliable, secure, accountable, and transparent.

The court stated that technology in facilitating the electoral process is couched within the provisions of Section 44 of the Elections Act and that it was noted in **Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** by the Supreme Court that technology fails in electoral processes and that the same failure of technology was witnessed in 2013. Additionally, there can be interference with the technology through criminal and human elements, and that following the failure of technology in the 2013 election process necessitated the enactment of Section 44A by Parliament.

That Regulation 69 and 83 were curated to give effect to Section 44A of the Elections Act, that Regulation 69 makes provision for the voting procedure while Regulation 83 provides for the tallying and announcement of election results. The court stated that it would not proceed to discuss what constitutes a supplementary mechanism to the electronic voter register since it was discussed in length in 2017 on the NASA Appeal by a 3 Judge bench, and rather what concerned the court was the impugned decision and notice and whether it was made within the law.

The reason for the petition was that in the case of a technological failure the truncated manual register could be used, since it only availed the name of the voter concealing the phone number and identification number of the voter. The court stated that it was therefore common knowledge that Section 44A was enacted to address the issue of technology failure and that the 1st Respondent in promulgating Regulation 69 anticipated that there would be technological failure outlining the procedure to be inducted when the technological failure occurs, which is to call a witness of the officers in the polling station to confirm such voter identification failure, fill in Form 32A to confirm the said failure, search out the name of the voter in the manual register, and finally issue ballot papers for their subsequent voting.

The court further proceeded to reproduce a textual internal memo that addressed the manner of voter identification electronically and in the event the electronic identification failed, the county election managers, Presiding Officers, Returning Officers, Deputy Returning Officer, etc., would proceed to use the manual voter

register employing three sets of identification as follows: biometric identification, the complementary mechanism of alphanumeric search, and the use of the printed register of voters.

The court dealt with the issue by stating that the 1st Respondent had the obligation to respond that the manual register was under the law envisaged to be used under the authorisation by itself rather than stating that they would be abandoning the manual voter identification completely. Therefore, the impugned decision is a violation of Articles 38, 83, and 86 of the Constitution, Section 44A of the Act, and Regulation 69 of the Elections (General) Regulations.

Next, the court evaluated whether it could direct the 1st Respondent to deploy a manual register in the identification of voters. The 1st Respondent counsel submitted that by dint of the Constitution, the 1st Respondent is independent and ought to be allowed the discretion to make decisions as it so allows. The court noted that the independence of institutions is to allow them to make decisions within their discretion without any interference as long as such decisions are within the provisions of the Constitution.

The court noted that in the exercise of independence, caution ought to be exercised on tribunals or authorities that acted as unruly horses and made decisions that would otherwise violate the underpinnings of the Constitution. Therefore, the court has supervisory jurisdiction to bring back the unruly and align them to the provisions of the law.

The court noted although the 1st Respondent did not act as an unruly horse, the impugned decision was found to violate the provisions of the Constitution and would therefore disenfranchise the voters' rights. Therefore, in light of the risk of disenfranchisement of the voters, the court deemed it fit to award appropriate relief.

The court declared that the 1st and 2nd Respondents were constitutionally mandated to take all necessary and logical steps to ensure that the rights of the Petitioners and citizens under Article 38, as read together with Article 83(3) of the Constitution of Kenya 2010, were observed, respected, protected, promoted, and fulfilled. It further declared that the 1st and 2nd Respondents were constitutionally required to ensure that administrative arrangements for the registration of voters and the conduct of elections, including the identification of voters during the August 2022 elections, were designed to facilitate, rather than deny, the right of eligible citizens to vote.

Additionally, the court declared that the decision issued by the 1st and 2nd Respondents, as signified by the letter dated 10 June 2022, stating that the 1st Respondent would not use the manual register of voters in the General Elections on Tuesday 9 August 2022, was unconstitutional. The court quashed the said decision and mandated that the 1st and 2nd Respondents comply with the provisions of Regulation 69 of the Elections (General) Regulations 2012 in the conduct of the general elections.

United Democratic Alliance Party v Kenya Human Rights Commission & 8 others (Civil Application E288 of 2022) [2022] KECA 813 (KLR)

In the Court of Appeal of Kenya at Nairobi

Coram: FA Ochieng, LK Kimaru & PM Gachoka, JJA

Ruling granting stay of judgment

Date: 8 August 2022

Section 44 Elections Act- identification of voters

Summary of the facts

The Court considered the Applicant's application, which was based on Rule 5(2)(b) of the Court of Appeal Rules and other relevant legal provisions. The Court reviewed the written submissions both supporting and opposing the application, as well as the oral submissions from Mr. Mutuma representing the Applicant, Mr. Mwangi representing the Respondents (excluding the 8th, 9th, 10th, 11th, 12th, and 13th Respondents), Mr. Mukele for the 8th and 9th Respondents, and Mr. Mbaji for the 12th Respondent. Additionally, the Court considered the authorities cited, particularly the decision in **National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR.**

Given the urgency of the matter, with general elections scheduled for 9 August 2022, the Court issued a short-form ruling under Rule 34(1) of the Court of Appeal Rules, 2022. The detailed reasons for the ruling were to be provided on 28 August 2022.

After a thorough consideration of the issues, the Court concluded that the Applicant had made a sufficient case for granting a stay of the High Court's judgment delivered on 4 August 2022 in **Kenya Human Rights Commission & 6 Others v Independent Electoral and Boundaries Commission & 2 Others Nairobi Constitutional Petition No E306 of 2022.** This stay was to remain in effect pending the hearing and determination of the intended appeal.

The Court reaffirmed the principles established in **National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR** regarding the identification of voters. This included adherence to the Memorandum from the Commission dated 27 July 2017, which outlined that Presiding Officers must ensure that voters are identified through Biometrics

upon the presentation of an identification document used during registration, with Biometric verification being the primary method. If Biometric identification was unsuccessful, Presiding Officers should employ an alphanumeric search as an alternative method, requiring the voter to complete form 32A before receiving their ballot papers. The printed register of voters should be used only after the KIEMS Kit has been confirmed by the Commission as irreparable or non-replaceable. These procedures were to be followed in accordance with Regulations 69 and 83 of the Elections (General) Regulations, 2012.

The Court determined that the costs of the application would be decided based on the outcome of the intended appeal.

ELIGIBILITY AND SUITABILITY FOR ELECTIVE OFFICE

RESIGNATION FROM PUBLIC OFFICE BEFORE SEEKING ELECTIVE OFFICE

Public Service Commission & 4 Others v Eric Cheruiyot & 32 Others Civil Appeal 119 & 139 of 2017 (consolidated)

In the Court of Appeal at Nairobi

Coram: DK Musinga, W Karanja & AK Murgor, JJA

Judgment allowing appeals

Date: 8 February 2022

Constitutionality of section 43(5) of the Elections Act-resignation from public office before elections

Summary of facts

This appeal arose from the judgment of the Employment and Labour Relations Court delivered on 29 March 2017, where Judge Marete declared section 43(5) of the Elections Act, 2011 unconstitutional and without legal force ab initio. The appeal involves various petitions filed at the Employment and Labour Relations Court challenging the constitutionality of sections 43(5) and (6) of the Elections Act, 2011.

The dispute originated from Petition No 1 of 2017, filed on 16 January 2017 by Eric Cheruiyot, a registered voter from Kericho County. Cheruiyot contested the constitutionality of sections 43(5) and (6) of the Elections Act, 2011, arguing that they were enacted without public participation, were discriminatory, and conferred undue advantage to certain public officers. He sought a declaration of unconstitutionality, a permanent injunction against disqualification of public servants, and other reliefs including quashing a circular issued by the Chief of Staff and Head of Public Service.The case led to the filing of Petition No 2 of 2017 by Raymond Kinyua, Emily Thaaro Njuki, and Monica Cyombua Gitari, public officers who had resigned to contest in the 2017 elections. They sought similar reliefs, arguing that their resignation notices were improperly handled and their rights under the Constitution were violated.

The trial court consolidated the petitions and, on 29 March 2017, issued several declarations and orders. These included declaring section 43(5) unconstitutional, restraining the IEBC and other bodies from disqualifying public servants based on the section, and quashing the circular issued by the Chief of Staff.

The Appellants, including the Public Service Commission, the Attorney General, and the Chief of Staff, filed appeals against this decision. They contended that the Employment and Labour Relations Court lacked jurisdiction under article 165 of the Constitution, and argued that the issues were res judicata based on the prior case ***Charles Omanga & Another v Independent Electoral and Boundaries Commission & Another*** **[2013] eKLR.** They also claimed the trial court erred in constitutional interpretation and procedural matters.

In the appeals, the court consolidated Nakuru Civil Appeal No 119 of 2017 and Nakuru Civil Appeal No 139 of 2017. At the hearing on 24 January 2022, the Appellants' arguments included challenges to the trial court's jurisdiction, the res judicata claim, and the constitutionality of section 43(5). The Respondents argued that the trial court had jurisdiction and that the issue of public participation was distinct from the prior case.

The court is tasked with determining whether the Employment and Labour Relations Court had the jurisdiction to handle the petitions, whether the issues were res judicata, and whether section 43(5) of the Elections Act, 2011 is unconstitutional.

Issues for determination

1. Whether the Employment and Labour Relations Court had jurisdiction to entertain and determine the matters raised in the consolidated petitions;
2. Whether the proceedings before the trial court were res judicata;
3. Whether section 43(5) of the Elections Act, 2011 was unconstitutional; and
4. Whether the trial judge made the correct findings on the requirement of public participation during the enactment of the Elections Act, 2011.

Determination of the court

On the question of jurisdiction, the court examined the concept of jurisdiction and its fundamental importance in legal proceedings, underscoring that jurisdiction is essential for a court or tribunal to lawfully address matters before it. John

Beecroft Saunders, in *Words and Phrases Legally Defined*, defines jurisdiction as the authority a court has to decide matters that are litigated before it, bound by the statute, charter, or commission under which it is constituted. Jurisdiction can be limited either by the type of matters a court can address or the geographical scope of its authority. A court's decision is invalid if it exercises jurisdiction it does not possess, and jurisdiction must be established before a judgment is rendered.

The landmark case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*** **[1989] KLR 1** is cited as the authoritative reference on jurisdiction. Nyarangi JA stated that without jurisdiction, a court cannot proceed with a matter and must cease its proceedings upon recognising its lack of jurisdiction. A decision rendered without proper jurisdiction is considered a nullity and is subject to being set aside *ex debito justitiae*.

The Supreme Court, in ***In the Matter of Interim Independent Electoral Commission*** **[2011] eKLR, Constitutional Application No 2 of 2011,** reaffirmed that jurisdiction is regulated by the Constitution, statutes, and judicial precedent. It held that a court cannot assume jurisdiction through interpretative craft when the legislation is clear and unambiguous.

Further, in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*** **[2012] eKLR,** Application No 2 of 2011, the Supreme Court reiterated that a court's jurisdiction stems from the Constitution or legislation and cannot extend beyond what is legally conferred.

Article 162 of the Constitution establishes the Employment and Labour Relations Court and outlines its jurisdiction, which includes disputes related to employment, labour relations, the environment, and land use. This jurisdiction is further defined under section 12 of the Employment and Labour Relations Court Act, 2011, which gives the court exclusive original and appellate jurisdiction over disputes related to employment and labour relations.

The court noted that while the Employment and Labour Relations Court has the authority to hear disputes under section 12(1) of the Act, including constitutional violations incidental to employment matters, its jurisdiction does not extend to all constitutional matters. The court should have recognised that the consolidated petitions lacked an employment relationship basis and, thus, fell outside its jurisdiction.The consolidated petitions involved parties who did not have an employee-employer relationship with the Respondents or public entities. Eric Cheruiyot, the 1st Petitioner, was merely a registered voter and had no employment connec

tion, while the 2nd, 3rd, and 4th Petitioners had voluntarily resigned from their positions in compliance with legal provisions. The Employment and Labour Relations Court should have acknowledged the absence of an employment relationship and refrained from exercising jurisdiction over the matter.

The High Court was deemed the proper forum to address issues raised in the petitions, particularly those concerning the constitutionality of section 43(5) of the Elections Act, 2011. The High Court's jurisdiction is defined under article 165(1) and 165(3) of the Constitution, including determining constitutional matters and inconsistencies with the Constitution.

In **Karisa Chengo & 2 others v Republic [2015] eKLR, i**t was held that while the Employment and Labour Relations Court has the same status as the High Court, it does not possess the same jurisdiction and cannot handle matters reserved for the High Court. The Supreme Court upheld this distinction, confirming that specialized courts like the Employment and Labour Relations Court cannot extend their jurisdiction beyond what is legally granted.

Therefore, the court found that the Employment and Labour Relations Court had exceeded its jurisdiction by addressing matters beyond its legal mandate, rendering its decision a nullity *ab initio*.

The court noted that while the finding on the jurisdiction of the Employment and Labour Relations Court could have resolved the consolidated appeals, the gravity of the remaining issues and their public interest warranted a determination of each issue.

On the second issue, it was contended that the constitutionality of section 43(5) and (6) of the Elections Act, 2011 had already been decided by the High Court in **Charles Omanga and another v Independent Electoral and Boundaries Commission and another [2013] eKLR** and was thus res judicata. The doctrine of res judicata, as enshrined in section 7 of the Civil Procedure Act, seeks to prevent litigation of matters that have been previously adjudicated between the same parties. This principle aims to provide finality to legal disputes and prevent continuous litigation, thus serving the public interest in securing prompt and definitive justice. This doctrine was upheld by the court in ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*** [2017] eKLR and ***William Koross v Hezekiah Kiptoo Komen & 4 others*** [2015] eKLR.

In ***Charles Omanga***, which was presided over by Lenaola J, the Petitioners, Charles Omanga and Patrick Njuguna, challenged the constitutionality of section 43(5) of the Elections Act, 2011. They argued that the provision requiring state officers to resign seven months before an election while excluding other categories of officers was discriminatory and violated principles of fairness and equality. Lenaola J, in a judgment dated 2 August 2012, found that the requirement was reasonable and did not contravene the Constitution, thus dismissing the petition.

In the current consolidated appeals, one of the issues under review was whether section 43(5) of the Elections Act, 2011 and the six-month resignation period for public officers was constitutionally justifiable, reasonable, and rational. The trial judge also considered whether section 43(5) was discriminatory or a limitation of public officers' rights under articles 27, 38, and 41 of the Constitution.

The court observed a notable similarity between the issues resolved in ***Charles Omanga*** and those before it in the consolidated petitions. However, as the parties in the current consolidated petitions differed from those in ***Charles Omanga***, including Petitioners Eric Cheruiyot, Raymond Kinyua, Emily Thaara Njuki, and Monica Cyombua Gitari, and Respondents including various government officials and bodies, the case did not meet all the criteria for res judicata as established in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR.**

The court concluded that, despite the inapplicability of res judicata, the Employment and Labour Relations Court lacked proper jurisdiction to address the issues raised in the consolidated petitions.

On the question of the constitutionality of section 43 (5) of the Elections Act, the court noted that the trial court was asked to declare that section 43(5) of the Elections Act, 2011 was inconsistent with and violated the rights of the 1st to 4th Respondents and other public officers seeking elective office, specifically their right to fair labour practices under article 41 of the Constitution.

The trial judge found that section 43(5) was unjustifiable, irrational, unreasonable, and oppressive. The judge noted that the rights guaranteed under article 38, which include equal political rights, must be honoured, and that article 41 rights are also entitled to public servants. The judge observed that section 43(5) did not meet the necessary tests of reasonableness, justification, and rationality. It was noted that while neutrality and political activity of public servants were mentioned, this did not justify the extent of the disqualification imposed by

section 43(5). The judge emphasised that the hardship of disqualification for public servants seeking elective positions should have been mitigated by Parliament in line with article 82 of the Constitution, rather than enhanced by unfavourable legislation.

Section 43(5) of the Elections Act, 2011 stipulates that a public officer intending to contest an election must resign from public office at least six months before the election date. Section 43(6) outlines exceptions, including the President, Prime Minister, Deputy President, Members of Parliament, county governors, deputy county governors, and members of county assemblies.

The constitutional provisions relevant to this issue include article 137(2)(b), which disqualifies public officers from being nominated as presidential candidates, and articles 99(2)(a) and 180(2), which disqualify public officers from being elected as members of Parliament and county governors respectively. Article 193(2)(a) similarly disqualifies public officers from being elected as members of county assemblies. These provisions imply that public officers must resign to be eligible for election, a stance reinforced by section 43(5) and (6) of the Elections Act, 2011.

Lenaola J, in the ***Charles Omanga*** petition, emphasised the necessity for public officers to resign in advance of elections to ensure impartiality. The neutrality and impartiality of public officers are also reinforced by section 23(2) and (3) of the Leadership and Integrity Act, 2012, and section 12(1) of the Political Parties Act No 11 of 2011, which prohibit public officers from engaging in political activities that compromise their neutrality.

The court considered arguments that section 43(5) and (6) were discriminatory and violated the Respondents' rights under articles 27 and 24 of the Constitution. Article 24(1) allows limitations on rights only if reasonable and justifiable in an open and democratic society, while article 25 lists rights that cannot be limited. The court interpreted these provisions to mean that the limitations imposed by section 43(5) and (6) are reasonable and justifiable.

The court referenced the Indian case **State of Kerala & another v NM Thomas & others [1976] AIR 490,** which discussed the principle of equality and the need for classifications in law to have substantial grounds rather than being arbitrary. The court agreed with Lenaola J's view that government functions cannot be suspended during election periods, which justifies the provisions of section 43(5) and (6) as reasonable and not in violation of constitutional rights.

The court therefore upheld the provisions of sections 43(5) and (6) of the Elections Act, 2011, finding them justifiable and reasonable in light of the constitutional requirements and principles.

The fourth issue addressed was whether the enactment of sections 43(5) and (6) of the Elections Act, 2011 complied with the public participation requirements under article 118 of the Constitution. Article 10(2)(a) of the Constitution underscores public participation as a national value and principle of governance, which includes democracy and participation of the people. Article 118 mandates that Parliament must facilitate public participation in its legislative processes.

The Appellants argued that public participation was not required because article 118(1)(b) had been suspended by section 2(1)(b) of the Sixth Schedule of the Constitution on Transitional and Consequential Provisions. This section, according to the Appellants, suspended certain constitutional provisions until the first general elections under the 2010 Constitution were completed.

However, the trial court found that there was no public participation in the enactment of sections 43(5) and 43(6) and declared these provisions unconstitutional. The trial court's decision was based on the interpretation that article 118(1)(b) was suspended, but the Appellants contended that article 10(2)(a) still mandated public participation.

The appellate court disagreed with the trial judge's interpretation. It clarified that section 2(1)(b) of the Sixth Schedule did indeed suspend the application of article 118(1)(b) until after the first general elections. This suspension was consistent with the transitional provisions' purpose to facilitate the shift to the new constitutional order. The court referenced ***Dennis Mogambi Mong'are v Attorney General & 3 others*** **[2011] eKLR** and ***Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & 40 Others*** **(CCT27/95) [1995]** to reinforce that transitional provisions are integral to the Constitution and do not have lesser status.

The appellate court concluded that public participation was not a constitutional prerequisite for the enactment of the Elections Act, 2011, given that it was enacted before the suspension period ended. Moreover, it found that the Employment and Labour Relations Court did not have jurisdiction over the matter of public participation in this context.

The appeals were thus upheld, with the court setting aside the trial court's orders, except for the order affirming the constitutionality of section 43(6) of the Elections Act, 2011. Each party was ordered to bear its own costs due to the public interest involved.

Mwawaza v Mwaidza & another Voi Petition E001 of 2022

In the High Court of Kenya at Voi

Coram: JN Onyiego J

Judgment allowing petition

Date: 15 July 2022

Resignation of public servants before election-meaning of public officer-whether a person who does not draw a salary from the Exchequer or Consolidated Fund is a public officer

Summary of the facts

The Appellant, an independent aspiring candidate for Member of Parliament for Voi Constituency, presented his nomination papers on 31 May 2022. The Respondent, a Returning Officer, rejected his nomination, citing non-compliance with Section 43(5) of the Elections Act 2011, as the Appellant, a public officer, had not resigned six months prior to the election. The Appellant challenged the decision before the IEBC Dispute Resolution Committee on 4 June 2022, arguing that he was not a public officer as per Article 260 of the Constitution of Kenya.

On 16 June 2022, the committee upheld the Returning Officer's decision, dismissing the complaint. Dissatisfied, the Appellant filed an appeal on 24 June 2022, seeking an order to compel the Respondent to validate his nomination. The appeal was grounded on the argument that the committee misinterpreted the term "public officer" and violated his political rights under Article 38 of the Constitution.

The Respondent opposed the appeal, arguing that the Appellant failed to enjoin the IEBC and its Dispute Resolution Committee, which made the decision. Additionally, the Respondent noted that the appeal was overtaken by events as the IEBC had already gazetted independent candidates on 1 July 2022.

At the hearing, the Appellant maintained that his employment by a board of governors did not make him a public officer, as his salary was not drawn from the exchequer or consolidated fund. He also argued that the gazettement of candidates was not an obstacle to his candidacy, as the IEBC Chairman had promised to amend the gazettement if necessary.

The Respondent's counsel contended that the Appellant had wrongly sued the Returning Officer, who was functus officio, and that any orders should have been directed at the IEBC. The court noted that the Appellant had delayed in filing his appeal, which contributed to the complexity of the case.

Issues for determination

1. Whether the IEBC Dispute Resolution Committee erred in finding that the appellant is a public officer who should have resigned six months to the election date prior to presentation of his nomination papers in compliance with Section 43(5) of the Elections Act.

2. Whether the Returning Officer is properly sued as the Respondent in this appeal.

3. Whether the reliefs sought can issue.

Determination of the court

The dispute originated from the rejection of the appellant's nomination papers, which was based on non-compliance with Section 43(5) of the Elections Act, 2011. This provision mandates that "a public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election." The central issue in this case was the interpretation of the term "public officer" and whether the appellant fell within this definition. If he did, his resignation six months prior to the election was necessary.

According to Article 260 of the Constitution, a "public officer" includes any State officer or any person, other than a State officer, who holds a public office. A "public office" is defined as an office in the national government, a county government, or the public service, with remuneration and benefits payable directly from the Consolidated Fund or money provided by Parliament. The term "public service" encompasses individuals performing functions within a state organ, which is defined as a commission, office, agency, or other body established under the Constitution. The "state" refers to the collective offices, organs, and entities of the government. Further statutory clarification is provided by the Public Officer Ethics Act, which defines a public officer as any officer, employee, or member of various government bodies and institutions, including those receiving funds from government sources. The Anti-Corruption and Economic Crimes Act also defines a public officer similarly, including those who may be unpaid or part-time.

The appellant argued that his employment at the Coast Institute of Technology, where he worked as a campus administrator and was paid by the board of governors, did not constitute holding a public office since his salary was not drawn from the Consolidated Fund or Parliament's allocations. However, the court noted that the Coast Institute of Technology is a public institution under the Ministry of Education, thus qualifying as a public body.

The Technical and Vocational Education and Training Act, 2013, establishes the Coast Institute of Technology as a public institution whose board of governors is empowered to handle financial matters, including receiving fees and making disbursements. This demonstrates that the institute benefits from government funding and operates as a public entity. The appellant's salary, despite being sourced from student fees, was indirectly funded by the government.

The court also referred to case law for context. In ***Charles Omanga & another v Independent Electoral & Boundaries Commission & another*** **[2012] eKLR,** the court emphasized the importance of impartiality in public service and the necessity for public officers to resign before running for elective office. Likewise, in ***Public Service Commission & 4 others v Cheruiyot & 20 others*** **[2022] KECA 15 (KLR),** the Court of Appeal underscored the need for public officers to resign in a timely manner to preserve political neutrality and good governance.

The court determined that the appellant was indeed occupying a public office and was required to comply with Section 43(5) of the Elections Act. The appellant's attempt to narrow the definition of "public officer" to exclude his situation was deemed inconsistent with both the Constitution and relevant statutory provisions. On the matter of whether the Returning Officer was the appropriate Respondent, it was found that the IEBC Dispute Resolution Committee should have been the proper party to address the appeal. Sections 74 of the Elections Act and Article 88 of the Constitution grant the IEBC the authority to resolve electoral disputes. The court noted that the appellant should have sought judicial review proceedings against the IEBC Dispute Resolution Committee, rather than pursuing a constitutional petition.

Given the procedural irregularities, including the failure to include the appropriate party in the proceedings, the court concluded that the appeal was improperly constituted. As such, the reliefs sought by the appellant could not be granted. The appeal was dismissed, and the appellant was ordered to bear the costs of the Respondent.

Peter Kibe Mbae v Speaker of the County Assembly of Nakuru & Another Registrar of Political Parties and 49 Others (Interested Parties) Nakuru Constitutional Petition No E004 of 2022

In the High Court of Kenya at Nakuru

Coram: Joel Ngugi, Chemitei, Matheka, JJ

Judgment allowing petition

Date: 7 July 2022

Political rights-section 14 of the Political Parties Act-where a member of county assembly resigned from the political party s/he used during his/her election within one hundred and eighty (180) days preceding the date of the general elections - whether political rights of the electorate in a ward would be violated if a ward was left with no representative as a result of the resignation-whether member of county assembly who changes party before a general election needs to resign and/or lose his elective seat

Summary of the facts:

The Petitioner, a Member of the County Assembly of Nakuru County, filed a petition on 25 February 2022, both in his personal capacity and in the public interest. He sought various declarations against the Respondents and interested parties, including the Speaker of the County Assembly of Nakuru, the Attorney General, the Registrar of Political Parties, the IEBC, and several speakers of various County Assemblies across the Republic of Kenya. The petition focused on challenging the constitutionality of section 14 of the Political Parties Act in light of Articles 38, 101(4)-(5), and 194(1)(e) of the Constitution. The Petitioner expressed dissatisfaction with the Nakuru County Assembly Speaker's interpretation of Article 194 in a communication made on 22 February 2022, which he argued was silent on the provisions of Article 38, and, in effect, derogated political rights guaranteed under the Constitution. The Petitioner argued that the interpretation of Article 194(1)(e) should be read together with Articles 38 and 101 to prevent vacating the seat of a Member of the County Assembly who switches parties towards the end of the electoral cycle, thereby promoting the constitutional objects and principles. He also raised concerns that Section 14 of the Political Parties Act did not accommodate the unique circumstances surrounding election timelines and changes in political party ideologies, which may force sitting members to seek re-election under a different party without losing their seats.

The 50th Interested Party, the Speaker of the Nairobi City County Assembly, filed an affidavit supporting the petition, arguing that the impugned communication misinterpreted Article 194 and section 14 of the Political Parties Act and infringed Article 38, which protects citizens' political rights. The Nairobi County Assembly Speaker also contended that the interpretation failed to consider that if a vacancy occurred within three months of a General Election, Article 101 would prevent a by-election from being held, leading to unrepresented constituencies until the General Election.

The court, in a ruling on 18 March 2022, issued conservatory orders pending the hearing of the petition and dismissed preliminary objections. The matter was referred to the Chief Justice for empanelment of a bench, which was constituted on 31 March 2022. The Respondents, including the Nakuru County Assembly Speaker and the Attorney General, opposed the petition, with the latter arguing that the petition was frivolous, mischievous, and violated several constitutional provisions, including Articles 194, 101(5), and 255.

The case revolves around a constitutional petition challenging the interpretation and application of various provisions of the Constitution and the Political Parties Act. On 28 April 2022, the Court directed that the petition would be handled through written submissions with oral highlights if necessary. The Petitioner and various Respondents and Interested Parties filed their submissions. The 22nd Interested Party supported the Petitioner's submissions without filing its own.

During oral highlighting, all parties, except the Petitioner, declined to present oral arguments. The Petitioner's advocate brought up ***Judges and Magistrates Vetting Board & Attorney General v Kenya Magistrates & Judges Association*** **[2014] eKLR,** highlighting the Court's jurisdiction to grant relief by interpreting statutes in conformity with the Constitution. The Petitioner relied on Articles 2(4), 10, 38, 159(2)(e), 165(3)(d), and 259(1) of the Constitution, arguing that laws inconsistent with the Constitution are void, and the Court is empowered to determine such constitutionality. The Petitioner dismissed the Respondent's claims of judicial overreach and non-specificity, stating that the petition adequately addressed threats to both individual and public rights.

The Petitioner further argued that the issue should not be referred to the Supreme Court for an advisory opinion under Article 163(6), as the Petitioner is not an entity eligible to seek such an opinion. The Petitioner urged the Court to reconcile Article 101(5) of the Constitution with Article 38 to ensure political rights are upheld and avoid legislative paralysis caused by party-hopping before elections.

Additionally, Articles 4(2) and 38 were cited to support the argument for safeguarding democratic principles and the freedom to associate with political parties.

The Petitioner also referenced Article 194(1), which provides instances when the office of a Member of County Assembly becomes vacant, further relying on Section 14A of the Political Parties Act to argue that political representatives should not change their ideologies post-election. The Petitioner submitted that Article 101 prohibits filling vacancies three months before elections, and the purpose of Article 101(4)(b) is to prevent unnecessary by-elections.

The 1st Respondent countered, citing ***National Gender and Equality Commission v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 2 others*** **[2016] eKLR,** stating that the Petitioner failed to demonstrate a constitutional case. He argued that Section 14 of the Political Parties Act is aimed at ensuring consistency in party membership and its implications for political representation. ***Kennedy Irungu Ngodi & Another v Mary Waithera Njoroge & 11 others*** **[2021] eKLR** was referenced to extend the application of Article 101 to County Assemblies.

The 2nd Respondent argued that the petition sought an advisory opinion, citing ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** Sup. Ct. **Appl. No. 2 of 2012 [2012] eKLR,** and stating that the Supreme Court had jurisdiction in such matters. Further, the 2nd Respondent cited ***John Harun Mwau v Independent Electoral and Boundaries Commission & Another*** [2013] eKLR to emphasise the Constitution's immunity from challenge.

The 1st Interested Party referred to ***Re the Matter of Kenya National Commission on Human Rights*** **[2014] eKLR** and ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*** **[2015] eKLR,** stressing a holistic approach to constitutional interpretation. The criteria for determining constitutionality, based on ***Law Society of Kenya v Attorney General & Another*** **[2021] eKLR,** were also highlighted. The Respondents and Interested Parties largely opposed the Petition, arguing that the provisions of the Constitution and the Political Parties Act had been correctly applied, and the Petition should be dismissed.

Issues for determination

1. Whether to the extent that section 14 of the Political Parties Act required a sitting member of county assembly to resign as a precondition to switching from one political party to another for purposes of general elections within one hundred and eighty (180) days preceding the date of the general elections, the section was unconstitutional.
2. Whether political rights of the electorate in a ward would be violated if a ward was left with no representative as a result of the resignation of the representative from the political party he used during the election within one hundred and eighty (180) days preceding the date of the general elections.
3. Whether articles 101(4) and (5) of the Constitution which described what happened when a vacancy arose in Parliament applied mutatis mutandis to vacancies in the county assemblies.
4. Whether a sitting member of a county assembly could request for an advisory opinion at the Supreme Court.
5. What were the canons of interpretation of the Constitution of Kenya, 2010?
6. What was the nature of the element of party discipline anticipated by the Constitution?
7. What was a purposeful reading of the Constitution that harmonized article 194 on vacation of office of member of county assembly, article 101 on election of Members of Parliament and article 38 on political rights expected to do?
8. What was the effect of mass resignations by members of county assemblies at the tail end of the electoral cycle?

Determination of the court

The petition concerned the interpretation of several constitutional and statutory provisions, primarily focusing on the interplay between Article 194 of the Constitution and Section 14 of the Political Parties Act, No. 11 of 2011. Article 194 of the Constitution outlines the circumstances under which a seat in the County Assembly becomes vacant, including defection from a political party. Section 14 of the Political Parties Act provides the procedure for resignation from a political party, affecting the validity of a Member of the County Assembly's position upon resignation.

The Petitioner argued that the interpretation of Article 194(1)(e) suggested by the 1st Respondent would create a constitutional issue, particularly affecting representation and the timing of by-elections. The Petitioner contended that if a Member of the County Assembly switches parties close to a general election, the affected ward could remain unrepresented for up to six months, which exceeds the constitutional limit of three months for vacancies.

Article 101 of the Constitution, which governs the process of filling vacancies in the National Assembly and the Senate, was also considered, as it applies mutatis mutandis to County Assemblies. This provision requires that vacancies be filled within specific timeframes, with by-elections held within ninety days unless within three months of a general election. The Petitioner questioned whether the restrictive interpretation of Article 194(1)(e), as suggested by Section 14 of the Political Parties Act, aligned with the constitutional principles found in Articles 4(2), 10, 19, 20, and 38, and whether a proviso should be read into Section 14 to align it with constitutional provisions.

The court addressed three preliminary issues before delving into the substantive matter. These issues concerned whether the petition should have been presented as an Advisory Opinion request to the Supreme Court rather than as a constitutional controversy before the High Court, whether the petition sought to declare part of the Constitution unconstitutional, and whether the petition was sufficiently specific according to the rules and case law.Firstly, the question was whether the petition should have been submitted as a request for an Advisory Opinion to the Supreme Court. The 2nd Respondent argued that the High Court lacked jurisdiction because the Petitioner was essentially seeking an advisory opinion to resolve legal uncertainties, a role reserved for the Supreme Court under Article 163(6) of the Constitution. The 2nd Respondent cited ***In the matter of the Principle of Gender Representation in the National Assembly and Senate*** Supreme Court **Application Number 2 of 2012 [2012] eKLR** and ***In the Matter of the Hon. Speaker of the Senate & Another*** **[2013] eKLR**, which outline that advisory opinions are meant to address matters of great public importance, novelty, and structural challenges. The Petitioner countered that only the national government, state organs, or county governments have standing to request an advisory opinion under Article 163(6). The Petitioner asserted that the High Court had jurisdiction to address the issues raised under Article 165 of the Constitution, arguing that the matter involved constitutional interpretation rather than a request for an advisory opinion. The Petitioner referred to ***Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*** **[2014] eKLR** and

India v Sankalchand Himatalal Sheth A**IR 1977 SC 250** to support the argument that the case was suitable for interpretation by the High Court rather than the Supreme Court.

Moreover, the Petitioner argued that denying the petition on these grounds would contravene the right of access to justice under Article 48 of the Constitution and that the High Court has original jurisdiction for constitutional interpretation under Article 165. The court highlighted the importance of interpreting the Constitution in line with its purpose and intention.

Secondly, the court considered whether the petition sought to declare a portion of the Constitution unconstitutional. The 2nd Respondent argued that the petition effectively aimed to challenge the constitutionality of Article 194(1), which was beyond the High Court's jurisdiction. The court clarified that the petition was not seeking to declare any part of the Constitution unconstitutional but rather requesting an interpretation of how various constitutional provisions should be harmonized. The court referred to ***John Harun Mwau vs IEBC & Another*** **[2013] eKLR** and ***Tinyefuza vs AG***, Constitutional Appeal No. 1/1997, asserting that the Petitioner's goal was to harmonize constitutional provisions rather than challenge their validity.

Lastly, the court addressed the issue of specificity in the petition. The 2nd Respondent claimed the petition lacked the necessary specificity required by procedural rules and case law, citing ***Anarita Karimi Njeru v Republic*** **[1979] eKLR** and ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*** **[2013] eKLR.** The Court in ***Mumo Matemu*** highlighted the importance of precise claims for due process and substantive justice, though it acknowledged that precision does not require formulaic or exact detail. The focus was on ensuring that the petition defined issues clearly enough to avoid vagueness and enable proper adjudication.

In assessing whether the petition complied with this standard, the Court considered the petition's factual precision and identification of relevant constitutional provisions. The petition addressed concerns related to the Honourable Speaker's interpretation of Section 14 of the Political Parties Act, which linked resignation from the sponsoring party to the automatic loss of the Member of the County Assembly (MCA) seat. The petition detailed three potential outcomes: (i) the Petitioner's loss of their elective seat; (ii) the electorate of the Petitioner's ward lacking representation for the six months leading up to the General Elections; and (iii) the risk of paralysis in the County Assembly if multiple members resigned.

The Petitioner argued that these scenarios could result from circumstances beyond their control and that being forced to remain with a party due to these provisions would unreasonably restrict their rights to freedom of conscience and association.

The Petitioner also demonstrated that their political rights, as well as the political rights of their constituents under Article 38 of the Constitution, were at risk. The petition highlighted the threat of a lack of representation due to the operation of Article 101(5) of the Constitution, which could render the seat unfillable.

The Court found that the petition was sufficiently specific, with a clear description of the factual and legal issues at stake. It was deemed to provide adequate notice to the Respondents and to allow for a determination without the risk of embarrassment due to vagueness.

The main constitutional issue addressed was whether Section 14 of the Political Parties Act was constitutionally deficient when interpreted in light of Articles 194, 101, and 38 of the Constitution. To address this, the Court applied established principles of constitutional interpretation. The Court emphasized that the Constitution must be interpreted in a manner that promotes its purposes, values, and principles, as outlined in Article 259(1)(a) and (d). It adopted a purposive and holistic approach to interpretation, taking into account historical, social, and political contexts, as detailed in ***Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 Others*** **(Civil Appeal E084 of 2021) [2021] KECA 282 (KLR),** ***In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion*** **Reference No. 1 of 2012; [2014] eKLR**, ***Re Interim Independent Election Commission*** **[2011] eKLR**, ***In Re the Speaker of the Senate & Another v Attorney General & 4 Others,*** **Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR,** and ***Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*** **[2014] eKLR.**The Court considered that Article 194(1)(e) was designed to instil party discipline, addressing the issue of party-hopping and ensuring stability within political parties and County Assemblies. This provision aimed to enforce party loyalty but also recognised the potential for dissatisfaction among party members. The Court noted that while the Political Parties Act prevented dual membership and required resignation from the party to avoid vacancy, it also ensured that if a seat was vacated, the electorate would have an opportunity to elect a new representative within 90 days. However, the Constitution also precludes by-elections within three months before the General Elections.

The Court acknowledged that while the provisions served to enforce party discipline and protect political representation, they must also align with constitutional rights, including the freedom of conscience and association under Article 38. This balance is crucial in a democratic society to ensure that political rights are protected even in cases of party dissatisfaction.

The court's findings addressed several key issues related to political party regulation and the implications of elected representatives changing parties.

The court acknowledged that Kenya's Republican form of government and democratic system were designed to foster growth and align with the nation's aspirations. This system was intended to empower voters and ensure effective representation. The historical context and constitutional development, particularly during the drafting of the Constitution of Kenya, 2010, reflected a need for proper regulation of political parties to prevent obstruction in political processes. The Constitution of Kenya Review Commission (CKRC) underscored the importance of political parties as constitutional organs that required regulation. The CKRC recommended entrenching the right to form or join political parties in the Constitution, regulating their conduct, and providing State financing, while also preventing an excessive number of parties.

The CKRC Report suggested that MPs and local government representatives who defect from their parties should seek a fresh mandate from the electorate. However, it also noted that participation in a coalition government should not be deemed defection. This approach was aimed at preventing a return to a one-party state and ensuring a multi-party democracy, as enshrined in Article 4(2) of the Constitution, which declared Kenya a multi-party democratic state.

The Constitution sought to balance party discipline with the right of elected leaders to switch parties, necessitating re-election through a by-election if they changed parties. This balance aimed to protect the electorate's interests and maintain effective representation. Article 38 of the Constitution guarantees political representation, even if an elected representative defects or joins a different party. It stipulates that a by-election should be held within ninety days of a vacancy, except immediately before a General Election, to prevent any ward, constituency, or county from being unrepresented for more than ninety days.

The court noted that the interpretation of the Constitution was expected to harmonize Articles 194, 101, and 38, achieving goals such as upholding party discipline, encouraging internal democracy, minimizing non-representation, and

avoiding legislative paralysis. However, the interpretation proposed by the 1st Respondent was criticised for potentially failing to meet these objectives. It could lead to prolonged periods of non-representation and risk paralysis of the County

Assembly if mass resignations occurred near an election. The Petitioner argued that Section 14(2) of the County Governments Act, which protects the validity of proceedings despite vacancies, did not fully address the risk of paralysis due to quorum issues outlined in Section 19 of the Act.

In its judgment, the Court reached several key conclusions. Firstly, it determined that it had the jurisdiction to consider and resolve the Petition as presented by the Petitioner. It concluded that the Petition was not an attempt to seek an Advisory Opinion but was a live constitutional controversy within the High Court's interpretive jurisdiction under Article 165 of the Constitution. The Court found that the Petition did not seek to declare any part of the Constitution unconstitutional but aimed to harmonise different constitutional provisions. Additionally, the Petition was specific enough to provide adequate notice to the Respondents and to allow the Court to frame issues for resolution.

Secondly, the Court found section 14 of the Political Parties Act constitutionally deficient when interpreted in conjunction with Articles 194, 101, and 38 of the Constitution. The interpretation assigned to Article 194(1)(e) by section 14 of the Act did not align with Articles 4(2), 10, 19, 20, and 38, rendering it null and void to that extent.

Thirdly, the Court held that the interpretation of Article 194(1)(e) of the Constitution as applied by the Speaker of Nakuru County on 22 February 2022 undermined the objects and purposes of Articles 101(4) and 38, and was inconsistent with the principles of constitutional interpretation as set out in Article 259(1)(d) and related Articles.

Fourthly, to address the unconstitutionality in section 14 of the Political Parties Act, the Court decided it had the jurisdiction to "read in" a proviso to the Act. This proviso would prevent a vacancy from arising for members switching parties during the 180 days preceding a General Election. The Court noted that such a reading in was appropriate to save the legislative scheme from being declared unconstitutional and aligned with the Court of Appeal's ruling in ***Judges & Magistrates Vetting Board & Attorney General v Kenya Magistrates & Judges Association*** **[2014] eKLR.**

Fifthly, the Court deemed this a public interest litigation and decided that each party should bear its own costs.

The final orders included declaring section 14 of the Political Parties Act unconstitutional to the extent it required Members of the County Assembly to resign within 180 days before a General Election. The Court read in a provision to prevent resignation due to party switching during this period. It issued a conservatory order restraining the declaration of seats as vacant for such party changes within the specified period. Each party was to bear its own costs.

SUITABILITY FOR ELECTIVE OFFICE UNDER THE CONSTITUTION

Republic v Independent Electoral & Boundaries Commission Dispute Resolution Committee & another; Thang'wa (Ex parte); Party (Interested Party) Judicial Review Application 2 of 2022

In the High Court of Kenya at Kiambu

Coram: R Ngetich J

Judgement allowing application

Date: 18 July 2022

Nomination-eligibility to hold office under Article 75 of the Constitution-disqualification to hold office on grounds of impeachment-whether applicant was ineligible to hold elective office-whether Nomination Dispute Resolution Committee had violated fair hearing rights of the ex parte applicant

Summary of facts

The ex parte Applicant sought leave to file the judicial review to challenge the 1st Respondent's decision. The 1st Respondent upheld the 3rd Respondent's refusal to clear the ex parte Applicant for the Senatorial position in Kiambu County under the UDA ticket. The 1st Respondent cited that the Applicant's ineligibility to hold public office following a purported removal from the office and the Applicant's presentation of the nomination papers outside the gazetted timelines.

The ex parte Applicant being aggrieved by the 1st Respondent's decision, filed the application in Milimani High Court and the same was transferred to the High Court in Kiambu in view of its territorial jurisdiction. It was the ex parte Applicant's submission that he was denied registration based on the communique by the IEBC Chairman on 4 June 2022 when he presented his papers to the 3rd Respondent. The ex parte Applicant argued that he was disqualified before he presented his documents to IEBC without being given an opportunity to be heard. He further argued that the decision of the 1st Respondent was vitiated by the infringements of the Applicant's right to natural justice as enshrined in Rule 9 of the Rules of Procedure of Settlement of the Dispute before the 2nd Respondent.

The applicant also contended that the decision of the 2nd Respondent was based on a conclusion that the Applicant was impeached yet it is the then Governor who

was impeached from office and thus the ex parte Applicant ceased to hold office by operation of the law. There was therefore no basis for the 3rd Respondent to make such a unilateral decision which the 1st Respondent relied on.

It was also argued that the 1st Respondent had acted irrationally and unreasonably by taking into consideration extraneous matters, and decided on the allegation that the ex parte applicant submitted clearance papers outside the gazetted timelines yet it was not the reason the 3rd Respondent declined to register the ex parte Applicant.

It was the Respondent's submission on this matter that nomination papers for the Senatorial candidature expired on 30 May 2022 and a gazette notice was in place, and there were briefing sessions at Kiambu Institute of Technology which ex parte Applicant failed to attend. Thus, the committee could not be accused of irrational decisions.

In his rejoinder the ex parte Applicant argued that clearance of Senatorial candidates happened between 1 May 2022 to 30 May 2022, a period when Petition E234 of 2022 had barred the 2nd Respondent from clearing the Applicant from vying for an elective post. These orders were vacated on 6 June 2022 and presentation of the nomination papers by the ex parte Applicant before the orders being vacated would have amounted to contempt of Court.

He further argued that Article 99(3) of the Constitution 2010 allows persons with pending appeals to run for office. While he appreciated the mandate of IEBC under Article 88, he argued that the disputes to be adjudicated were under Rule 9 of the IEBC Rules and Procedure which provides that a complaint should be from any other party and not where IEBC is the complainant.

Issues for determination

1. Whether the ex parte Applicant was granted right to fair hearing.

2. Whether the decision by the 1st Respondent was illegal, irrational and procedurally unfair.

Determination of the court

The court conducted an analysis to determine whether the Applicant had established that the decision by the 1st Respondent was illegal, irrational, or procedurally unfair, as required for judicial review. The Applicant invoked Articles 47,

50, 75, and 99 of the Constitution of Kenya 2010, claiming that his constitutional rights had been violated.

The court noted that it was undisputed that the Applicant had served as a County Executive Committee member for Kiambu County. On 29 October 2019, the Kiambu County Assembly passed a resolution to impeach the Applicant, but the Governor did not dismiss him due to stay orders issued by the Employment and Labour Relations Court (ELRC). The Applicant argued that he remained in office until he ceased to hold office by operation of Article 179(7) of the Constitution following the Governor's impeachment.

In addressing the first issue, the court considered whether the Applicant's right to natural justice had been violated. The Applicant contended that the composition of the 1st Respondent, which included members appointed by the 2nd Respondent and its Commissioners, resulted in a violation of natural justice, as the 1st Respondent acted as a judge in its own cause. However, the court referred to ***Diana Kethi Kilonzo & Another v Independent Electoral & Boundaries Commission & 10 Others*** **[2013] eKLR,** where it was held that the IEBC's mandate to adjudicate disputes related to nominations is constitutionally ordained, and if exercised in accordance with the Constitution and the law, it does not violate the principle that no one shall be a judge in their own cause. Therefore, the court agreed with the Respondents that the composition of the Committee could not be faulted.

Regarding the second issue, the court examined whether the decision by the 1st Respondent was illegal, irrational, and procedurally unfair. The Applicant argued that the 2nd Respondent considered extraneous matters, as the reason given by the 3rd Respondent for refusing to clear the Applicant was disqualification under Article 75 of the Constitution. However, the 1st Respondent based its decision on timelines set by the 2nd Respondent, which was not the original ground for disqualification.

The court reviewed the proceedings before the tribunal and noted that the 3rd Respondent had refused to register the Applicant on 7 June 2022, a day after the prohibition order issued by Justice Mrima on 25 May 2022 was lifted. The court observed that the 3rd Respondent's decision was based on a communique from the IEBC Chairman, indicating that individuals removed from office were disqualified from vying for elective positions under Article 75 of the Constitution. However, the 3rd Respondent did not cite timelines as the reason for refusing to register the Applicant in the official forms.

The court further noted that Article 99(3) of the Constitution provides that a person is not disqualified under Article 99(2) unless all possibilities of appeal or review have been exhausted. The court found that the Applicant had filed an appeal challenging the decision that disqualified him from vying for the Senate position before the IEBC Chairman's communique was issued. Thus, the Applicant was entitled to the protections provided under Article 99. Additionally, the court held that the 1st Respondent acted beyond its mandate by considering timelines that were not raised as an issue before the committee and by failing to grant the Applicant an opportunity to be heard on this new ground. The court emphasised that had the Applicant been given an opportunity to explain the delay in presenting his papers, he would have provided a valid explanation related to the prohibition order that was in place. Consequently, the court found that the 1st Respondent's decision was unreasonable and procedurally unfair.

In conclusion, the court quashed the decision of the 1st Respondent delivered on 19 June 2022 in complaint No. 130 of 2022, which upheld the 3rd Respondent's refusal to register the Applicant as a candidate for the Senate position in Kiambu County. The court issued an order of mandamus compelling the 2nd Respondent to clear and register the Applicant as a candidate for the Senate position in the general elections scheduled for 9 August 2022, with no orders as to costs.

Okiya Omtatah Okoiti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Parties) (Constitutional Petition E090, E168, E221, E230, E234, E249, E017, E109 & E010 of 2022 (Consolidated))

In the High Court of Kenya at Nairobi (Milimani Law Courts)

Coram: DAS Majanja, EC Mwita & M Thande, JJ

Judgment dismissing petition

Date: 24 June 2022

Summary of Facts

The Petition concerned the interpretation of Chapter 6 of the Constitution as it relates to the electoral process particularly the 2022 General Elections. Additionally, it related to the qualification of candidates standing for elections which directed the Court's focus to Article 99 on qualification of election as Member of Parliament and Article 193 on qualification of member of county assembly.

NRB Petition No. E090 of 2022

The Petitioner, Okiya Omtatah Okoiti was concerned that persons who lacked integrity were vying for public offices in the general elections. He further noted that that an individual was elected as a Member of Parliament despite having being arrested, charged and dismissed from his high-profile public position for receiving a bribe. He claimed that it was a matter of public interest that people involved in the theft of public funds, including the so called "COVID-19 billionaires" are lining up to vie for positions in the upcoming elections. As consequence, these tendencies hamper good governance, transparency and accountability ultimately undermining the Constitution. The Petitioner sought the interpretation of Chapter 6 of the Constitution, which deals with leadership and integrity, and prayed for several declaratory and compulsory orders from the court. Firstly, he requested a declaration that elective aspirants must pass the eligibility tests set out in Articles 99 and 193 of the Constitution to vie for political offices. Secondly, he sought a declaration that the stipulations of Articles 99(3) and 193(3), which state that a person is not disqualified unless all possibilities of appeal or review of the relevant sentence or decision have been exhausted, do not apply to the eligibility criteria in clause (1) of those articles.

The Petitioner also requested a declaration that, subject to Article 88(4)(e) & (f), 99(1)(b) and 193(1)(b) of the Constitution, read together with Section 13 of the Leadership and Integrity Act, Section 74(1) of the Election Act, and Section 4(e) of the IEBC Act, the Independent Electoral and Boundaries Commission (IEBC) has the authority to bar anyone who does not satisfy the moral and ethical requirements prescribed by the Constitution or an Act of Parliament from vying in elections for the offices of the president, deputy president, governor, deputy governor, Member of Parliament (both Senate and National Assembly), and Member of County Assembly.

Furthermore, the Petitioner sought an order compelling the IEBC to vet and ensure that persons vying for elections satisfy the moral and ethical thresholds prescribed in the Constitution and Acts of Parliament. He also requested an order compelling the Respondents to bear the costs and any other remedy the court deems fit to give effect to the foregoing orders.

NRB Petition E221 of 2022

The Petitioner, Edward Asitibat was also concerned with Chapter 6 of the Constitution and contended that the IEBC, which is mandated to register candidates for elections has failed to bar persons with questionable integrity from running for elective posts unless there was an order from the court or quasi-judicial body to that effect.

The Petitioner sought several reliefs concerning the eligibility of candidates for state office. Firstly, he requested a declaration that officials who have been removed from office through impeachment are in violation of the Constitution if they contest for any state office. Secondly, he sought a declaration that public officials found guilty of abuse of power or misuse of office are barred from holding any state office. Thirdly, the Petitioner requested a declaration that candidates with ongoing court cases alleging corruption, abuse of office, or other serious crimes should not be allowed to contest for elective positions until they have been cleared of such charges. Additionally, he sought any other remedy that the honourable court may deem fit to grant in light of these requests.

NRB Petition No. E168 of 2022

The Petitioners; Inuka Kenya ni Sisi, Wanjiru Gikonyo, Kenya Human Rights Commission, and Transparency International Kenya anchored their petition with Chapter 6 of the Constitution seeking to address the historical challenges of

corruption and impunity regarding management of public funds by imposing a proper test for elective office holders. The noted that despite the exhaustive constitutional and legislative provisions providing for standards and qualifications required to contest for elective positions, candidates with integrity issues have been allowed to contest for public offices.

The Petitioners sought several reliefs regarding the interpretation and application of Chapter 6 of the Constitution, which addresses leadership and integrity. Firstly, they requested a declaration that Chapter 6 establishes a fit and proper test for leadership applicable to both elective and appointive offices. Secondly, they sought a declaration that this fit and proper test is objective, rather than subjective, for the purposes of vetting and appointing bodies.

Additionally, the Petitioners requested a declaration that the fit and proper test required by Chapter 6 is distinct from the criminal test related to the conviction of criminal offenses. They further sought a declaration that vetting and appointing bodies, including the Respondents, have an obligation to objectively determine whether a person seeking an elective position is fit and proper.

The Petitioners also sought a declaration affirming that the first Respondent has the primary mandate to vet and clear candidates in accordance with Chapter 6 of the Constitution. They requested a declaration that any individual seeking elective office who is charged in court with abuse of office, corruption, breach of public trust, or any serious offense is unfit to contest or hold an elective position until such matters are resolved.

Moreover, they sought a declaration that a person barred from performing their duties by a court of law should be deemed unfit to vie for or hold an elective position until the matter is settled. They also requested a declaration that a person found by the first Respondent to have breached the values outlined in Chapter 6 should be considered unfit for elective office, regardless of whether they have pending court cases.

Furthermore, they sought a declaration that a person found by an electoral court to have committed an election offense should be deemed unfit to contest or hold an elective position. They also requested a declaration that a person adversely mentioned in a report from a fact-finding or investigative body, and recommended for prosecution or further action, should be found unfit for elective office.

Additionally, they sought a declaration that a person mentioned in the Auditor General's report for overseeing the loss of public funds or violating financial laws should be considered unfit for elective office. Finally, they requested a declaration that the criteria for qualification for elective positions at both the county and national levels should also apply mutatis mutandis to appointments to public offices.

MSA HC Petition No. E017 of 2022

The Petitioners, George Odhiambo claimed that Mike Mbuvi Sonko was disqualified from holding any state office including the office of the Governor of Mombasa County. He further reiterated that any person who had been removed from office through impeachment pursuant to article 75 of the Constitution is disqualified from holding any state office.

The Petitioner contended that Mike Sonko should be barred from being elected, appointed, designated, employed, or otherwise recruited to serve in any state office. He sought several specific reliefs from the court. Firstly, he requested a declaration that, by virtue of being removed from the office of the Governor of Nairobi County through impeachment, Mike Mbuvi Sonko was disqualified from holding any state office, including the office of the Governor of Mombasa County. Secondly, he sought a declaration that any county governor or individual, including Mike Sonko, who has been removed from office via impeachment is disqualified from holding any elective office. Additionally, the Petitioner requested that the costs of the petition be paid jointly and severally by the first and second Respondents. Finally, he sought any other order that the honourable court might deem fit to grant in relation to these matters.

ELD Petition No. E010 of 2022

The Petitioner, Silverstor Kipkemoi Arap stated that Mike Mbuvi Sonko and Ferdinand Ndung'u Waititu Babayao were impeached and their attempts to obtain a reprieve from court failed and as a result they couldn't run for public offices. The Petitioner sought several reliefs regarding the eligibility of individuals for elective office. Firstly, he requested a declaration that a person who has been impeached by the County Assembly and the Senate is disqualified and ineligible to offer themselves for any elective office. Secondly, he sought a declaration that the first and second interested parties are disqualified and ineligible to hold any public office due to their removal from office for numerous offenses, including gross violations of the Constitution.

Additionally, the Petitioner requested a declaration that, by virtue of Articles 75(3), 99(2), 180(2), and 19 of the Constitution, the first and second interested parties are disqualified from vying for elective offices. He also sought a declaration affirming that the second Respondent has the primary legal and constitutional mandate to vet and clear candidates for any elective office.

Furthermore, the Petitioner requested a permanent injunction restraining the first, second, and third Respondents from clearing any person who has been impeached from standing for any elective office. He also sought any other order that the honourable court may deem fit and requested that the costs of the petition be borne by the Respondents.

NRB Petition No. E230 of 2022

The Petitioners, Mukudi Jwenge and Anderson Warui stated that Mike Mbuvi Sonko was impeached and his quest to challenge the impeachment in the High Court and Court of Appeal was dismissed, pending his appeal to the Supreme Court.

The Petitioners sought several reliefs regarding the eligibility of the first Respondent for state office. Firstly, they requested a declaration that the first Respondent, having been removed from the office of the County Governor of Nairobi County pursuant to Article 181 of the Constitution, is barred from holding any state office by virtue of Article 75(3) of the Constitution. Secondly, they sought a declaration that the second Respondent cannot accept the first Respondent for nomination as a candidate for the Mombasa gubernatorial elections or any elections thereafter, due to the bar imposed by Article 75(3).

Additionally, the Petitioners requested a declaration affirming that the first Respondent cannot assume the office of the County Governor of Mombasa following the provisions of Article 75(3). They also sought a declaration mandating the second Respondent to consider, use, and apply the judgment and decree issued in this case while receiving, evaluating, and processing the nominations of individuals seeking election to various state offices. Furthermore, the Petitioners requested a declaration that, even if the first Respondent seeks immunity under the provisions of Article 193(3) of the Constitution, he cannot be exonerated in any manner due to the binding authority of Article 10(2)(c). Lastly, they sought that the costs of the petition be borne by the first Respondent.

NRB Petition No. E234 of 2022

The Petitioner, Kevin Njui Wangari claimed that Paul Thang'wa was the Kiambu County Executive Member for Youth Affairs, Sports, ICT and Communications until the Kiambu County Assembly resolved to remove him from office on grounds of incompetence, abuse of power and gross misconduct.

The Petitioner contended that an individual who has been impeached cannot be fit to hold any elective office and sought several specific reliefs. Firstly, he requested a declaration that the impeachment of the first Respondent, or any other person impeached from public office due to gross misconduct and violations of the Constitution, poses a threat to the Constitution if they are re-elected to public office. Secondly, he sought a declaration that the candidacy of the first Respondent and any other impeached individual is contrary to the ideals and spirit of the Constitution, particularly Chapter 6.

Additionally, the Petitioner requested a declaration that a person cannot be deemed fit to run for any elective office if they are or have been in breach of the Code of Integrity set out in Articles 73, 75, 76, 77, 78, and 80 of the Constitution. He also sought a permanent injunction restraining the third Respondent from accepting the nomination of the first Respondent due to incompetence, abuse of office, gross misconduct, and actions contrary to the spirit of the Constitution.

Furthermore, the Petitioner requested a declaration that the nomination of the first Respondent to contest the position of Senator of Kiambu County, or any other state office, would violate the Constitution. He also sought any other orders that the court may deem fit and requested that the costs of the petition be borne by the Respondents.

Petition No. E249 of 2022

The Petitioner, Onchieku Hesbon Moisiori petitioned that Samuel Arama (the Respondent) had been nominated by the Jubilee Alliance Party and had been cleared to vie for the Nakuru West National Assembly Constituency despite his conviction by the Nairobi Anti-Corruption Criminal Case No. 20 of 2018.

The Petitioner sought several declarations and orders from the court regarding the eligibility of the first Respondent to contest in elections. Firstly, he requested a declaration that the process followed by the second Respondent in nominating the first Respondent was illegal, unlawful, and therefore null and void. Secondly,

he sought a declaration affirming that the first Respondent was not fit to hold any state office due to concerns about his honesty, dignity, personal integrity, and suitability, and that his appointment was therefore in violation of the Constitution.

The Petitioner also sought an order of prohibition to restrain the third Respondent from processing the first Respondent's nomination papers to contest the mentioned seat. Additionally, he requested a permanent injunction restraining the third Respondent from processing the first Respondent's nomination papers to contest in the elections and prohibiting the first Respondent from contesting unless due process was followed in the nomination and appointment of a person who meets the requirements of Chapter 6 of the Constitution.

Furthermore, the Petitioner requested that the costs be borne by the Respondents and sought any other order that the court may deem fit to issue in relation to these matters.

The eight Respondents of the consolidated petitions replied in the following manner:

The Attorney General

The Attorney General filed the ground of opposition stating that the petitions lacked specificity and sought an advisory opinion which falls within the Supreme Court's jurisdiction. It further highlighted the allowing said petitions would interfere with the constitutional and statutory mandates of the constitutional bodies. It argued that the Petitioners raised issues that weren't ripe for adjudication as they were not based on controversy arising from a prevailing factual matrix. Finally, it was the Attorney General's argument that it was improper for the court to make declarations regarding constitutional and statutory issues without reference to specific actions done or not done.

EACC

The EACC acknowledged that it has a mandate of ensuring compliance with Chapter 6 of the Constitution through conducting investigations and recommendations to the prosecution as empowered by Articles 99(1) and 193(3) as read with Section 13(1) of the Leadership and Integrity Act. To that effect, it forwarded an integrity verification report to guide IEBC in discharging its mandate under Article 88(4)(f). In furthering its argument, the EACC stated that IEBC was obligated by article 259(11) and Section 4(3) & (4) of the Leadership and Integrity Act

Issues for Determination

1. Whether the court has jurisdiction to hear and determine the petitions that raise abstract and hypothetical questions.
2. Whether the petitions are premature in view of the Constitutional and statutory mandate of the IEBC.

Determination of the Court

The Court acknowledged that its jurisdiction to adjudicate over matters concerning the Constitution is wide. Regarding the matter brought before it, it highlighted Article 165(3) which stipulates for its jurisdiction to determine matters revolving around the interpretation of the Constitution and the violation of a fundamental freedom or right. Accordingly, it was the Court's view that it the clause had confirmed the Petitioner's position that it may entertain any question regarding the interpretation of the Constitution.

The Court adopted the standing in ***John Harun Mwau & 3 Others v Attorney General*** **[2021] eKLR** where it was held that the court does not deal with hypothetical issues and that the jurisdiction to interpret the Constitution under Article 165(3)(d) does not exist in a vacuum and is not exercised independently in the absence of the real dispute. The aforesaid position also emanated in the case of ***Wanjiru Gakenyo & Others v National Assembly of Kenya & 4 Others, Petition No. 453 of 2015*** **[2016] eKLR** where the principle of ripeness of a matter was invoked to ensure that a matter was factually ripe for determination.

The court admitted that despite it having jurisdiction to interpret the Constitution, it could not proceed to grant reliefs merely on the ground that there are conflicting decisions that required harmonisation. It made reference to ***Kenya National Commission on Human Rights v Attorney General; IEBC and 16 Others (Interested Parties)*** where an invitation to "harmonise" jurisdiction based on the need to clarify the fit and proper test for leadership under Chapter 6 of the Constitution in light of the conflicting case laws that had built up on the issue. It opined that harmonization could only be achieved where an actual and live dispute existed.

Having considered the entirety of Petition Nos. E090 of 2022, E168 of 2022, and E221 of 2022 the Court posited that they were general in nature, raised issue without reference to concrete facts, did no allege any wrong doing against a specific person and did not have specific Respondents against which the reliefs would be granted. Hence, they were rejected.

to operate according to the integrity verification report and decline candidates who failed to satisfy the thresholds provided. Consequently, EACC sent a list of aspirants with unresolved integrity issues to the IEBC requesting for their disqualification.

IEBC

It was the IEBC's position that by dint of Article 249(2) of the Constitution it is not subject to control of any person or authority. It further reiterated that under Article 88(4)(e), it has the obligation of resolving electoral disputes including matters involving nominations. A role buttressed by Section 74 of the Election Act establishing the Dispute Resolution Committee (DRC) under IEBC. It therefore stated that Mike Sonko had lodged a complaint with the DRC against its decision to reject his nomination for the Mombasa gubernatorial contest hence causing the Court to lack jurisdiction over the matter.

On matters of integrity and leadership under Chapter 6, IEBC stated that in exercising its duty in the nomination process, it acted in accordance with the Constitution, the IEBC Act, the Elections Act, the Elections (General) Regulations and all other applicable laws in an independent, fair, transparent, impartial, neutral, efficient, accurate and accountable manner.

It further recognized Section 13(1) of the Elections Regulations which mandates political parties intending to nominate candidates for elective seats to observe the Constitution, the Election Act and any other written law in respect to the qualification and disqualification for those offices. A requirement echoed in Section 38H of the Political Parties Act. Subject to the aforementioned, IEBC stated that on receipt of the party lists it commences an exercise of confirming that the aspirants are in compliance with the qualification requirements set out in the Constitution.

Following the arguments made by the EACC, the IEBC contended that the representations made by the EACC were not binding on it unless backed by an order from a court or quasi-judicial entity as it was required to weigh the representations against the provisions of Article 38 and 24 and make its own decision on whether the aspirants are qualified to run for any public office or not. Therefore, it denied that it misrepresented Article 99(3) and 193(3) as it took a holistic construction of the Articles 75, 99(3), 193(3) and the Bill of Rights as required by Article 249.

Mike Sonko and Wiper

According to Mike Sonko and his sponsoring party the court lacked jurisdiction to entertain any claim contesting his right to vie for the position of Governor of Mombasa County. They stated that the petitions violated Sections 88(4)(e) and 74(1) of the Elections Act which provide procedures for resolving nominations disputes, a mandate vested upon the IEBC.

Additionally, the two contended that the Petitioners sought to curtail their political rights guaranteed under Article 38 and denied that the nominations violated anyone's political rights. Mr. Sonko admits that his impeachment was upheld by the High Court and the Court of Appeal but contends that the petitions are premature because his Petition No. E008 of 2002 is pending before the Supreme Court.

Paul Thang'wa

Mr. Thang'wa contended that the County Assembly of Kiambu County passed a resolution to commence his removal from the County Executive Committee however he was neither impeached nor removed. He further indicated that there was no evidence provided to show that he was dismissed from office under Section 40 of the County Government Act. He stated that the Employments and Labour Relations Court stayed the matter in court asserting that he remained a County Executive Committee Member for Kiambu until he ceased to hold office by operation of Article 179(7) when the governor of Kiambu ceased to hold the office. Mr. Thang'wa maintained that he filed an appeal against the decision of the ELRC which was still pending before the Court of Appeal.

Samuel Arama

Mr. Arama stated that he presented his nomination credentials and was duly nominated by the IEBC. He admitted that he was convicted in NRB ACCR No. 20 of 2018, the court had not passed sentence by time of hearing the petitions and averred that once the court rendered its sentence, he would utilize all available opportunities to appeal.

Regarding the second issue, the Court stated that the net effect of the decision-made in the case of ***Mohamed Abdi Mohamud v Ahmed Abdullahi & Others*** **SCK Pet. No 7 of 2018 [2019] eKLR** where the jurisdiction of IEBC was affirmed by dint of Article 88(4)(e) was that pre-election dispute such as those regarding suitability and eligibility for nomination of candidates must be resolved by the IEBC in the 1st instance. The High Court's jurisdiction is only triggered once the IEBC makes a decision on the issue. In applying the above principle, the Court asserted that the cases concerning Mike Mbuvi Sonko, Paul Thang'wa and Samuel Arama were presented prematurely in court.

It went further and stated that considering the DRC process was invoked, it must be allowed to run its course and highlighted that its jurisdiction should only be invoked until the process was exhausted while quoting the case of ***International for Policy and Conflict & 5 Others v Attorney General***. Consequently, jurisdiction claim made on the petitions relating to Mike Sonko, Paul Thang'wa and Samuel Arama were rejected.

Mike Sonko Mbuvi Gideon Kioko v Swalha Ibrahim Yusuf and 3 Others Petition E027 of 2022

In the High Court at Mombasa

Coram: Sewe, Githinji & Ong'injo JJ

Judgment allowing petition

Date: 13 July 2022

Summary of the facts:

In his petition dated 22 June 2022, Mike Sonko Mbuvi Gideon Kioko sought several declarations and orders from the court. He argued that his constitutional rights under Articles 20, 27, 38(2), 47, and 50 of the Constitution of Kenya, 2010, had been violated by the Independent Electoral and Boundaries Commission (IEBC) and other Respondents. He claimed he had been nominated by the Wiper Democratic Movement Party to vie for the gubernatorial seat of Mombasa County in the forthcoming General Elections. Sonko contended that, despite meeting the requirements for nomination and presenting the necessary documents, the IEBC disqualified him, citing his failure to present an original degree certificate and a certified copy of it from the institution, as well as his impeachment under Article 75 of the Constitution.

Sonko maintained that the additional requirements imposed on him were specifically designed to lock him out of the election. He also argued that he had a pending appeal before the Supreme Court regarding his impeachment, which the IEBC and other Respondents failed to consider. He stated that this appeal should have allowed him to contest the elections, per Article 193(3) of the Constitution. He further alleged that other gubernatorial candidates with local university degrees were not subjected to similar scrutiny, thus violating his rights under Article 27 of the Constitution. The petitioner argued that his disqualification violated multiple constitutional provisions, including Articles 3, 10, 47, and 180(2). He also claimed that the IEBC's decision was unreasonable and unfair as the requirements for submitting his degree were altered at the last minute, despite his efforts to comply within the stipulated timelines. Finally, he challenged the IEBC's decision to allow the Wiper Democratic Movement Party to nominate another candidate for the position within 72 hours, terming it unreasonable and unlawful. The 1st Respondent, Swalhah Ibrahim Yusuf, Mombasa County Returning Officer, swore an affidavit on her own behalf and for the 3rd Respondent.

She stated that the 3rd Respondent had issued Gazette Notice No. 434 on 19 January, 2022, outlining the nomination process for the Governor seat in Mombasa for the August 2022 elections. She noted that in April 2022, the Petitioner declared his candidacy under the 4th Respondent's ticket. Yusuf was aware that the Petitioner had been impeached as Governor of Nairobi City County in December 2020 for gross violations of the Constitution, abuse of office, and misconduct, a decision upheld by the High Court and Court of Appeal.

In May 2022, the 4th Respondent forwarded the Petitioner's name for clearance as their gubernatorial candidate. Yusuf stated that on 31 May 2022, the Ethics and Anti-Corruption Commission (EACC) issued a report to the 3rd Respondent confirming the Petitioner's impeachment and his criminal charges in several anti-corruption cases. A media release followed on 4 June 2022, outlining Chapter Six compliance requirements, including disqualification for impeached officials, which applied to the Petitioner.

Yusuf added that the Petitioner was scheduled to present his nomination papers on 7 June 2022 but failed to submit his original degree and a certified copy within the required timelines. Though the Petitioner submitted these at 4:42 pm, this was outside the gazetted time. The 1st Respondent also disqualified the Petitioner for failing to meet leadership and integrity requirements, as per Article 75 of the Constitution, and for not proving that an appeal against his impeachment was pending within the stipulated time. The 2nd Respondent, through Chrispine Owiye, the 3rd Respondent's Legal Director, confirmed the rejection of the Petitioner's nomination papers due to his failure to present the necessary documents on time and his disqualification under Article 75 of the Constitution. Owiye also pointed out that the Petitioner's appeal against his impeachment was challenged as out of time, and thus no valid appeal existed. Consequently, the Petition lacked merit and should be dismissed.The 4th Respondent, in supporting the Petition, argued that the 2nd Respondent unfairly dismissed Complaint No. 136 of 2022 without considering it on its merits. It claimed that the 2nd Respondent's requirement for a new gubernatorial nominee within 72 hours was irrational and unconstitutional. The 4th Respondent also contended that the degree certificate requirement had been declared unconstitutional in a previous case, ***County Assembly Forum & 6 others v Attorney General & 2 others*** **[2021] KEHC 304 (KLR).** They urged the court to find the decision of the 2nd Respondent unlawful. The 1st Respondent, Swalhah Ibrahim Yusuf, Mombasa County Returning Officer, swore an affidavit on her own behalf and for the 3rd Respondent. She stated that the 3rd Respondent had issued Gazette Notice No. 434 on 19 January 2022, outlining the nomi

nation process for the Governor seat in Mombasa for the August 2022 elections. She noted that in April 2022, the Petitioner declared his candidacy under the 4th Respondent's ticket. Yusuf was aware that the Petitioner had been impeached as Governor of Nairobi City County in December 2020 for gross violations of the Constitution, abuse of office, and misconduct, a decision upheld by the High Court and Court of Appeal.

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Yusuf added that the Petitioner was scheduled to present his nomination papers on 7 June 2022 but failed to submit his original degree and a certified copy within the required timelines. Though the Petitioner submitted these at 4:42 pm, this was outside the gazetted time. The 1st Respondent also disqualified the Petitioner for failing to meet leadership and integrity requirements, as per Article 75 of the Constitution, and for not proving that an appeal against his impeachment was pending within the stipulated time.

The 2nd Respondent, through Chrispine Owiye, the 3rd Respondent's Legal Director, confirmed the rejection of the Petitioner's nomination papers due to his failure to present the necessary documents on time and his disqualification under Article 75 of the Constitution. Owiye also pointed out that the Petitioner's appeal against his impeachment was challenged as out of time, and thus no valid appeal existed. Consequently, the Petition lacked merit and should be dismissed.

The 4th Respondent, in supporting the Petition, argued that the 2nd Respondent unfairly dismissed Complaint No. 136 of 2022 without considering it on its merits. It claimed that the 2nd Respondent's requirement for a new gubernatorial nominee within 72 hours was irrational and unconstitutional. The 4th Respondent also contended that the degree certificate requirement had been declared unconstitutional in a previous case, ***County Assembly Forum & 6 others v Attorney General & 2 others*** **Constitutional Petition E304 of 2021.** They urged the court to find the decision of the 2nd Respondent unlawful.

Issues for determination

1. Whether the Petitioner presented all the documents required by the 3rd Respondent within the stipulated time; and if not, whether time could be extended in the circumstances;
2. Whether the Petitioner was entitled to reprieve from disqualification under Article 193(3) of the Constitution.
3. Whether costs are payable and by who.

Determination of the court

The Petitioner, who served as Governor of Nairobi City County until his impeachment on 17 December 2020 pursuant to Article 121 of the Constitution, challenged his impeachment through Petition ***Hon. Mike Sonko Mbuvi Gedion Kioko & Another v Clerk, Nairobi City County Assembly & 9 Others,*** **Petition No. E425 of 2020,** in the Constitutional & Human Rights Division of the High Court of Kenya at Nairobi. This petition was consolidated with Petition No. E014 of 2021 and was dismissed by a three-judge bench on 24 June 2021. Dissatisfied, the Petitioner filed ***Mike Sonko Mbuvi Gedion Kioko v Clerk Nairobi City County Assembly & 11 Others*** **Civil Appeal No. 425 of 2021** before the Court of Appeal, which also dismissed the appeal on 4 March 2022.

Undeterred, the Petitioner approached the Supreme Court in ***Hon. Mike Mbuvi Sonko v The Clerk County Assembly of Nairobi City & 11 Others*** Appeal No. E008 of 2022. The matter remained pending hearing and determination before the Supreme Court, with the Deputy Registrar having been informed of the scheduled mention. In this context, the Petitioner expressed interest in running for Governor of Mombasa County in the General Elections scheduled for 9 August 2022. His nomination by the 4th Respondent was confirmed with a Nomination Certificate, as evidenced in Annexure MSK-1 to the Petitioner's Supporting Affidavit. This nomination was made following Gazette Notice No. 434 dated 20 January 2022, which outlined election timelines and nomination procedures. On 18 May 2022, the 1st Respondent issued a notice for a Pre-Candidates Registration Meeting at the Kenya School of Government, which included a Presentation Schedule detailing the dates and times for candidate clearance. According to this schedule, the Petitioner was set to present his Nomination Papers on 7 June 2022 between 2.00 pm and 4.00 pm. However, a Press Release issued by the Chairman of the 3rd Respondent on 4 June 2022, indicated that the Petitioner, along with two

other aspirants, was disqualified due to impeachment and/or removal from public office for breaching Chapter 6 of the Constitution.

The Petitioner appeared at 2.30 pm on 7 June 2022 but was not cleared due to failing to produce his original degree certificate, a duly certified copy of the degree, and for breaching Article 75 of the Constitution of Kenya. This led to a complaint before the 3rd Respondent's Disputes Resolution Committee (DRC) in ***Mike Sonko Mbuvi Gedion Kioko v Returning Officer, Mombasa County*** Complaint No. 127 of 2022, which was dismissed on 20 June 2022.

The Petitioner then sought relief from the court, raising issues regarding the presentation of documents within the stipulated time, the applicability of Article 193(3) of the Constitution for reprieve, and the allocation of costs.

Regarding the presentation of documents, the 1st and 3rd Respondents stated that nomination requirements were published on the 3rd Respondents' Candidates Registration Management System (CRMS). According to the CRMS, candidates needed to meet certain qualifications, including holding a degree from a recognised university. The relevant statutory provisions included Article 180 of the Constitution, Article 193(1), Section 22 of the Elections Act No. 24 of 2011, and Regulation 47 of the Elections (General) Regulations, 2012.

The Petitioner provided a list of documents including a certified copy of his degree certificate. However, the 1st Respondent required the original degree certificate and a certified copy from the issuing institution. Despite efforts to obtain these documents, the Petitioner was denied clearance.

The court found that the Petitioner complied with the constitutional and statutory requirements. It noted that the Media Release and the CRMS requirements may not have been adequately communicated, and the Petitioner made significant efforts to comply even at the last moment. The court deemed the refusal to accept the documents unreasonable, referencing the decision in ***Harun Mwadalu Mwaeni v IEBC & Another*** **[2017] eKLR,** which emphasised flexibility and consideration of exceptional circumstances.

The court therefore found that the 1st, 2nd, and 3rd Respondents acted unreasonably by not clearing the Petitioner, considering the circumstances of the case. On the issue of whether the Petitioner is entitled to reprieve from disqualification under Article 193(3) of the Constitution, the court considered several factors. The Petitioner was impeached on 17 December 2022, and both his Petition to the High

Court and appeal to the Court of Appeal were dismissed. Generally, a person impeached for gross constitutional violations is ineligible to hold any other state office, as stipulated by Article 75(3) of the Constitution, which disqualifies individuals removed from office for constitutional breaches from holding other state positions.

Counsel for the 1st, 2nd, and 3rd Respondents argued that the Petitioner was ineligible and unsuitable for the Governor position in Mombasa County. The Petitioner, however, cited Article 193(3) of the Constitution, which states that a person is not disqualified unless all avenues for appeal or review of the relevant decision have been exhausted. The Respondents contended that Article 75 is self-executing, and issues of morality and ethics should be determined by the 3rd Respondent, arguing that the court should not intervene in matters already resolved by the 3rd Respondent.

Mr. Kipkogei argued that the Petitioner should prove the right to appeal his impeachment, while Mr. Kagucia highlighted that the Petitioner was disqualified under Article 75(3) and that Article 193(3) should not be interpreted to allow candidacy despite pending appeals if educational and moral qualifications were not met.

The court adopted a holistic approach to constitutional interpretation, as outlined in Article 259(1) of the Constitution, which promotes the Constitution's purposes, values, and principles and contributes to good governance. This approach was supported by the Supreme Court's decision in ***The Matter of the Kenya National Human Rights Commission*** Supreme Court Advisory Opinion **Reference No 1 of 2012 [2014] eKLR**, which emphasized interpreting the Constitution in context and considering its provisions in harmony with each other. The Supreme Court also addressed constitutional interpretation in ***The Matter of Interim Independent Electoral Commission*** **[2011] eKLR,** advocating for a purposive approach rather than a formalistic one.

The court found that Article 193(3) of the Constitution was intended to provide protection for citizens with pending appeals or reviews, thus contradicting the 3rd Respondent's denial of the Petitioner's candidature despite the pending Supreme Court appeal. The court also noted that the 3rd Respondent was aware of the appeal and could not feign ignorance.

The court concluded that the 1st Respondent acted unreasonably and unfairly by rejecting the Petitioner's degree certificate and that this action, along with other procedural breaches, violated the Petitioner's constitutional rights. The court ordered that the Petitioner was eligible to vie for the Governor position, quashed the disqualification decision, and directed the acceptance of the Petitioner's nomination papers.

The petition was allowed, with declarations made that the 1st, 2nd, and 3rd Respondents had violated the Petitioner's rights and an order issued to accept the Petitioner's nomination papers. Each party was to bear their own costs.

Kenneth Njagi Njiru & 10 others v Ruto & 5 others; Azimio la Umoja One-Kenya Coalition & 3 others (Interested Parties) (Petition 22 (E25) of 2022)

In the Supreme Court of Kenya at Nairobi

Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, Ouko, SCJJ

Ruling striking out petition and application

Date: 6 September 2022

Doctrine of exhaustion-Jurisdiction of the Supreme Court in respect of the presidential election-justiciability and ripeness

Summary of facts:

The Petitioners filed an application under Articles 3, 10, 88(4) (e), 99, 137, 148 and 163 (3) (a) of the Constitution and Section 12 of the Supreme Court Act, 2011. The petition sought ten declarations herein condensed into four main prayers: a declaration that the 2nd Respondent was unfit and unsuitable to hold office of Deputy President by dint of his non-compliance with Chapter Six of the Constitution and Articles 99 (1) as read with Article 148 (1) of the Constitution; a declaration that the nomination of the 2nd Respondent as a running mate by the 1st Respondent was invalid, null and void ab initio; a declaration that the 1st Respondent violated Articles 99 (1), as read with Articles 137 (1), 148 (1) of the Constitution by nominating the 2nd Respondent as a candidate for Deputy President in the General Elections conducted on 9 August 2022, hence unfit and unsuitable to hold office of President; and an order quashing the 4th Respondent's Gazette Notice No. 7995 published on 1 July 2022 declaring the 1st and 2nd Respondents as the President and Deputy President candidates for the 3rd Respondent. vContemporaneously with the petition, the Petitioners filed an application brought pursuant to the provisions of Article 163(4)(a) of the Constitution, Sections 21 (1) (a) and 24 (1) of the Supreme Court Act, 2011) and Rules 3 (5), 31 and 32 of the Supreme Court Rules, 2020,which sought conservatory orders restraining the 1st and 2nd Respondents from being sworn into office of President and Deputy President respectively, in the event that they got elected during the General Elections, then scheduled for 9 August 2022.

The 1st to 3rd Respondents filed a Notice of Preliminary Objection dated 11 August while the 4th and 5th Respondents filed a similar Notice of Preliminary Objection

and Grounds of opposition on 15 August 2022 challenging the court's jurisdiction to entertain the appeal and motion. The Respondents asserted that the court was only clothed with exclusive original jurisdiction pursuant to Article 140 of the Constitution. It was also their case that the petition and application offended the principle of exhaustion as there were avenues of recourse available under Article 88 (4) (d) and (e) of the Constitution. They further contended that it failed the test of justiciability and ripeness and offended the principle of sub judice as Constitutional Petition E395 of 2022 was pending before the High Court. They urged that the petition and application were incompetent and an abuse of the process of the court and urged that they both be struck out.

The Petitioners filed written submissions on 9 August and further submissions on 15 August 2022 to the effect that the preliminary objections were unmerited and that the court was vested with exclusive original jurisdiction under Article163 (3) (a) of the Constitution and asserted that the application sought to preserve the subject matter of the petition.

Determination of the court

The Supreme Court carefully considered the arguments regarding its jurisdiction to hear and determine disputes related to the election of the President, as defined under Article 140 of the Constitution. The Court reaffirmed that its jurisdiction, as outlined in Article 163(3)(a), is exclusive and original but limited to disputes arising after the declaration of presidential election results, as stated in Article 140(1). The Court referenced its previous decision in ***Okiya Omtatah Okoiti v. Independent Electoral and Boundaries Commission & Others***; SC Petition No. 18 of 2017, [2020] eKLR, to emphasize that this jurisdiction does not extend to any and all interpretational questions related to the election of the President, nor does it override the High Court's original jurisdiction under Article 165(3)(d) to interpret the Constitution.

The Court observed that since the petition and motion in question were filed before the General Elections and before the declaration of the presidential election results, they fell outside the jurisdiction granted by the Constitution. The applicants were thus seen as attempting to inappropriately expand the Court's jurisdiction, which the Court could not entertain. Consequently, the Court ruled that it lacked jurisdiction to hear the petition and application, leading to their dismissal. The objections raised by the Respondents were upheld, and the petition and motion were struck out as incompetent. The applicants were ordered to bear the costs.

III. PRESIDENTIAL ELECTION PETITIONS

242. We note that apart from their eleventh-hour denunciation of the verification and tallying process, and their averments regarding the conduct of the Chairperson, the four Commissioners did not place before this Court, any information or document showing that the elections were either compromised or that the result would have substantially differed from that declared by the Chairperson of IEBC. Critically, they did not explain why they had participated in a verification process when they knew that it was opaque up until the last minute. Indeed, at the Serena Hotel press briefing, the four Commissioners acknowledged that thus far, the entire election had been managed efficiently and credibly. The Chairperson on his part, did not make matters any better, by maintaining a stoic silence even as things appeared to be falling apart. All this in our view, points to a serious malaise in the governance of an institution entrusted with one of the monumental tasks of midwifing our democracy.

243. But are we to nullify an election on the basis of a last-minute boardroom rupture (the details of which remain scanty and contradictory) between the Chairperson of the Commission and some of its members? In the absence of any evidence of violation of the Constitution and our electoral laws, how can we upset an election in which the people have participated without hindrance, as they made their political choices pursuant to article 38 of the Constitution? To do so, would be tantamount to subjecting the sovereign will of the Kenyan people to the quorum antics of IEBC. It would set a dangerous precedent on the basis of which, the fate of a presidential election, would precariously depend on a majority vote of IEBC Commissioners. This we cannot do. Clearly the current dysfunctionality at the Commission impugns the state of its corporate governance but did not affect the conduct of the election itself.

Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)

[2022] KESC 54 (KLR) (Election Petitions)

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Judgement Dismissing Petition

Date: September 26 2022

Summary of the facts:

The 2022 presidential election was a close race between the two top candidates. On 15 August 2022, the Chairperson of the Independent Electoral and Boundaries Commission declared that William Samoei Ruto (the 1st Respondent) had satisfied the terms of Article 138(4) of the Constitution to be declared President-elect and Rigathi Gachagua (the 2nd Respondent) as the Deputy President-elect. Gazette Notice No 9773 of August 16 2022 was subsequently issued by the Chairperson to formalize the declaration.

Following this declaration, 9 election petitions were filed. During the hearing of the petitions, 23 interlocutory applications were filed. Upon considering these applications and objections thereto, Petitions E006 and E009 of 2022 were struck out for failure to meet the dictates of Article 140 (1) of the Constitution. The seven remaining petitions were consolidated on the court's own motion, with Petition E005 of 2022 designated as the lead file, and Raila Odinga and Martha Karua being the 1st Petitioner. The Law Society of Kenya (LSK), the Kenyan Section of the International Commission of Jurists (ICJ-Kenya chapter), John Walubengo, Dr John Sevilla and Martin Mirero were admitted as amici curiae.

On August 30 2022, the court also partially granted the applications of the 1st, 3rd and 4th Petitioners for an ICT scrutiny, inspection and recount of ballots in specified polling stations under the supervision of the Registrar of the Court.

Issues for determination

The court delineated the following nine (9) issues as arising for its examination and final determination:

1. Whether the technology deployed by IEBC for the conduct of the 2022 General Election met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results.
2. Whether there was interference with the uploading and transmission of Forms 34A from the polling stations to IEBC's Public Portal.
3. Whether there was a difference between Forms 34A uploaded on IEBC's Public Portal and the Forms 34A received at the National Tallying Centre, and the Forms 34A issued to agents at the polling stations.
4. Whether the postponement of Gubernatorial Elections in Kakamega and Mombasa Counties, Parliamentary elections in Kitui Rural, Kacheliba, Rongai and Pokot South Constituencies and electoral Wards in Nyaki West in North Imenti Constituency and Kwa Njenga in Embakasi South Constituency resulted in voter suppression to the detriment of the Petitioners in Petition No E005 of 2022.
5. Whether there were unexplainable discrepancies between the votes cast for presidential candidates and other elective positions.
6. Whether IEBC carried out the verification, tallying, and declaration of results in accordance with article 138(3)(c) and 138(10) of the Constitution.
7. Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with article 138(4) of the Constitution.
8. Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential election.
9. What reliefs and orders can the Court grant/issue?

Determination of the court

1. Whether the technology deployed by IEBC for the conduct of the 2022 General Election met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results.

On the question of whether the technology deployed met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results, the 1st, 3rd, 4th and 7th Petitioners had challenged the technology used by the 3rd Respondent (the IEBC), contending that the manner it was deployed and utilised fell short of the prescribed standards under Article 86 of the Constitution

and section 44 of the Elections Act. It was their assessment that the technology was not simple accurate, verifiable, secure, accountable and transparent. It was the Petitioner's case that pursuant to Sections 8A (1) and (6) of the Elections Act and the Elections Operations Plan, IEBC conducted an audit of the Register of Voters by 31 March 2022, but only availed the Audit Report on its website on August 2 2022, 7 days to the election, when it was too late to enable any meaningful engagement by stakeholders. The auditors identified serious gaps including numerous changes to voting stations without the knowledge or approval of affected voters, grant of voter update privileges to IEBC Integrated Database Management System to 14 user accounts unrelated to voter registration.

The 7th Petitioner (George Osewe) contended that the KIEMS kit failed the test of simplicity as they were not user friendly to ordinary citizens without expert knowledge; failure of KIEMS kits and members of the public being unable to examine transmission of results affected the transparency of the process and that technology deployed in election management were foreign owned and susceptible to manipulation by third parties without knowledge of voters.

While the IEBC was expected to procure and put in place the necessary technology for the conduct of the general elections 120 days before elections and ensure consultation with stakeholders, IEBC violated the Constitution by delegating design, implementation and use of KIEMS to Smartmatic International, a foreign company. For this reason, IEBC staff did not have visibility of KIEMS, thereby abdicating role of conducting elections to Smartmatic International. IEBC also rejected attempts to subject Smartmatic's activities to accountability and transparency as provided for under Regulations 61(4)(a), 69(1)(d), 69(1) (e) (iii) and 75(6) of the Elections (General) Regulations 2012. Due to Smartmatic's opaqueness, it was difficult to ascertain the turnout and verify accuracy of transmission of the images of Forms 34A.

It was also the Petitioners' case that the IEBC failed to engage a reputable firm to conduct an annual systems' audit to evaluate confidentiality, integrity and availability of the said technology pursuant to Regulations 11 and 12 of the Elections (Technology) Regulations 2017.

In response, IEBC asserted that it adopted a hybrid system which relied on Biometric Voter Registration and Voter Identification to avoid double voting and Election Results Transmission, while the 2nd phase consisted of manual counting, recording, tallying, transmitting (partly) and verification of the votes cast. It was also their assertion that continuous reinforcement of the electoral process and

system had ensured a considerable degree of certainty and outcome of IEBC's activities. IEBC's case was that all necessary information in its system was accessed only by authorized persons; that information was accurate, complete and protected from malicious modification either by authorised or unauthorised persons.

IEBC also maintained an audit trail on activities related to technological information and the information could be authenticated through use of various security features.

IEBC further asserted that KPMG, a reputable law firm, conducted an audit of the Register of Voters and its report was submitted on June 18 2022. IEBC issued a briefing on June 20 2022 summarising thematic areas and findings and actions taken to remedy the issues identified. It was their case that they could not publish the full final Audit Report without compromising the integrity and security of the election technology system and violating the Data Protection Act 2019. IEBC maintained that it complied with Regulations 11 and 12 of the Elections (Technology) Regulations 2017 by engaging Serianu Limited to conduct annual audit of its elections technology system, which entailed the Biometric Voter Registration System tests, Biometric Voter Identification tests, Result Transmission System tests, web portal for publishing election results online (IEBC Website Test) and Candidate Registration System Test. As proof of the audit, the certificate of compliance was annexed to the affidavits of the Chair and the IEBC's Director of ICT.

It was also their position that complementary mechanisms were adopted in relation to voter identification and result transmission. In the event of failure to transmit results, the IEBC had issued guidelines on what should happen. Voters were identified using printed registers in 229 polling stations and only 6 polling stations experienced voting challenges due to violence. A total of 86, 889 voters were manually identified in polling stations that had 114, 916 voters. IEBC was also categorical that it carried out tests on KIEMS, including public testing on June 9 2022, 60 days before the date of the election and a simulation done on July 15 2022. It was satisfied that KIEMS was efficient for voter verification and had successfully transmitted presidential results from polling stations to the online public portal on the polling day.

The 1st and 2nd Respondents also asserted that even if there was a failure of technology, it did not vitiate the result of the presidential election. Complementary voter identification methods were guided by the Court of Appeal decision in ***United Democratic Alliance v Kenya Human Rights Commission & 8 Others*** **Civil Appeal E288 of 2022.**

The court noted that there were divergent positions presented by both sides. The Petitioners argued that section 8A of the Elections Act was complied with, while the 3rd Respondent maintained that KPMG did not carry out an audit of the Register of Voters and a report submitted to the IEBC on 16 June 2022. Further, the IEBC conceded that KPMG pointed out several gaps on the state of the register. In addition to disclosing the findings contained in the report by way of a briefing on June 20 2023, it embarked on remedial measures, including committing to review, in the medium term, the registration processes with a view to strengthening them through the development and implementation, *inter alia,* of automated data input validation controls and exploring the use of Integrated Population Registration System in the enrolment process. IEBC committed to conducting periodic comparison of the Register of Voters with the data held by relevant government agencies.

IEBC further confirmed that at the time of the release of the Audit Report on June 16 2022, all transactions relating to the questionable transfer of voters had been reversed. 5 of its employees for their involvement in this infraction and referred the matter to the ODPP for further investigation and action. Having taken all the necessary steps required of it by the KPMG report, IEBC submitted the Audit Report to the Speakers of the National Assembly and Senate and availed copies to the political parties and any interested party.

It was the finding of the court that the Petitioners' submissions on the integrity of the Register of Voters were enough to shift the evidentiary burden of rebuttal to the 3rd Respondent, the IEBC. The 3rd Respondent had given a detailed explanation of the remedial measures it had instituted to address the shortcomings. In the absence of evidence to the contrary, the court found merit in the IEBC's explanation. While the Audit Report was released 7 days before the August 9 election, the Register of Voters was used at the election as a medium for identification of voters without apparent anomalies. The IEBC also successfully deployed a BVR system which captured unique features of a voter's facial image, fingerprints and civil data to register and update voter details across the country and in the diaspora.

The IEBC opened the Register of Voters for verification of biometric data by members of the public for a period of 30 days from 4 May to 2 June 2022. The Register of Voters was revised to address issues arising from verification. KPMG then audited the Register and the court was satisfied that the inconsistencies and inaccuracies identified in the Audit were successfully addressed.

that while the law directed the IEBC to procure such systems, the IEBC did not have capacity to develop complex election technology. The affidavit evidence confirmed the IEBC's adherence to procurement regulations and the concurrent decisions by review boards and courts affirmed the legality of the procurement process. Regarding system visibility and control during the August 9 2022 elections, the Registrar's Report indicated that the IEBC granted supervised access to the server and provided necessary information to the Petitioner's team, ensuring transparency. In the assessment of the court, the Petitioners failed to prove unauthorised access to the system, and the IEBC's compliance with system audit regulations, conducted by Serianu Limited, further supported the integrity, verifiability, security and transparency of the deployed technology. The court reaffirmed its findings from the September 5 2022 judgment as follows: Despite KIEMS kit failures in 235 polling stations, 86,889 voters were facilitated to vote manually with Forms 32A in Kibwezi West Constituency and parts of Kakamega County. The Audit Report, released a week before August 9 election, found no anomalies in the use of the Register of Voters, ensuring no prejudice to voters or parties. Smartmatic was engaged due to IEBC's technological capacity limitations, with no credible evidence of unauthorized system access by Petitioners. The Scrutiny Report found no security breaches in IEBC's Result Transmission System (RTS). IEBC effectively implemented a Biometric Voter Register (BVR) system for voter registration and updates, including diaspora voters. The Register of Voters, opened for public verification for 30 days as per the Elections Act section 6A, underwent successful revision and audit by KPMG to address inconsistencies and inaccuracies identified during the verification process.

2. Whether there was interference with the uploading and transmission of Forms 34A from the polling stations to IEBC's Public Portal

The 1st Petitioner contended that the technology employed by the Independent Electoral and Boundaries Commission (IEBC) did not adhere to the Constitutional and statutory standards, specifically Article 86 of the Constitution and Section 44 of the Elections Act. Their central claim was that the Kenya Integrated Election Management System (KIEMS) failed to uphold key principles such as confidentiality, integrity, availability, non-repudiation, and authenticity, thereby rendering the Presidential Election results unverifiable, inaccurate, and invalid. The Petitioners argued that Forms 34A submitted through the Results Transmission System (RTS) were manipulated, pointing to discrepancies in image formats and security vulnerabilities. They raised concerns about the conversion of security vulnerabilities. They raised concerns about the conversion of imag es and alleged lack of transport layer security in the RTS, suggesting that

unauthorized access could compromise the electoral process. The 1st Petitioner further contended that the RTS was susceptible to 'man in the middle attack,' emphasizing instances where over 11,000 Forms 34A were allegedly dumped onto the online portal within a short timeframe. They identified specific polling stations where Forms 34A were believed to have been manipulated, and discrepancies between physical copies and online versions of Forms 34A. Additionally, expert testimony, including an e-forensics analysis and reports on alleged irregularities, was presented to support the Petitioners' claims. The 3rd Petitioner added weight to these arguments, asserting that alterations in Forms 34B were evident, with discrepancies in signature placements, suggesting the potential for manipulation. They contended that certain Forms 34B showed an inflation of votes for the 1st Respondent by 180,000 votes, highlighting statistical abnormalities. The Petitioners also raised concerns about the timing of data transmission, alleging that over 75,000 KIEMS kits had not transmitted electronic voter identification (EVI) data by the day after polling. The 1st Petitioner further claimed that a laptop belonging to an UDA party agent was found unattended at the National Tallying Centre (NTC) and, upon forensic analysis, revealed connections to an external IP, implying data manipulation. The Petitioners argued that IEBC deliberately set the RTS to be vulnerable, citing the choice of Smartmatic as a controversial technology provider and the alleged involvement of specific individuals to facilitate irregularities. They relied on an e-forensics report by Prof Walter Richard Mebane, alleging greater electoral fraud in the 2022 Presidential Election compared to 2017. In response, IEBC and its Chairperson vehemently denied the allegations, asserting that the electoral technology and the RTS adhered to rigorous security measures. They refuted claims of manipulation, emphasizing the authenticity of the certified Forms used in the declaration of the final Presidential Election results. IEBC detailed security parameters, including firewalls, digital certificates, and secure socket layer certificates, to demonstrate the robustness of the electoral system. They argued that the Petitioners' claims were based on doctored documents and false oral evidence, aiming to mislead the public and the court. IEBC highlighted the use of digital signatures, UV sensitivity security marks, and other security features on Forms 34A to prevent tampering. Additional ly, they emphasized the monitoring and control tools in place, such as Call Data Records (CDRs) and a third layer of firewalls, to ensure the integrity of the RTS. IEBC refuted the authenticity of the logs presented as evidence, describing them as falsified, and denied any compromise or intrusion by third parties. In conclusion, IEBC maintained that the allegations lacked factual or technical basis and were intended to mislead the public and the court.

Transmission System (RTS) were manipulated, pointing to discrepancies in image formats and security vulnerabilities. They raised concerns about the conversion of images and alleged lack of transport layer security in the RTS, suggesting that unauthorized access could compromise the electoral process. The 1st Petitioner further contended that the RTS was susceptible to 'man in the middle attack,' emphasizing instances where over 11,000 Forms 34A were allegedly dumped onto the online portal within a short timeframe. They identified specific polling stations where Forms 34A were believed to have been manipulated, and discrepancies between physical copies and online versions of Forms 34A. Additionally, expert testimony, including an e-forensics analysis and reports on alleged irregularities, was presented to support the Petitioners' claims.

The 3rd Petitioner added weight to these arguments, asserting that alterations in Forms 34B were evident, with discrepancies in signature placements, suggesting the potential for manipulation. They contended that certain Forms 34B showed an inflation of votes for the 1st Respondent by 180,000 votes, highlighting statistical abnormalities. The Petitioners also raised concerns about the timing of data transmission, alleging that over 75,000 KIEMS kits had not transmitted electronic voter identification (EVI) data by the day after polling. The 1st Petitioner further claimed that a laptop belonging to an UDA party agent was found unattended at the National Tallying Centre (NTC) and, upon forensic analysis, revealed connections to an external IP, implying data manipulation.

The Petitioners argued that IEBC deliberately set the RTS to be vulnerable, citing the choice of Smartmatic as a controversial technology provider and the alleged involvement of specific individuals to facilitate irregularities. They relied on an e-forensics report by Prof Walter Richard Mebane, alleging greater electoral fraud in the 2022 Presidential Election compared to 2017.

In response, IEBC and its Chairperson vehemently denied the allegations, asserting that the electoral technology and the RTS adhered to rigorous security measures. They refuted claims of manipulation, emphasizing the authenticity of the certified Forms used in the declaration of the final Presidential Election results. IEBC detailed security parameters, including firewalls, digital certificates, and secure socket layer certificates, to demonstrate the robustness of the electoral system. They argued that the Petitioners' claims were based on doctored State third parties. In conclusion, IEBC maintained that the allegations lacked factual or technical basis and were intended to mislead the public and the court.

The Petitioners' central claim revolved around the alleged dumping of 11,000 forms during the election process, suggesting systemic manipulation. They posited a scenario where forms were intercepted, altered, and then uploaded onto the IEBC portal with falsified data. This narrative was vividly described, implying a sophisticated operation involving the manipulation of digital documents.

According to the Petitioners' submissions, Presiding Officers would capture Forms 34A using KIEMS kits, save them as PDFs, but before transmission to the IEBC portal, they would be intercepted and converted into editable CSV format, enabling third-party alterations. However, upon court inquiry, counsel withdrew the reference to CSV, emphasizing PDF format, though the mention of JPEG remained in the record.

The key question raised was the feasibility of such manipulation. The Petitioners sought access to IEBC systems and documents, including technology infrastructure, server access, and security protocols, through interlocutory applications and scrutiny exercises overseen by the Registrar of the Court.

The scrutiny exercise, attended by agents and experts representing Petitioners, examined the transmission process of Forms 34A from KIEMS kits to the online portal. It was confirmed that the KIEMS kits scanned handwritten forms directly into PDFs, dispelling claims of image conversion. The evidence presented by IEBC during rebuttal suggested that the system's configuration and design made external interference improbable.

Additionally, altering Forms 34A would necessitate knowledge of voter turnout, making widespread manipulation logistically challenging. The scrutiny exercise also failed to uncover evidence supporting the Petitioners' claims of staging or dumping. Logs and investigations revealed no suspicious activity or unauthorized access to the RTS server. Allegations based on logs from the 2017 election confidentiality, integrity, availability, non-repudiation, and authenticity, thereby rendering the Presidential Election results unverifiable, inaccurate, and invalid. The Petitioners argued that Forms 34A submitted through the Results Transmission System (RTS) were manipulated, pointing to discrepancies in image formats and security vulnerabilities. They raised concerns about the conversion of images and alleged lack of transport layer security in the RTS, suggesting that unauthorized access could compromise the electoral process. The 1st Petitioner further contended that the RTS was susceptible to 'man in the middle attack,' emphasizing instances where over 11,000 Forms 34A were allegedly dumped onto the online portal within a short timeframe. They identified specific polling stations

where Forms 34A were believed to have been manipulated, and discrepancies between physical copies and online versions of Forms 34A. Additionally, expert testimony, including an e-forensics analysis and reports on alleged irregularities, was presented to support the Petitioners' claims.

The 3rd Petitioner added weight to these arguments, asserting that alterations in Forms 34B were evident, with discrepancies in signature placements, suggesting the potential for manipulation. They contended that certain Forms 34B showed an inflation of votes for the 1st Respondent by 180,000 votes, highlighting statistical abnormalities. The Petitioners also raised concerns about the timing of data transmission, alleging that over 75,000 KIEMS kits had not transmitted electronic voter identification (EVI) data by the day after polling. The 1st Petitioner further claimed that a laptop belonging to an UDA party agent was found unattended at the National Tallying Centre (NTC) and, upon forensic analysis, revealed connections to an external IP, implying data manipulation.

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The Petitioners' central claim revolved around the alleged dumping of 11,000 forms during the election process, suggesting systemic manipulation. They posited a scenario where forms were intercepted, altered, and then uploaded onto the IEBC portal with falsified data. This narrative was vividly described, implying a sophisticated operation involving the manipulation of digital documents.

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Additionally, altering Forms 34A would necessitate knowledge of voter turnout, making widespread manipulation logistically challenging. The scrutiny exercise also failed to uncover evidence supporting the Petitioners' claims of staging or dumping. Logs and investigations revealed no suspicious activity or unauthorized access to the RTS server.

Allegations based on logs from the 2017 election were discredited, and attempts to link individuals to irregularities lacked substantive evidence. The role of Venezuelan technicians hired by Smartmatic was clarified as technical and unrelated to RTS access.

Detailed examination of the Public Portal's integrity highlighted consistent security measures, including encryption, firewall protection, and KIEMS kit verification. The Petitioners' assertion that forms were tampered with before appearing on the portal was refuted as technically implausible.

while diminishing the 1st Petitioner's tally. Their argument relied on evidence purportedly revealing discrepancies between physical copies of Forms 34A and their online counterparts, particularly evident across 41 identified polling stations in various counties.
The 1st Petitioner presented compelling affidavits, notably from Celestine Anyango Opiyo and Arnold Ochieng Oginga, highlighting inconsistencies and irregularities in the transmission and uploading of election results. These allegations, if substantiated, could potentially undermine the credibility and fairness of the electoral outcome.

In response, the 1st and 2nd Respondents vehemently denied any wrongdoing, asserting the integrity of the electoral process and challenging the authenticity of the 1st Petitioner's evidence. They refuted claims of tampering, arguing that there were no material discrepancies between Forms 34A issued to their agents and those published on IEBC's website. Furthermore, they questioned the reliability of forensic document examiner reports presented by the Petitioner, alleging manipulation and fabrication of evidence.

The Respondents defended the procedural integrity of the electoral process, emphasizing adherence to Constitutional and legal standards. Affidavits from IEBC officials and polling station officers supported their stance, attesting to the consistency and authenticity of the electoral documents in question.

In essence, there was a clash between the 1st Petitioner's allegations of electoral malpractice and the 1st and 2nd Respondents' staunch defence of procedural integrity and due process. The intricate details and intricacies of the case underscored the profound significance of electoral transparency and accountability in safeguarding democratic principles and public trust in the electoral system.
In the court's analysis, the 1st Petitioner put forth a compelling argument alleging deliberate manipulation and tampering with Forms 34A, contending that votes were systematically deducted from their count and added to that of the 1st Respondent. This assertion formed the crux of their legal challenge. In response, the Respondents vehemently refuted these claims, asserting that none of the Forms 34A transmitted to the Independent Electoral and Boundaries Commission's (IEBC) Public Portal had been interfered with or manipulated. They maintained that the forms signed at the polling stations were to those accessible on the Public Portal and subsequently delivered to the National Tallying Centre (NTC). The court, in its ruling delivered on August 30 2022, acknowledged the gravity of the

allegations and, in an effort to ensure a thorough examination, issued specific orders for scrutiny. These orders included the opening of ballot boxes for inspection, scrutiny, and recount in designated polling stations. Additionally, the court mandated the IEBC to provide certified copies of Forms 32A and 34C Book 2, specifically from contested polling stations.

During the scrutiny process, discrepancies were indeed identified in four polling stations. During the scrutiny process mandated by the court, discrepancies emerged in four specific polling stations. At Chepkutum Primary School (2 of 3), an anomaly was detected where one vote meantthe 1st Petitioner was erroneously counted for the 1st Respondent, indicating a computational error. Likewise, at Kapsuser Primary School (2 of 3), although the total valid votes cast were miscalculated, the individual votes for each candidate remained unaltered. At Sinderet Primary School (1 of 2), the absence of Form 34A in the ballot box raised concerns; however, upon recounting, the votes aligned with the figures recorded in Form 34C. Additionally, Nandi Hills Primary School (2 of 4) exhibited an error on Form 34A, resulting in one vote less for the 1st Petitioner.

However, crucially, the Registrar's Report confirmed the authenticity of the original Forms in the sampled polling stations, validating the integrity of the electoral process in those specific areas. The court, in its subsequent analysis, dismissed the Petitioners' claims of discrepancies between Forms 34A uploaded online, those delivered to the NTC, and those issued to party agents at the polling stations. This dismissal was grounded in the evidence provided by IEBC officials and agents.

Moreover, the court scrutinized and ultimately dismissed allegations of fraudulent alteration of Forms 34A based on evidence presented by John Mark Githongo and others. The court found this evidence regarding discrepancies in the election process lacking in credibility and failing to meet the required threshold for several reasons. Firstly, affidavits submitted by individuals alleging tampering with Forms 34A were dismissed due to inconsistencies between the forms presented and those certified by the Registrar.

Secondly, affidavits sworn by advocates on behalf of clients were deemed unacceptable and inadmissible, violating the principle that affidavits should only contain facts within the deponent's knowledge. Furthermore, the court cautioned against advocates assuming the role of witnesses in their clients' cases, emphasizing that affidavits should only contain facts within the deponent's knowledge.

It criticized the practice of advocates swearing affidavits on behalf of clients in contentious matters, highlighting the potential risks of presenting false information and the ethical implications of such actions. The court underscored the fundamental principle that advocates should not act as both counsel and witnesses in the same case, emphasizing the need to maintain professional integrity and uphold the standards of the legal profession.

Thirdly, the court criticized the submission of misleading or fabricated evidence, including digital logs and transcripts, which were later withdrawn by the Petitioners, signalling dishonesty. Furthermore, forensic reports alleging alterations to Forms 34A were discredited due to their failure to meet the evidential threshold. Similarly, claims of tampering based on forensic reports and demonstrations by Ms Julie Soweto, counsel for the 1st Petitioner, were deemed insufficient to substantiate the Petitioner's case. Additionally, demonstrations by the Petitioners' counsel regarding purported irregularities in certain polling stations were refuted by explanations provided by the Independent Electoral and Boundaries Commission (IEBC). Overall, the court concluded that the evidence presented by the Petitioners did not withstand scrutiny and failed to substantiate their claims of electoral malpractice.

Ultimately, the court found no credible evidence to support the 1st Petitioner's claims of tampering with Forms 34A, thereby affirming the integrity of the electoral process and the validity of the outcome declared by the IEBC.

4. **Whether the postponement of Gubernatorial Elections in Kakamega and Mombasa Counties, Parliamentary elections in Kitui Rural, Kacheliba, Rongai and Pokot South Constituencies and electoral Wards in Nyaki West in North Imenti Constituency and Kwa Njenga in Embakasi South Constituency resulted in voter suppression to the detriment of the Petitioners in Petition No E005 of 2022**

The IEBC announced the suspension of several elections on the eve of the August 8, 2022, election. This suspension affected gubernatorial elections in Mombasa and Kakamega Counties, as well as various Member of National Assembly and County Assembly Ward elections in different regions. The postponement was primarily due to errors in the candidate details and photographs on the ballot papers. While initially, no specific rescheduling date was provided, subsequent announcements indicated a by-election date of August 23, 2022.

Despite the formal confirmation of the by-election date through a gazette notice on August 12, 2022, and subsequent attempts to set a definitive date, the elections-faced further postponements, with the final election date set for August 29, 2022.

Notably, the postponements did not affect the Presidential or other scheduled elections.

Several legal challenges arose from affected candidates and parties, contesting the constitutionality of the postponements and alleging voter suppression tactics. Petitioners argued that the postponements, particularly in Mombasa and Kakamega Counties, were deliberate attempts to suppress voter turnout in areas historically supportive of certain candidates. They cited significant decreases in voter turnout as evidence of this suppression.

IEBC officials denied allegations of deliberate voter suppression, attributing the errors to printer mistakes and logistical challenges.

They emphasized the discovery of the mix-up on the eve of the election, which hindered timely rectification. IEBC officials vehemently refuted claims of intentional voter suppression and highlighted low voter turnout nationwide, arguing that it was not exclusive to the areas affected by the postponements.

The court noted that the right to vote as enshrined in Article 38(3)(b) of the Kenyan Constitution, which guarantees citizens the right to vote by secret ballot without unreasonable restrictions. This right is fundamental to the electoral system, with the Independent Electoral and Boundaries Commission (IEBC) mandated to ensure its fulfilment under Article 81.

Furthermore, the court highlighted the significance of periodic genuine elections as recognized by international human rights law, emphasizing that postponing elections should be a rare occurrence justified only by exceptional circumstances such as major crises or technical delays.

The court noted that the consequences of election postponements were extensive, impacting citizens, political parties, candidates, and even international perception. The court evaluated voter suppression; a political strategy aimed at reducing voting among specific groups to influence election outcomes. The court emphasised that voter suppression contradicts the principles of universal suffrage and fair representation.

Regarding the postponement of elections by the IEBC, the court assessed whether the postponement was justified and whether it aimed to suppress voter turnout to disadvantage certain candidates. Despite acknowledging potential procedural errors by the IEBC, the court found instructive the absence of empirical evidence linking the postponement to voter suppression. Voter turnout data from neighbouring counties was used to refute claims of deliberate suppression, suggesting that other factors may have influenced turnout.

In conclusion, the court rejected the claim of voter suppression resulting from the election postponement, citing insufficient evidence to support such allegations. It underscored the importance of upholding the integrity of electoral processes and ensuring transparency and accountability in elections, while highlighting the challenges of ensuring voter rights in a democratic society. The court concluded that the IEBC possessed the necessary Constitutional and legal authority to postpone elections in the specified counties, constituencies, and wards. Additionally, the Petitioners failed to provide evidence demonstrating that the postponement resulted in voter suppression or was driven by malicious intent, bad faith, or irrelevant factors

5. Whether there were unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions

The 1st and 3rd Petitioners alleged systematic voter suppression in the 1st Petitioner's strongholds and ballot stuffing in certain Counties in Kenya's Rift Valley and Central regions to favour the 1st and 2nd Respondents. They cited discrepancies between votes cast for the presidential election and other elective positions in eight Counties. For instance, in Othaya Constituency, Nyeri County, there were 18,287 unaccounted votes for the Presidential election. Similarly, in North Imenti Constituency, Meru County, there was a discrepancy between the number of registered voters for the National Assembly and the President.

The Petitioners argued that these irregularities undermined the integrity of the presidential results. They contended that according to electoral regulations, the total votes cast for each position should be similar, with any variance explained by rejected or invalid votes. They claimed that the differences suggested potential fraud, shifting the burden of proof to the IEBC.

In response, the 1st Respondent presented evidence suggesting that the discrepancies were due to factors like votes from prisons, rejected votes, and stray ballots, not accounted for in the Petitioners' analysis. Ashif Kassam, representing the 1st Respondent, clarified that the alleged variance was significantly lower than claimed, attributing it to various factors including voters in diaspora and prisons who vote only for the President, as well as stray and rejected ballots.

The IEBC reiterated that such variances were not uncommon and were influenced by multiple factors, including the unique voting eligibility of certain groups and the handling of stray and rejected ballots. Additionally, factors like the postponement of gubernatorial elections in Mombasa and Kakamega Counties and the exclusion of votes from specific polling stations further contributed to the discrepancies noted.

The court's analysis of the evidence presented in the case primarily focused on whether the claims made by the 1st and 3rd Petitioners regarding discrepancies in the votes cast for presidential candidates and other elective positions, totalling 33,208 votes, were substantiated.
The court scrutinized the Petitioners' assertions of systematic voter suppression and ballot stuffing, particularly in the 1st Petitioner's strongholds and certain Counties in Kenya's Rift Valley and Central regions, allegedly favouring the 1st and 2nd Respondents. The Petitioners cited irregularities in Forms 34C alongside Forms 37C, 38C, and 39C in eight Counties, including Kwale, Nyandarua, Nyeri, Kirinyaga, Turkana, West Pokot, Vihiga, and Migori.

The court scrutinized examples provided by the Petitioners, such as discrepancies in voter counts between different positions in specific constituencies. For instance, in Othaya Constituency, Nyeri County, there was a notable variance between the votes cast for the President and those for other positions. Similar disparities were highlighted in North Imenti Constituency, Meru County, among others.
The Petitioners argued that these irregularities undermined the integrity of the presidential election results and suggested fraudulent practices, such as ballot stuffing, in contravention of electoral regulations. In response, the 1st Respondent presented evidence through Ashif Kassam, an Executive Chairperson of RSM Eastern Africa LLP, a firm of certified accountants licensed by the Institute of Certified Public Accountants of Kenya to refute the Petitioners' claims. Kassam's analysis attributed the vote differentials to factors such as votes from prisoners and Kenyans in the diaspora, rejected votes, and stray ballots. He argued that the alleged discrepancies did not amount to systematic ballot stuffing.

Furthermore, the court examined Regulation 69 of the Election (General) Regulations, 2012, which requires the crossing out of voters' names from the printed register after voting. The Petitioners contended that failure to comply with this regulation indicated potential voter fraud. However, the court clarified that crossing out names from the register does not directly address the issue of votes cast.
In assessing the evidence, the court emphasized the burden of proof for allegations of fraud, requiring a high standard of evidence beyond reasonable doubt. The court referenced the Raila 2017 case to underscore this point. Ultimately, the court found that the Petitioners had not provided sufficient evidence to substantiate their claims of unexplainable discrepancies in the votes cast for presidential

candidates and other elective positions. The explanations provided by the 1st Respondent regarding the differential votes, including votes from specific voter categories and stray ballots, were deemed satisfactory. As a result, the court concluded that there were no significant discrepancies that would warrant nullification of the election results.

6. Whether IEBC carried out the verification, tallying, and declaration of results in accordance with Article 138 (3) (c) and 138 (10) of the Constitution

This issue revolved around differing interpretations of article 138 (3) (c) and (10) of the Constitution, as presented in the consolidated petitions. The Petitioners argued that under these provisions, the task of verifying and tallying votes from polling stations across the country fell within the purview of the entire Commission, not solely the Chairperson of the Independent Electoral and Boundaries Commission (IEBC). They contended that the Chairperson could not independently perform this duty without involving other Commissioners, citing legal precedents such as the Maina Kiai case and Raila 2017.

On the contrary, the 1st, 2nd, and 3rd Respondents asserted that the authority to verify, tally, and declare presidential election results at the National Tallying Centre (NTC) belonged exclusively to the IEBC Chairperson. They argued that Regulation 87 (3) of the Elections (General) Regulations, 2012, which assigns this responsibility to the Chairperson, was Constitutional. Moreover, they claimed that Article 138 (3) (c) of the Constitution did not imply direct involvement of Commissioners in the verification and tallying process due to its impracticality.

The Petitioners alleged that the Chairperson unilaterally designated himself as the 'Presidential Returning Officer' through Gazette Notice No. 4956 of 2022, excluding other Commissioners from meaningful participation in the verification and tallying process.

In response, the Chairperson of IEBC contended that he involved all Commissioners in the verification and tallying exercise, albeit assigning them peripheral roles. He asserted that the Commissioners were engaged in the election process from inception until they disengaged just before the final result declaration, emphasizing a collaborative approach.

The court delved into the interpretation and application of article 138 (3) (c) and (10) of the Constitution concerning the roles of the Independent Electoral and Boundaries Commission (IEBC) and its Chairperson in verifying and tallying presidential election votes. It ruled that the Constitution had to be interpreted in a manner that promotes its purposes, values, and principles, advancing the rule of law, human rights, and contributing to good governance.

While the text of the Constitution is paramount, courts must avoid textual absurdity, recognizing that the Constitution is a living document.

Article 88 (4) mandates the IEBC to conduct or supervise elections in accordance with the Constitution and national legislation, with article 88 (5) emphasizing adherence to legal frameworks. IEBC is categorized as a Constitutional Commission under Chapter Fifteen of the Constitution, comprising multi-member bodies where the Chairperson presides over the Commission. The powers vested in the Commission are collective, including the formulation of policies and strategies. Article 138 (3) (c) assigns the task of tallying and verifying presidential election results to the IEBC as a collective entity, while article 138 (10) designates the exclusive responsibility of result declaration to the Chairperson. Statutory provisions clarify the roles and procedures for tallying and verification, emphasizing the collective responsibility of the Commission.

The Petitioners alleged exclusion of four Commissioners from the tallying and verification process, leading to a split within the Commission during the result declaration. Despite their late criticism of the verification and tallying process, they failed to substantiate their claims or explain their participation in the process. Moreover, their acknowledgment of the election's efficient management until the eleventh hour raised questions about their sudden disapproval. The court questioned whether a last-minute internal dispute within the Commission justified nullifying the election, especially in the absence of Constitutional violations or evidence of electoral malpractice. In the view of the court, nullifying an election based on internal Commission dynamics would undermine the people's sovereign will expressed through their votes. It highlighted the danger of allowing the fate of a presidential election to hinge on internal Commission dynamics, setting a precarious precedent.

Despite internal disagreements, the court found that the IEBC fulfilled its Constitutional duties in tallying, verifying, and declaring election results. Further, the Chairperson does not possess special powers regarding tallying or verification. Nor does the law give the Chairperson of IEBC a veto over the rest of the Commissioners. In essence, IEBC Chairperson's status in relation to the other Commissioners is as a "first among equals," a primus inter pares. Contrary to the argument that the IEBC has an 'Executive Chairperson', the court found that such an argument went against the Constitutional scheme that seeks to build a strong collegiate institution.

While the court acknowledged dysfunction within the Commission, it ruled that the dysfunction did not affect the election process. The court also ruled that disputed Constituency results were tallied and verified, though not announced, and were included in the final tally. Overall, the court found that the Commission fulfilled its Constitutional obligations, with tallying and verification being collective responsibilities while result declaration lies exclusively with the Chairperson. The Chairperson did not hold extraordinary powers in tallying or verification.

7. Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with article 138(4) of the Constitution

The Petitioners, comprising the 1st, 2nd, 3rd, 4th, and 6th parties, contested that the 1st Respondent, having not secured 50% + 1 of the total votes cast, failed to meet the Article 138(4)(a) Constitutional threshold. They argued that the determination of whether a candidate achieved 50% + 1 should exclude rejected votes, asserting that the valid votes amounted to 7,176,582.77, and the 1st Respondent's 7,176,141 votes fell short of this threshold.

Their claim stemmed from the IEBC Chairperson's post-voting press briefing, which cited a 65.4% voter turnout based on KIEMS kit verifications, not including 235 polling stations with malfunctioning kits. The Petitioners contended that the minimum vote count should be 14,466,779, likely to increase with manual register votes.

Challenging the IEBC Chairperson's declaration, the Petitioners argued that Form 34C's tally, including rejected ballots, did not account for 140,138 manual register votes. They computed percentages for each candidate based on 14,353,165 total valid votes, indicating none met the 50% + 1 threshold. However, IEBC countered, stating the total valid votes as 14,213,137, with the 1st Respondent securing 7,176,141 votes, surpassing the threshold at 50.49%.

The Law Society of Kenya (LSK), as amicus curiae, proposed including rejected votes in the 50% + 1 calculation under Article 138(4)(a). They argued that rejecting rejected votes could limit voting rights under Article 38, citing various Constitutional drafts to support their stance.

LSK urged the court to reconsider previous rulings, including Raila 2013 and Raila 2017, which interpreted 'votes' as 'valid votes'. They cited legislative history and Constitutional drafts, advocating for a departure from prior interpretations to include rejected votes in the electoral threshold calculation.

The analysis of evidence presented in this case revolved around the interpretation of the data-specific threshold outlined in Article 138(4) of the Constitution for declaring a presidential winner. The Petitioners, including the 1st, 2nd, 3rd, 4th, and 6th parties, challenged the inclusion of rejected votes in the calculation, citing precedent from Raila 2013 where the court determined that rejected votes should not count towards the threshold.

The court upheld its previous stance, reiterating that rejected votes cannot be considered when calculating the 50% + 1 threshold as per Article 138(4) of the Constitution. Additionally, it clarified the burden and standard of proof for electoral disputes concerning data-specific electoral requirements, emphasizing that the burden of proof lies with the party challenging the results.

Regarding voter turnout, the court found the methodology used by the IEBC and its Chairperson, which excluded rejected votes progressively, to be correct. It dismissed the Petitioners' argument about rounding off votes as mathematically unsound.

In conclusion, the court affirmed that the declared President-elect had indeed achieved the 50% + 1 threshold of valid votes cast, as stipulated in Article 138(4) of the Constitution. Rejected votes were deemed void and incapable of influencing the outcome of the election.

8. **Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential election.**

The Petitioners have raised numerous instances of irregularities and illegalities in the electoral process, including failures of technology, alleged voter suppression, printing and utilization issues, and indiscretions by the Independent Electoral and Boundaries Commission (IEBC). These irregularities encompass fraudulent creation of parallel Forms 34A, KIEMS kit failures, late opening of polling stations, discrepancies in result declaration forms, and allegations of election offences and ethical breaches by the Chairperson of IEBC. Specifically, the Petitioners highlighted issues such as fraudulent printing of parallel Forms 34A, discrepancies in result declaration forms, and alleged election offences by the Chairperson of IEBC. They also pointed out failures of KIEMS kits and late opening of polling stations, leading to suppressed voter turnout in certain areas. Moreover, concerns were raised about the treatment of voters with charred fingers in Mathira and allegations of interference in the supply and delivery of ballot papers.

In response, IEBC refuted many of the allegations, stating that challenges with KIEMS devices were promptly addressed and did not significantly affect voter turnout. They also denied allegations of interference in the supply of election materials and harassment of party agents. Additionally, IEBC stated that procedures for special voting were in place and contested the claim of 500,000 voters unable to access polling stations.

Overall, the Petitioners argued that the magnitude of irregularities was significant enough to impact the election outcome, while IEBC defended its handling of the electoral process and disputed several allegations raised by the Petitioners.

The analysis of evidence revolved around determining whether the alleged irregularities and illegalities in the 2022 Presidential Election were substantial enough to impact the final result. The burden lay with the Petitioners to demonstrate both the existence and significance of these irregularities.

The court established that irregularities referred to violations of specific regulations, while illegalities entailed breaches of substantive law. To nullify the election results, the Petitioners must provide cogent and credible evidence, which falls between the civil standard of balance of probabilities and the criminal standard of proof beyond reasonable doubt.

Several claims made by the Petitioners regarding fraudulent use of Forms 34A, failures of KIEMS kits, late opening of polling stations, and alleged interference in ballot paper supply lacked substantial evidence. The court found that the irregularities cited were not adequately proven to the required standard.

Moreover, allegations of interference in ballot paper delivery and harassment of party agents lacked specificity and credible evidence. Similarly, claims related to the failure to facilitate special voting for certain groups were not sufficiently supported.

Regarding allegations of election offences and ethical breaches by the Chairperson, the court emphasized that such claims must meet a standard of proof beyond reasonable doubt. However, the evidence presented did not meet this threshold, and no violations of electoral laws or regulations by the Chairperson were substantiated.

In conclusion, the court found that the irregularities and illegalities cited by the Petitioners were not proven to the required standard, thus affirming the legitimacy of the election results.

9. What reliefs and orders can the Court grant/issue?

The Supreme Court addressed a wide array of reliefs sought by the Petitioners in the context of the 2022 Presidential Election. However, the court's jurisdiction and authority are carefully delineated by the Constitution, particularly in matters concerning presidential elections.

Article 163(3)(a) of the Constitution grants the Supreme Court exclusive original jurisdiction to hear and determine disputes related to the election of the President, as outlined in Article 140. This article stipulates the timeline and procedures for challenging the validity of a presidential election, providing a clear framework for Petitioners to follow.

Under Article 140, individuals have seven days after the declaration of election results to file a petition challenging the election of the President-elect. The Supreme Court must then hear and determine the petition within fourteen days. If the court determines the election to be invalid, a fresh election must be held within sixty days.

The Supreme Court Rules further reinforce these Constitutional provisions by outlining the orders the court may make at the conclusion of an election petition. These orders include dismissing the petition, invalidating the election declaration, declaring the election valid or invalid, and issuing orders on costs or any other measures deemed appropriate.

Importantly, the court's jurisdiction is confined to matters directly related to the validity of the presidential election. It cannot adjudicate on issues outside the scope of the petition, nor can it remove or declare the Chairperson of the IEBC unfit for office.

While the court has the authority to issue recommendations, observations, and advisory opinions under Article 163(6) of the Constitution, it cannot make definitive findings or orders on matters beyond the presidential election petition.

In light of these Constitutional constraints, the court issued recommendations aimed at addressing institutional deficiencies within the IEBC, including enhancing corporate governance, improving election technology, and restructuring statutory forms used in the electoral process. Additionally, the court suggested Constitutional reforms to extend the timeline for hearing presidential election petitions, ensuring adequate time for case management and deliberation.

The Supreme Court issued several recommendations aimed at addressing institutional deficiencies and enhancing the electoral process. Firstly, regarding the corporate governance of the IEBC, Parliament was advised to bolster the statutory and regulatory framework governing the distinct policy and administrative roles within the IEBC. Additionally, the IEBC should establish formal internal guidelines to clearly delineate the policy, strategy, and oversight responsibilities of its Chairperson, Commissioners, and Chief Executive Officer. It was further suggested that roles for IEBC officials and third parties be explicitly defined in both legislative and administrative directives to ensure clarity and accountability.

Secondly, in terms of election technology, the court recommended restricting access to servers supporting the transmission and storage of election forms to IEBC staff during elections, unless absolutely necessary. It was proposed that separate servers should be designated for election-related data and internal administrative functions to facilitate forensic analysis without compromising third-party agreements.

Thirdly, the court recommended reforms regarding statutory forms used in the electoral process. It suggested simplifying and restructuring Form 34A, including the addition of a column for stray ballots. Furthermore, it advocated for thorough training of Returning Officers on what constitutes valid votes based on court decisions. The IEBC was encouraged to establish mechanisms for special voting, as outlined in regulation 90 of the Elections (General) Regulations.

Moreover, the court recommended revisiting the need to extend the Constitutional timeline for hearing and determining presidential election petitions, as previously suggested. Lastly, the court underscored the importance of professionalism and decorum in courtroom proceedings. Advocates were cautioned against using inappropriate language or making insulting remarks against the court, especially outside the courtroom or on social media. Upholding the dignity and respect for the judiciary and the legal profession was emphasized as a fundamental principle of democratic society, highlighting the responsibilities that come with exercising freedom of speech within the bounds of professional conduct. These recommendations seek to address systemic issues within the electoral process, enhance transparency and accountability, and uphold the integrity of the judiciary and legal profession. In conclusion, the Supreme Court reaffirmed its commitment to upholding the Constitution and administering justice impartially. Its rulings and recommendations serve to safeguard the integrity of the electoral process and the dignity of the judiciary, both in the present and for future generations.

The Petitioners and Respondents sought orders of costs in their respective petitions regarding the presidential election. The Respondents urged that costs follow the event, guided by section 84 of the Elections Act, suggesting the dismissal of the consolidated Petition with costs. Referring to the Raila 2013 case, the court highlighted the unique nature of presidential election petitions, emphasizing their impact on the entire nation and the Constitutional questions they raise. Considering the public interest involved, the court decided that each party should bear their own costs, in line with the principles outlined in *Raila 2013*.

In its final orders, the court dismissed the Presidential Election Petition No E005 of 2022, along with several other petitions, affirming the validity of the 1st Respondent's election as President-elect. Additionally, the court declared Regulation 87(3) of the Elections (General) Regulations, 2012 unconstitutional to the extent that it vested the power of verifying and tallying presidential election results solely on the Chairperson of the Commission, excluding other members. As the matter was of national public interest, the court directed that each party should bear their own costs, and sums deposited as security for costs should be released to the Petitioners.

Youth Advocacy for Africa & 7 Others v IEBC & 17 Others Election Petition E002, E003 & E005 of 2022 (Consolidated) [2022]

KESC 42 (KLR) (Election Petitions)

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling Allowing Partial Scrutiny

30 August 2022

Application for scrutiny-criteria employed by election courts in determining applications for scrutiny and recount- whether an order allowing for the filing of further affidavits arising from the attainment of the information from the scrutiny exercise could issue given the strict timelines applicable to a presidential election petition- whether the court could grant orders to direct the production of contracts with terms of reference between third parties who were not parties to petitions before the court.

Summary of facts:

The Petitioners in Petition E002 of 2022 filed an application seeking to have the IEBC compelled to give the Petitioners, the complete unedited soft copy of the Voters Register; to give Petitioners' full and unfettered physical and remote access to electronic devices used to capture Forms 34A and Forms 34B on KIEMS and transmitted to the Constituency Tallying Centre and the National Tallying Centre; to give the applicants full and unfettered physical and remote access to any servers at the constituency tallying centre for storing and transmitting voter information and forensic imaging to capture, among other things, metadata such as data files for all Forms 34A and Forms 34B, among other orders regarding the technology used in the presidential election. The Petitioners also sought orders for inspection, scrutiny and recount for various polling stations.

The Petitioners in Petition No E003 of 2022 also sought orders that the IEBC be compelled to produce the full KPMG audit of the Register of Voters Report dated June 16, 2022; an order of scrutiny and review of the infrastructure deployed by the IEBC; that IEBC provide a list of all the KIEMS Kits turn around turnout reporting logs for all the polling stations indicating the total number of voters captured under the KIEMS Kits for scrutiny by the court; that IEBC provide geolo

cation data/logs of the KIEMS Kit while on voter identification mode and results transmission mode; that IEBC provide the KIEMS kit mobile device management logs for Forms 3C in CSV or Excel format, Forms 37B in CSV or in Excel format and Forms 38B in CSV or in Excel format; that IEBC provide a list of Forms 32A capturing the details of all registered voters not identified through the KIEMS Kits and identified to vote manually; that the IEBC does produce all the Forms 34A Book 2; and that the court do issue an order of scrutiny of the Biometric Voter Register used in the 2022 presidential elections.

Issues for determination

1. What criteria should courts employ in determining applications for scrutiny and recount of election results?
2. Whether the Supreme Court in determining the presidential election petition could grant orders to direct the production of contracts with terms of refer ence between third parties who were not parties to petitions before the court.
3. Whether an order allowing for the filing of further affidavits arising from the attainment of the information from the scrutiny exercise could issue given the strict timelines applicable to the presidential election petition.

Determination of the court

In determining the application for scrutiny, the court was guided by its position in *Raila 2017*, where it had determined that while considering a request for scrutiny of either the Forms or technology used in the election, there had to be sufficient reason for the request, and that any prayer that would in effect be fishing exercise to procure fresh evidence not already set out in the petition had to be rejected.

The court had also established in the ***Raila 2017*** case that where a prayer was couched in general terms and not pleaded with specificity, or where a request was impracticable in terms of the scope and time, it ought to be declined. Further, the court noted that due to the narrow timelines granted by the Constitution to hear and determine a presidential election dispute, only reasonable, practical and helpful orders ought to be issued in this regard.

Therefore, in relation to the prayer to avail a soft copy of the Voters' Register as well as scrutiny of the biometric voter register, the court saw no reason to grant those prayers as the register was already in the public domain and in any event, no justification in the context of the dispute before the court was given as to why the register should be provided.

On access to all KIEMS Kits and servers for all Constituency Tallying Centres, the court noted that such a request was unrealistic given the short timelines for hearing and determination of the petitions before the court.

On the prayers touching on the technological aspects of the presidential election petitions, the court noted that the orders sought were not practicable, reasonable or helpful for ensuring that the court reached a just and fair determination of the petitions. The prayers were also couched in general terms and vague. With reference to the prayer asking for terms of reference between Smartmatic International and local service providers, the court noted that there might be possible legal issues that could arise from the grant of such an order as the court could not blindly grant orders directing the production of contracts with terms of reference between third parties who were not parties to the petition before the court. Neither Smartmatic International nor the local service providers were a party to the proceedings before the court and to demand that such terms of reference be accessed by the applicants was impractical and could cause unnecessary delay in the hearing and determination of the election petitions before the court.

On the filing of further affidavits arising from the attainment of information from the scrutiny exercise, the court, noting the time left for the hearing and determination of the petition, ruled that such an order would only delay the proceedings and occasion prejudice to the Respondents who would not be able to respond to the issues raised in the affidavits. That prayer was therefore disallowed.

The Independent Electoral and Boundaries Commission (IEBC) was directed to provide the applicants with copies of its technology system security policy. This policy should include details such as the password policy, password matrix, system administration password owners, system users and access levels, workflow charts for identification, tallying, transmission, and posting of portals, and any integrated APIs, as well as the list of human interface and controls for such interventions, subject to any security concerns.

Additionally, the IEBC was ordered to grant the applicants supervised access to servers at the National Tallying Centre used for storing and transmitting voting information. These servers, which should be forensically imaged, will allow the applicants to obtain a copy of Form 34C, which details the total votes cast.

The IEBC was also instructed to provide certified copies of penetration tests conducted on its election technology system both prior to and during the 2022 General and Presidential Elections. This includes certified copies of all reports prepared under Regulation 10 of the Election (Technology) Regulations, 2017, and certificates issued by professionals as per Regulation 10(2) of the same regulations.

Furthermore, the IEBC was directed to disclose partnership agreements with its technical partners, as well as a list of users, audit trails, and administrative access details to clarify the use of its systems. This is to be done while considering any related security issues.

The court ordered the opening of ballot boxes for inspection, scrutiny, and recount from the following polling stations: Nandi Hills and Sinendeti Primary Schools in Nandi; Belgut, Kapsuser, and Chepkutum Primary Schools in Kericho County; Jomvi, Mikindani, and Ministry of Water Tanks Polling Stations in Mombasa County; Mvita, Majengo, and Mvita Primary Schools in Mombasa County; Tinderet CONMO in Nandi County; and Jarok, Gathanji, and Kiheo Primary Schools in Nyandarua County.

The IEBC was also instructed to provide the applicants with error forms signed by its Chairperson during the tally and verification exercise at the National Tallying Centre from 10th to 15th August 2022.

Certified copies of Forms 32A and 34C Book 2 used in the contested election must be provided by the IEBC, subject to the applicants specifying the contested polling stations for compliance.

The court specified that these actions should be completed within 48 hours of the orders, from 2 pm on Tuesday, 30th August to 2 pm on Thursday, 1st September 2022.

Each party is to be represented by two agents during these procedures, with supervision by the court Registrar and her staff. The Registrar is required to file her report by 5 pm on 1st September 2022 and distribute copies to all parties.

Parties are allowed to make submissions on the report before the hearing concludes, as directed by the court President.

Finally, the court directed that there would be no order as to costs.

Odinga & another v Independent Electoral and Boundaries Commission & 9 Others Presidential Election Petition E005 of 2022

[2022] KESC 46 (KLR) (Election Petitions)

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling Allowing Amicus Curiae application

Date: 29 August 2022

Principles that guide court in considering applications for joinder as amicus curiae-circumstances when a party can be admitted as amicus

Summary of facts:

The applicant, the Kenyan Section of the International Commission of Jurists, sought to be enjoined as *amicus curiae* in Presidential Election Petition 5 of 2022. In support of their application, they urged the court to allow them to address the role of the Independent Electoral and Boundaries Commission vis-à-vis the role of the chairperson.

Issues for determination

1. What principles a court should consider in an application to be enjoined as an amicus curiae.
2. Whether the Kenyan Section of the International Commission of Jurists (ICJ Kenya) could be admitted as amicus curiae to address the court on the role of the Independent Electoral and Boundaries Commission vis-à-vis the role of its chairperson.

Determination of the court

The court considered the applicant's grounds in support of the application, the intended amicus brief and written submissions filed on August 27 2022. The applicant submitted that it had the relevant expertise in rule of law, democracy and the intersection between the law and electoral technology that it could assist the court in developing the law on novel legal aspects of the case in relation to the

broad principles, consistent with articles 10, 38, 81, 86 and 138 (3) (a), (b) and (c) of the Constitution govern the use of technology in elections; what is the requisite standard of proof in Kenyan election petitions, considering the legal reforms following the case of ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others*** **Petition 14 of 2014 [2015] eKLR** amending section 87 of the Elections Act, 2011 and enacting the Election Offences Act, 2016; the powers an electoral court possesses where allegations imputing criminal conduct are pleaded in an election petition; the "appropriate reliefs" in the context of a presidential election petition; the respective roles of the Commission and its Chairperson in presidential election result management under Article 138 (3) (c) and (10) of the Constitution.

The court also noted the applicant's further arguments that it was neutral in the petition and guided by fidelity to the law, consistent with the decisions of the court in the cases of ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*** **Supreme Court Petition 12 of 2013 [2014] eKLR (Mumo Matemu case)** and ***Francis Karioki Muruatetu & Another v Republic & 5 Others*** **Supreme Court Petition No 15 and 16 of 2015 [2016] eKLR**.

The court was also guided by the fact that no party had filed a response to the application. Moreover, the court considered the provisions of Rule 17A of the Supreme Court (Presidential Election Petition) Rules 2017 which make provision for admission of a friend of the court in a presidential election petition and rule 19 (1) of the Supreme Court Rules 2020, which provides that the court may, on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the court.

The court restated the guiding principles set out in the *Mumo Matemu* decision on the role of *amicus curiae* as follows:

i. *An amicus brief should be limited to legal arguments.*
ii. *The relationship between amicus curiae, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.*
iii. *An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The court may therefore, and on a case- by- case basis, reject amicus briefs that do not comply with this principle.*
iv. *An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.*

v. *The court may call upon the Attorney-General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.*

vi. *Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the court, the court will consider such an objection by allowing the respective parties to be heard on the issue (see: Raila Odinga & others v IEBC & others; SC Petition No 5 of 2013- Katiba Institute's application to appear as amicus).*

vii. *An amicus curiae is not entitled to costs in litigation in instances where the court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.*

viii. *The court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role in to partisan role.*

ix. *In appropriate cases and at its discretion, the court may assign questions for amicus research and presentation.*

x. *An amicus curiae shall not participate in interlocutory applications, unless called upon by the court to address specific issues" [emphasis supplied].*

The court allowed the application and directed the applicant to confine itself to addressing the court on the constitutional principles on election technology; the court's jurisdiction in determining criminal issues in the petition; appropriate reliefs in the context of a presidential election petition and the roles of the IEBC vis-à-vis its chairperson in the management of a presidential election result.

Odinga & another v Independent Electoral and Boundaries Commission & 9 Others Presidential Election Petition E005 of 2022

[2022] KESC 45 (KLR)

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling Disallowing Amicus Curiae application

Date: 29 August 2022

Whether an individual can be admitted as an interested party in a presidential election petition

Summary of the facts

The applicant, Milton Nyakundi Oriku, sought to be enjoined as an interested party in the presidential election petition. In support of his application, he submitted that he had an inherent interest in the outcome of the petition as it raised fundamental issues which were integral to the protection of his rights as enshrined in articles 10, 38, 73, 81, 86 and 140 of the Constitution. Further, he had substantial issues to raise about the legitimacy of Forms 34A and Forms 34B which were central to the petition. No response was filed to the application.

Issue for determination

Whether a natural person could be admitted as an interested party in a presidential election petition.

Determination of the court

The court reviewed Rule 17A (4) of the Supreme Court (Presidential Election Petition) Rules 2017, which provides that an application by an interested party shall not be allowed in a presidential election petition.

The court therefore found no merit in the application and accordingly dismissed it.

Odinga & another v Independent Electoral and Boundaries Commission & 8 Others Presidential Election Petition 5 of 2020

[2022] KESC 47 (KLR) (Election Petitions)

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling Disallowing Application to Strike Out Affidavits

Date: 29 August 2022

Whether the Supreme Court could expunge supporting affidavits of a presidential election petition at the preliminary stage of the petition on grounds that the affidavits were inadmissible due to hearsay

Summary of facts

The 9th Respondent, William Samoei Ruto, sought to strike out the affidavits of John Mark Githongo, Benson Wesongo and Martin E. Papa which had been sworn in support of the petition. The 9th Respondent/Applicant also sought to have paragraphs 64 and 69 and paragraphs 115 and 127 of the Petition expunged. In support of the application, it was urged that the affidavits were inadmissible in evidence as they contained hearsay and impugned paragraphs of the petition sought to expand the scope of the petition, contrary to the provisions of Article 140 of the Constitution as to what a petition ought to contain.

Issues for determination

Whether the Supreme Court could expunge supporting affidavits of a presidential election petition at the preliminary stage of the petition on grounds that the affidavits were inadmissible due to hearsay.

Determination of the court

The court reviewed the grounds that the affidavits are inadmissible in evidence because they contained hearsay material and that the impugned paragraphs of the petition sought to expand the scope of the petition contrary to the matters which ought to form a petition under Article 140 of the Constitution.

The court also considered the affidavit of Josphat Koli Nanok, the Deputy Chief Agent of UDA's Presidential Candidate at the National Tallying Centre, in support of the application where it was deponed that the request to summon the DCI, who was a known proxy of the Petitioner and who had publicly avowed bias against the 9th Respondent, was intended to unfairly advance the Petitioners' case by introducing extraneous matters which were beyond the purview of the petition under Article 140 of the Constitution.

The court took cognisance of the fact that there were no responses to the application filed by the Petitioners and the 1st to 8th Respondents within the required timelines and that the nature of the proceedings before the court involved the court's exclusive and original jurisdiction under Article 163(3) (a) of the Constitution. The court opined that the said affidavits revealed that they contained factual contestations which had been responded to substantively by the 1st Respondent and by the applicant, including through the affidavits of Martin Wachira Nyaga (on behalf of the 1st Respondent) and by Dennis Itumbi who had been directly implicated and Davis Kimutai Chirchir on behalf of the applicant. It was only proper that the court be allowed to consider the totality of the evidence before it and as guided by the rules of evidence be able to discern the probative value and evidentiary threshold of each the evidence adduced by each party. Striking out of the affidavits at this early juncture in isolation while leaving the responses on record would, in the view of the court, be premature under the circumstances.

In relation to the prayer to expunge certain paragraphs of the petition, the court noted that it was an issue that could only be dealt with on merits as and when it was made in each of the impugned instances. The court also noted that it had circumscribed jurisdiction both under article 140 of the Constitution and as an election court in respect of potential electoral and other offences and would deer this issue to be dealt with appropriately. Seeing as the applicant had not persuaded the court to grant the reliefs sought at that time, the application was dismissed with no order as to costs.

Odinga & another v Independent Electoral and Boundaries Commission & 8 Others Presidential Election Petition E005 of 2022

[2022] KESC 48 (KLR)

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling Allowing Filing Further Affidavit Evidence

Date: 29 August 2022

Filing of further affidavits in presidential election petition-When could further affidavits be allowed in presidential election petitions - Supreme Court (Presidential Election Petition) Rules, 2017, rule 17

Summary of facts

The 5th Respondent, Juliana Cherera, filed the present application seeking to have the replying affidavits of Juliana Cherera, Justus Nyang'aya, Francis Wanderi and Irene Masit (the 5th to 8th Respondents), being members of the 1st Respondent, admitted on record. In support of their application, the applicants argued that the 2nd, 3rd, and 4th Respondents, in their Replying Affidavits, had alleged that all the members of the 1st Respondent attended a meeting with a delegation from the National Security Advisory Committee (NSAC) to subvert the will of the people. It was further contended that the 5th to 8th Respondents agreed with the proposal from the NSAC delegation to alter the results of the presidential election in favour of one candidate against another. It was urged that unless the 5th to 8th Respondents were allowed to file responses to the allegations, they would suffer great prejudice as the court would make adverse findings without hearing the affected Respondents.

Issue for determination

Circumstances under which the filing of further or other affidavits could be allowed in a presidential election petition.

Determination of the court

The Court considered the grounds on the face of the application and the supporting affidavit sworn by Juliana Cherera on August 28, 2022 and filed on even date.

The applicants' argument was that the 2nd, 3rd and 4th Respondents, in the Replying Affidavit, alleged that all the members of the IEBC attended a meeting with a delegation of the National Security Advisory Committee (NSAC) comprising Dr Kennedy Kihara, the Principal Administrative Secretary in the Office of the President, Mr Kennedy Ogeto, the Solicitor General, Mr Hillary Mutyambai, the Inspector General of Police and Lieutenant General Fredrick Ogolla, Vice Chair of the Kenya Defence Forces, to subvert the will of the people. They urged that unless the 5th, 6th, 7th and 8th Respondents were allowed to file responses to the said allegations, they would suffer great prejudice as the court would make adverse findings without hearing them.

The court also perused the further affidavit of the 5th Respondent sworn on August 28 2022 and filed on even date and upon reviewing Rule 17 of the Supreme Court (Presidential Election Petition) Rules 2017, found that there was no provision allowing any further affidavits of this nature. However, the Court considered the special circumstances where the facts/allegations made by the 2nd, 3rd and 4th Respondents were contained in their response to the Petition. Since the events took place in the pendency of the matter, it would only be fair and just, considering the serious nature of the allegations and implications of the same, that the 5th, 6th, 7th and 8th Respondents ought to be given the opportunity to he heard regarding the same.

The Court thereby invoked the provisions of the Supreme Court (Presidential Election Petition) Rules 2017, rule 4 (2) as read together with section 3A of the Supreme Court (Act No 7 of 2011) on the inherent powers of the court, and allow the further affidavits to be admitted as applied for.

The application was therefore allowed with no order as to costs.

Wafula v Odinga, Flag Bearer for Azimio La Umoja One Kenya Alliance & 5 others; Royal Media (Media Television) & 4 others (Subsequent Party) Presidential Election Petition 1 of 2022

[2022] KESC 51 (KLR) (Election Petitions)

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling dismissing application to prosecute a preliminary objection and counterclaim as a pauper

Date: 30 August 2022

Whether a party could prosecute a preliminary objection and a counterclaim in a presidential election petition as a pauper where the party was neither a Petitioner nor a Respondent

Summary of the facts

The applicant filed the application seeking to prosecute a draft preliminary objection and counterclaim as a pauper due to lack of funds for payment of court fees totalling to Kshs 1,004,000. It was his case that there was manipulation of the IEBC tallying server by the commanders of the paramilitary Azimio la Umoja One Kenya Kwanza Alliance of Political Parties.

Issue for determination

Whether a party could prosecute a preliminary objection and a counterclaim in a presidential election petition as pauper where the party was neither a Petitioner or a Respondent

Determination of the court

The court noted that the applicant was neither a Petitioner nor had she been sued as a Respondent in any presidential election petitions before the court. The court further noted that the applicant had also not sought to participate as a friend of the court.

In support of the orders sought, the applicant contended that he was employed by Pan African Paper Mills (EA) Company Ltd from January 3 1983 to September 23 2003 when his employment was terminated after he supported the government to raise the Pan African Paper Mills EA Company Ltd employees' salaries, who were underpaid by 32.9%; that after his termination as a Quality Control Checker and Trade Unionist, his capacity to secure employment was crippled, affecting his financial status.

The Court considered the Applicant's Preliminary Objection and Counterclaim where he contended that there was manipulation of the IEBC tallying server by James Orengo, Charity Ngilu, Stephen Kalonzo and Ali Hassan Joho being the commanders of the paramilitary Azimio la Umoja One Kenya Alliance of Political Parties. The Court also considered the Supreme Court (Presidential Election Petition) Rules, 2017 and it was evident to the court that the Applicant was neither a Petitioner nor had he been sued as a Respondent in any of the presidential election petitions before the court. The Applicant had also not sought to participate as a friend of the court.

The Court therefore found that the applicant was not merited and it was therefore dismissed.

Khalifa & 3 others v Independent Electoral and Boundaries Commission & 3 others Presidential Election Petition E003 of 2022

[2022] KESC 49 (KLR) (Election Petitions)

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling Disallowing Application to Strike Out Attorney General from Presidential Election Petition

Date: 30 August 2022

Whether the Office of the Attorney General was wrongfully named as a party in a presidential election petition – Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.

Summary of the facts

The 3rd Respondent sought leave to strike out the name of the Attorney General in Petition No E003 of 2022 on the grounds of misjoinder.

Issues for determination

Whether the Office of the Attorney General was wrongfully enjoined as a party in the presidential election petition.

Determination of the court

The Court, having considered the application, affidavit in support, as well as the Petitioners' Replying Affidavit and submissions in opposition to the application, found that the application, which was filed on August 29 2022 at 4:45 pm, was filed out of time and was therefore incompetent and an abuse of the court process.

In any event, the Court had determined the issue in the application in its ruling delivered on August 29 2022 in Petition E002 of 2022. The application was therefore dismissed with no orders as to costs.

Reuben Lichete Kigame v Independent Electoral Boundaries & Another Supreme Court Presidential Election Petition 9 of 2022

Supreme Court of Kenya at Nairobi

Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling striking out petition

Date: 29 August 2022

Jurisdiction of Supreme Court in relation to presidential election results-whether Article 140 confers jurisdiction in respect of matters arising before declaration of President-elect-whether Supreme Court can entertain presidential petition over issues pending in an appeal at the Court of Appeal

Summary of facts

The Supreme Court considered applications from the 1st Respondent and the 2nd Interested Party, William Samoei Ruto, seeking to strike out Petition E009 of 2022. William Ruto Samoei's application, dated 26 August 2022, was based on Rule 17 of the Supreme Court (Presidential Election Petition) Rules 2017. The applicant argued that the Petitioner had a pending appeal before the Court of Appeal in the case of ***Independent Electoral and Boundaries Commission & Wafula Wanyonyi Chebukati v Reuben Kigame Lichete & Hon Attorney General*; Nairobi Civil Appeal No. E2456 of 2022**, and a stay of execution was granted on the High Court judgment in ***Reuben Kigame Lichete v Independent Electoral and Boundaries Commission & Wafula Chebukati*** **Constitutional Petition No. E275 of 2022**. The applicant contended that since the matter was pending appeal, it was not within the purview of Article 140 of the Constitution, and thus the Supreme Court lacked jurisdiction.

The 2nd Interested Party further argued in a supporting affidavit and written submissions that the petition was a pre-election dispute pending before the Court of Appeal and that the Supreme Court's jurisdiction under Article 140 is limited to challenging the election of the President-elect. The 2nd Interested Party cited the decision in ***Sammy Ndungu Waiti v IEBC and 3 others*** **[2019] eKLR** to support this position.

Additionally, the 1st Respondent filed a Notice of Motion on 27 August 2022 under Articles 88(4), 140(1), and 163(3)(a) of the Constitution, Section 74(1) of the Elections Act, Sections 3A and 24 of the Supreme Court Act 2011, Rule 31(6) of the Supreme Court Rules 2020, and Rule 17 of the Supreme Court (Presidential Election Petition) Rules 2017. The 1st Respondent argued that the petition raised pre-election issues about the clearance and registration of independent presidential candidates and did not meet the threshold for the Supreme Court's original exclusive jurisdiction. The grounds of opposition emphasized the lack of jurisdiction, the petition's failure to exhaust the remedies provided under Article 88(4)(e) of the Constitution, and the petition being sub judice.

The 1st Respondent's written submissions reiterated the jurisdictional issue, relying on ***The Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd*** **(1989) KLR 1**, and stated that the petition's issues were already before the Court of Appeal. The Court noted that the Petitioner had not responded to the applications.

The petition was struck out, and the Kshs. 1,000,000/- deposited as security for costs upon lodging of this petition was to be refunded to the Petitioner., with each party bearing its costs.

IV. COUNTY ELECTION PETITIONS

PETITIONS CONCERNING ELECTIONS OF COUNTY GOVERNORS

Abdullahi v Independent Electoral & Boundaries Commission & 3 Others Garissa Election Petition E006 of 2022

In the High Court of Kenya at Garissa

Coram: Dulu J

Ruling striking out petition

Date: 2 November 2022

Misjoinder and non-joinder of necessary parties to a petition-Whether misjoinder of a Returning Officer was fatal to a petition-Whether failure to join deputy governor in a petition challenging election of a governor was fatal to the petition-

Summary of facts

In an election petition dated 8 September 2022 and lodged on 9 September 2022, the Petitioner initiated proceedings. The 4th Respondent filed a Notice of Motion on 26 September 2022. The application argued that the Petitioner had violated the Elections (Parliamentary & County Elections) Petitions Rules 2017 by omitting necessary parties, including the elected Deputy Governor, and by incorrectly joining parties, such as the County Returning Officer for Nyamira County. Additionally, it claimed that the Petitioner sought relief against George Kiomburi Ndungu, the elected Member of the National Assembly Juja, who was not a party to the petition.

Supported by an affidavit sworn on 26 September 2022, the 4th Respondent/Applicant, asserted that the petition and supporting affidavit should be struck out entirely. It alleged that the Petitioner made criminal allegations against the wrong Constituency Returning Officer and failed to include the Deputy Governor in the proceedings. In response, the 1st Respondent, the Independent Electoral & Boundaries Commission, filed a Replying Affidavit, arguing that the petition was fatally flawed for failing to specify the challenged election results and for not meeting legal requirements regarding result declaration. It contended that the Petitioner's failure to include the Deputy Governor as a party violated election laws and the right to fair hearing under Article 50 of the Constitution.

The Petitioner, in a Replying Affidavit sworn on 12 October 2022, denied violating election laws and refuted claims of mis-joinder or non-joinder of parties. The Petitioner argued that the inclusion of the Deputy Governor was unnecessary as the petition primarily concerned the Governor.

In the written submissions, counsel for the Applicant outlined the issues for determination. They addressed whether the petition suffered from non-joinder and misjoinder of parties, the incompetence due to defective reliefs sought, deficiency in stating election results, and if these defects could be rectified through an amendment.

Regarding the first issue, counsel argued that the petition was incompetent due to the failure to include the Deputy Governor elect as a necessary party and the misjoinder of the County Returning Officer. They referenced Rule 2 of the Elections Petition Rules 2017 and cited the case of ***Mwamlole Tchappu Bwana v IEBC & 4 Others*** **[2017] eKLR**, for the necessity of including the Deputy Governor in gubernatorial election petitions. Additionally, they cited the case of ***Samuel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 Others*** **[2018] eKLR**, to support the argument that removal of a Governor also affects the Deputy Governor, necessitating their inclusion as parties.

On the issue of misjoinder concerning Anthony Njoroge Douglas, the Nyamira County Returning Officer, counsel relied on the case of ***Ali Hassan Joho & Another v Suleiman Said Shahbal & 2 Others*** **[2014] eKLR**, to argue that the ultimate outcome for gubernatorial elections is declared by the County Returning Officer.

Regarding the defective reliefs sought, counsel contended that seeking orders against a party not involved in the proceedings rendered the petition ambiguous. They referenced the case of ***Ismael Suleman & 9 Others v Returning Officer – Isiolo County, IEBC & 4 Others*** **[2013] eKLR**, to support this argument.

On the omission of election results, counsel cited Rule 8(1)(c) of the Election Petition Rules and referenced the case of ***Omar Juma Mwamlole v IEBC & 2 Others*** **[2017] eKLR**, for the mandatory nature of including election results in petitions.

Lastly, concerning the possibility of curing the defects through an amendment, counsel argued that the defects were incurable. They referenced the case of ***Gakenia v Kimani & 2 Others*** **[2008] 2 KLR**, to support their contention that such errors would lead to confusion and should not be allowed to proceed to hearing.

In their submissions, counsel for the 1st and 2nd Respondents outlined two key issues for determination. The first issue pertained to whether the Petitioner's failure to adhere to Rule 8(1), (c), (d), and (f), and Rule 12(2)(c) of the Elections (Parliamentary and County Elections) Petitions Rules rendered his petition fatally defective. They argued that the failure to include the Deputy Governor as a Respondent could also have a similar effect on the petition's validity.

In addressing the failure to plead the full election results, counsel emphasized the mandatory nature of Rule 8 of the Election Petition Rules and cited precedent cases such as ***Hassan Ali Joho & Anor v Suleman Ali Shabal & 2 Others*** **[2014] eKLR** and ***Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others*** **[2013] eKLR**). They also referenced the Indian case of ***Jyoti Basu & Others v AIR 1982 SC 983***.

Concerning the failure to join the Deputy Governor in the petition, they argued that it was a critical omission that violated the Deputy Governor's right to a fair hearing, citing ***Joel Makori Onsando v IEBC & 4 Others*** **[2017] eKLR**).

On the Petitioner's side, two issues were identified for determination: whether the petition adhered to the cardinal rules of pleadings and whether the court should strike out the petition. Counsel cited Rule 9(a) of the Election Petition Rules and relied on cases such as ***Wavinya Ndeti & Anor v IEBC & 2 Others*** **[2017] eKLR** and ***Lesrma Simeon Saimanga v IEBC & 2 Others*** **[2017] eKLR** to support their arguments.

Regarding the mis-joinder of a wrong County Returning Officer, the Petitioner's counsel argued against dismissal, citing ***Zephir Holdings Ltd v Minosa Plantations Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya*** **[2014] eKLR** and ***George Mbogo Ochillo v IEBC & 2 Others*** **[2018] eKLR**).

Issues for determination

1. Whether there was misjoinder or non-joinder of parties in the petition and if so, what was the effect.
2. Whether the election results were pleaded and if not, whether the omission was fatal.
3. Whether the petition contained hearsay evidence and if, how such evidence ought to be treated.
4. Whether the petition contained defective reliefs and if yes, their effect if any.
5. What orders ought to be granted by the court.

Determination of the court

The court examined the issue of misjoinder, noting the incorrect identification of Anthony Njoroge Douglas as the County Returning Officer in the petition. Despite this error, evidence showed that Douglas was not directly involved in the proceedings, as he held the position for Nyamira County, not Wajir County. However, this misidentification was deemed inconsequential, as the actual County Returning Officer for Wajir County was properly involved.

In the view of the court, from the evidence placed before it, the appearance of Anthony Njoroge Douglas as part of the description of the 3rd Respondent was as a result of careless copy pasting which did not prejudice anyone, seeing as the 3rd Respondent was actually the County Returning Officer and the description appeared in the petition as the 3rd Respondent. The court therefore found that the name Anthony Njoroge Douglas appeared erroneously on the petition and did not render the petition defective.

In discussing the complaint of non-joinder, it was noted that there were conflicting High Court decisions regarding the necessity of joining the Deputy Governor as a party in an election petition. Some decisions suggested that the Deputy Governor should only be joined if there were specific complaints against them, while others argued that failure to include the Deputy Governor as a party rendered the petition fatally defective.

Echoing the sentiments expressed by Korir J in ***Samuel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 Others*** **[2018] eKLR** and Thande J in ***Mwamlole Tchappu Mbwana v IEBC & 4 Others*** **[2017] eKLR**, it was emphasized that the Governor and Deputy Governor were intertwined in the election process. Consequently, any action to remove the Governor, such as through an election petition, would also affect the Deputy Governor.

In line with this understanding, it was asserted that the Deputy Governor should be joined as a party in an election petition against the Governor to ensure their right to be heard, as guaranteed under Article 50 of the Constitution of Kenya. This position was supported by the judgment of Omondi J in ***Joel Makori Onsando v IEBC & 4 Others*** **[2017] eKLR**.

The key consideration was not whether there were specific complaints against the Deputy Governor in the petition, but rather whether they were likely to be adversely affected by the court's decision. Given the potential impact on the Dep

uty Governor in a gubernatorial election petition, it was deemed necessary to join them as a party, rather than expecting them to apply later to be joined as an interested party. Therefore, the petition in question was deemed fatally defective for failing to include the Deputy Governor as a Respondent.

In addressing the issue of election results, it was noted that the Petitioner only mentioned in the filed election petition documents the number of votes obtained by the 4th Respondent, the applicant whose election was contested. This fact remained undisputed. The petition's paragraph 10 explicitly stated, "the 3rd Respondent returned the 4th Respondent as the duly elected County Governor Elections – Wajir County with a vote of 35,533 votes." Additionally, paragraph 7 of the supporting affidavit to the petition deposed that "the 4th Respondent is allegedly elected County Governor – Wajir County in the general election held on 9 August 2022, having allegedly garnered a total of 35,533 votes."

The Election Petition Rules, specifically Rule 8(1)(c), mandates the inclusion of election results in an election petition. However, there was no indication in the pleading to show who contested against the 4th Respondent and their respective vote counts. Thus, there was no basis for a witness to testify that the 4th Respondent's declaration as the winner was erroneous and needed correction by the court.

The reasoning in the case of ***Omari Juma Mwakamoli v IEBC & 2 Others*** **[2017] eKLR**, as articulated by Njoki Mwangi J, supported this view. It underscored that the failure to plead election results deprived the Petitioner of crucial information and hindered the Petitioner's burden of proof, rendering the petition defective.

Moreover, the Supreme Court emphasized in ***Hassan Ali Joho & Another v Suleman Said Shabal & 2 Others*** **[2014] eKLR** the significance of pleading quantitative election results, stating that they form the basis for election challenges and enable a clear understanding of the election outcome.

Consequently, the Petitioner's failure to plead the complete quantitative results of the election undermined their ability to substantiate why the 4th Respondent's victory was invalid. This omission constituted a fatal defect in the petition, rendering it untenable.

The court addressed whether there was hearsay evidence in the affidavit filed with the petition, focusing on paragraphs 91, 92, and 93 of the supporting affidavit. It was contended that the deponent of the affidavit either did not disclose

the source of the information or relied on Facebook information. The court determined that even if some averments in the affidavit were hearsay evidence, such defects would only affect those specific paragraphs, not the entire affidavit or the main petition. Therefore, the petition was not considered fatally defective solely because of allegations that three paragraphs of the supporting affidavit contained hearsay evidence.

Concerning the issue of defective reliefs, it was argued that prayer (C) of the petition listed George Kiomburi Ndungu as the person against whom a declaration was sought. However, the Petitioner denied the reference to the above name. Upon reviewing the prayers in the petition, the court found that the alleged defective relief did not exist. Therefore, the complaint was deemed to have no basis, and the court dismissed it.

In conclusion, the court found the election petition to be fatally defective due to the Petitioner's failure to join the Deputy Governor as a Respondent and the failure to plead the complete quantitative election results as mandated by law in the pleadings.

Following its considerations, the court allowed the Notice of Motion application and ordered the petition and supporting affidavit(s) filed therewith to be struck out, terminating the proceedings. The 4th and 1st Respondents were awarded the costs of the application and proceedings against the Petitioner.

Abdullahi v Independent Electoral and Boundaries Commission & 3 Others Nairobi Election Petition Appeal E004 of 2022

Court of Appeal in Nairobi

Coram: DK Musinga, KI Laibuta & GWN Macharia, JJA

Judgment striking out appeal

Date: 24 February 2023

Whether appeal was incompetent for not being filed within seven (7) days of service of the appeal as required under rule 19 of the Court of Appeal (Election Petition) Rules-Jurisdiction-

Summary of the facts:

On, 9 August 2022, the residents of Wajir County participated in an election to choose their political representatives. The Appellant and the 4th Respondent contested for the position of governor in an election conducted by the 1st Respondent. The 4th Respondent emerged as the winner, receiving 35,533 votes and was subsequently gazetted as the governor-elect. Dissatisfied with the election outcome, the Appellant filed Election Petition No E006 of 2022 on 8 September 2022, seeking to annul the 4th Respondent's election. The petition alleged various electoral irregularities, including non-compliance with the law and electoral malpractices. During the proceedings, the 4th Respondent filed a motion seeking to strike out the petition, citing several grounds, including failure to join the Deputy Governor as a necessary party. In response, the Appellant denied the allegations and defended the petition's validity. In its ruling dated 2 November 2022, the High Court made several findings. It noted that certain errors in the petition, such as the mention of a wrong party, were not fatal defects. However, it found that the failure to include the Deputy Governor as a Respondent rendered the petition defective. Additionally, the court observed that the petition lacked essential details, such as complete election results, as required by Rule 8(1)(c) of the Election Petition Rules. Consequently, the court granted the 4th Respondent's application and struck out the Appellant's petition, ordering costs against the Appellant.

The Appellant, dissatisfied with the decision of the High Court, filed an appeal with a memorandum dated 2 December 2022 and which was submitted to the Court on 5 December 2022. The Appellant argued that the learned judge erred

both in law and in fact in several aspects: firstly, by deeming the failure to join a deputy governor in an election petition as rendering the petition fatally defective; secondly, by holding that the Appellant had not complied with section 8(1)(c) of the Elections (Parliamentary and County) Petition Rules, 2017, which mandates a Petitioner to state the declared results of the election; thirdly, by ruling that the failure to provide the quantitative results of the disputed election in the petition rendered it fatally defective; and fourthly, by making a determination on the alleged non-compliance with section 8(1)(c) of the Elections (Parliamentary and County) Petition Rules, 2017, an issue that was not raised in the grounds of the 4th Respondent's application.

During the appeal hearing, Ms. Awuor for the Appellant, while acknowledging that the appeal was filed beyond the 30-day period as required by section 85A of the Elections Act, 2011, argued that the preliminary objection challenging the competence of the appeal was also filed out of time under Rule 19 of the Court of Appeal (Election Petition) Rules, 2017. Therefore, she contended that the notice of preliminary objection was incompetent and should be struck out. Ms. Awuor urged the court not to dismiss the appeal on a technicality but to exercise its discretion to enlarge time and determine the appeal on its merits.

On the issue of joinder or non-joinder of the deputy governor, the Appellant's counsel argued that a deputy governor was not one of the Respondents contemplated under the provisions of Rule 2 of the Elections (Parliamentary and County) Petition Rules, 2017. It was submitted that a deputy governor was not a mandatory party in an election petition, and therefore, failure to join the deputy governor ought not to be fatal to the petition. The decision in ***Japthet Muroko & Another v Independent Electoral and Boundaries Commission (IEBC) & 2 Others*** **[2017] eKLR** was cited in support of this proposition.

Regarding the determination on the issue of the Appellant's non-compliance with the provisions of Rule 8(1)(c), an issue not raised in the application by the 4th Respondent, it was submitted that parties are bound by their pleadings, as held in ***Ndichu & Another v Muriungi (Civil Appeal 3 of 2020)*** **[2022] KEHC 2 (KLR)**. As to whether the Appellant failed to state the declared results of the election, it was contended that the Appellant did, in fact, state the declared results in paragraph 9 of the petition and paragraph 10 of the supporting affidavit, referencing Gazette Notice No 9949.

On the issue of failure to quote the quantitative results of the disputed election, it was argued that such a defect did not automatically lead to the petition being struck out, citing ***Silverse Lisamula Anami & Another v Independent Electoral and Boundaries Commission & 2 Others*** **[2018] eKLR** and ***Mohamed Dado Hatu v Dhadho Gaddae Godhana, Returning Officer, Tana River County & Independent Electoral and Boundaries Commission*** **[2017] eKLR**. The court's duty to hear the parties and the interest of justice were emphasized.

Mr. Onderi, on behalf of the 1st to 3rd Respondents, indicated that the Respondents would be relying on their written submissions dated 30 January 2023. However, he made brief oral highlights on the issue of the competence of the appeal, urging the court to strike it out due to late filing, in contravention of statutory timelines. The Respondents argued that the appeal was incompetent due to late filing and failure to comply with the statutory timeline, which affected the jurisdiction of the court to hear and determine the appeal, citing ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*** **[2014] eKLR**.

On the Appellant's failure to comply with the provisions of Rule 8(1)(a), (c), (d), and (f) of the Elections (Parliamentary and County) Petition Rules, 2017, it was submitted that it was mandatory to plead the results of an election, citing decisions in ***Amina Hassan Ahmed v Returning Officer, Mandera County & 2 Others*** **[2013] eKLR**, and ***Evans Nyambaso Zedekiah & Another v Independent Electoral and Boundaries Commission & 2 Others*** **[2013] eKLR** were cited to buttress that position. The Appellant raised various issues for determination; however, the appeal hinged on its competence. It was argued that the timing of the preliminary objection did not affect its validity, as it pertained to the court's jurisdiction to hear and decide the appeal. This could be raised at any stage, including by the court itself, as noted in ***Attorney General & 2 Others v Okiya Omtata Okoiti & 14 Others*** **[2020] eKLR**. The 1st to 4th Respondents asserted that the appeal was filed late, depriving the court of jurisdiction. The Appellant acknowledged the late filing but requested discretion to extend the time and hear the appeal. Courts consistently emphasized that jurisdiction was crucial for a court to make any ruling. In ***Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd*** **[1989] eKLR**, Nyarangi, JA highlighted this importance. Additionally, the Supreme Court in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others*** **[2012] eKLR** emphasized that a court's jurisdiction was limited by Constitutional or legislative provisions.

The challenge to the appeal's competence arose from section 85A of the Elections Act, 2011. This section mandated appeals concerning specific elected positions to be filed within thirty days of the High Court's decision, such as the case related to the Wajir County Governor's election. The appeal, filed on 5 December 2022, was outside this deadline set by section 85A(1)(a) of the Elections Act, 2011. The court's discretion to extend time under rule 17(2) of the Court of Appeal (Election Petition) Rules, 2017, did not apply to Constitutional or statutory timelines. This was supported by the decision in ***Wavinya v IEBC & 4 Others*** **[2014] eKLR**.

Further, the Supreme Court's rulings in ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*** **[2014] eKLR** and ***Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*** **[2014] eKLR** emphasized the importance of adhering to statutory timelines in election petitions. In light of these principles, the appeal filed beyond the statutory period lacked jurisdiction for this court to consider its merits. Thus, the appeal was struck out with costs to the Respondents.

Dado v Godhana & 2 others Garissa Election Petition E001 of 2022

High Court of Kenya at Garsen

Coram: Njoki Mwangi J

Judgment dismissing petition

Date: 3 March 2023

Joinder-effect of failure to join deputy governor

Summary of facts

The Petitioner (Hussein Tuneya) challenged the gubernatorial election results for Tana River County held on August 9, 2022, and the election of the 1st Respondent (Dhadho Gaddae Godhana) as the governor for Tana River County. He alleged serious irregularities and malpractices that rendered the election unfair and sought a declaration that the election was invalid. He argued that the voting, counting, tallying, and transmission processes were biased and flawed, and requested that the Court nullify the election results and declare him the duly elected Governor.

The 2nd Respondent (IEBC) and 3rd Respondent (County Returning Officer) submitted that the election was conducted in accordance with the Constitution and relevant electoral laws and regulations and denied the allegations in the petition. They prayed that the court would dismiss the petition with costs.

The 1st Respondent denied the allegations in the petition and stated that the election was conducted in a free, fair, peaceful, accurate and transparent manner and free from violence, corruption and intimidation. It was conducted in accordance with the Constitution and relevant election laws. There was no interference with the integrity, credibility and security of the election. Therefore, he was validly elected and declared a winner after proper counting and tallying of votes.

The 1st Respondent further filed an application seeking to strike out the petition on grounds of non-joinder of the Deputy Governor, arguing that the election of the Governor and Deputy Governor are inseparable, and both must be included in the petition. He argued that the absence of the Deputy Governor as a party violated the principles of natural justice and the right to a fair hearing.

Issues for determination

The Court determined the following issues:

1. Whether the failure to include the Deputy Governor as a Respondent in the election petition rendered the petition incurably defective.

2. Whether the 2nd Respondent's employees conducted the election process in compliance with the law.

3. Whether the alleged irregularities and malpractices affected the results of the gubernatorial election.

4. Who should bear the costs of the petition.

Determination of the court

The Court found that the non-joinder of the Deputy Governor was not fatal to the petition. The election of the Governor and Deputy Governor, while intertwined, did not mandate the Deputy Governor's inclusion in the petition unless specific allegations were made against him. It, therefore, dismissed the application to strike out the petition.

The Court held that the Respondents demonstrated compliance with electoral laws and procedures, and any minor errors did not significantly impact the election results. It stated that that the petitioner failed to provide sufficient evidence that the alleged irregularities and malpractices were of such magnitude to affect the overall outcome of the election. Thus, the Court dismissed the petition.

The Court observed that since the costs follow the event, the Petitioner and IEBC shall pay the 1st Respondent Kshs. 2,000,000 and Kshs. 3,000,000 respectively as costs for the petition.

Dado v Godhana & 2 others Malindi Election Appeal No 2 of 2023

Court of Appeal at Malindi

Coram: Gatembu, Nyamweya, Odunga JJA

Date: 7 July 2023

Judgment dismissing appeal

Notice of Appeal-Failure to file Notice of Appeal within 7 days-Filing Notice of Appeal out of time without leave

Summary of facts

Article 180(1) of the Kenyan Constitution mandates that county governors are elected directly by voters on the same day as the general elections for Members of Parliament, held every five years on the second Tuesday in August.

In accordance with this provision, the Kenyan general elections took place on 9 August 2022. Voters in Tana River County, along with other Kenyans, elected their governor. In Tana River, the candidates were Hussein Tuneya Dado from the Orange Democratic Movement (ODM) and Dhadho Gaddae Godhana from the United Democratic Alliance (UDA). The Independent Electoral and Boundaries Commission (IEBC) declared Dhadho Gaddae Godhana the winner with 26,982 votes, narrowly defeating Dado, who received 26,633 votes.

Unhappy with the results, Dado filed an election petition in the High Court of Malindi (Election Petition No. E001 of 2022), arguing that the election was marred by significant illegalities and irregularities, thus violating the principles outlined in the Constitution and electoral laws. He sought several declarations, including the invalidation of the election results announced on 12 August 2022 and gazetted on 23 August 2022, and the annulment of 1st Respondent's election as governor. The Appellant also requested compensation for the costs of the petition.

On 3 March 2023, the High Court (presided over by Justice Njoki Mwangi) dismissed the Appellant's petition, affirming 1st Respondent's election as governor and ordering the IEBC to pay Kshs 3,000,000 to 1st Respondent for the petition's costs. Additionally, the Appellant was instructed to pay 1st Respondent Kshs 2,000,000. Discontent with this ruling, the Appellant filed a Notice of Appeal on 24 March 2023, which was lodged on 28 March 2023. Subsequently, on 4 April

2023, 1st Respondent sought to have the Notice of Appeal struck out for being filed late, while the Appellant, on 6 April 2023, requested an extension for filing and serving the Notice of Appeal.

The Appellant's main appeal, filed on 30 March 2023, contested the High Court's decision on multiple grounds. He argued that the elections did not meet Constitutional standards of transparency, impartiality, and efficiency. He also claimed that the judge failed to properly consider evidence of irregularities, such as the mishandling of ballot papers and improper counting and announcement of votes. Appellant asserted that these issues infringed on voters' rights and affected the election's outcome, thereby nullifying the results.

Appellant's appeal sought to overturn the High Court's decision and have the election declared invalid. He also requested the court to declare that 1st Respondent was not validly elected and to award costs against the Respondents in both the High Court and the appeal.

On 17 April 2023, the legal teams for the Appellant, Hussein Tuneya Dado, and the Respondents, including the 1st Respondent, Dhadho Gaddae Godhana, and the Independent Electoral and Boundaries Commission (IEBC) along with the Tana River County Returning Officer (the 2nd and 3rd Respondents), appeared before Justice Gatembu, JA. This session was convened to address procedural issues concerning the Appellant's Notice of Appeal regarding the Tana River gubernatorial election, which was under judicial review. The case involved two opposing motions. The 1st Respondent's motion, dated 4 April 2023, argued that the Appellant's Notice of Appeal, which was filed 25 days after the original judgment, exceeded the seven-day deadline mandated by the Election (Parliamentary and County Elections) Petitions Rules, 2017. The 1st Respondent's counsel contended that this delay rendered the notice invalid and accused the Appellant of attempting to deceive the court into considering an untimely appeal. They emphasized that strict adherence to the electoral law's timelines is essential to uphold the judicial process's integrity. Conversely, the Appellant's motion, filed on 6 April 2023, sought an extension to validate his delayed filing. He cited health issues as the reason for the delay, explaining that his illness prevented timely meetings with his legal team, which led to the late filing. The Appellant's counsel argued that the court possesses the discretionary power to extend filing deadlines in exceptional circumstances like these. They asserted that granting the extension would not disrupt the appeal process, as the Record of Appeal was filed within the required 30-day timeframe.

The court decided to consolidate both motions with the main appeal for a hearing on 17 May 2023. This decision acknowledged that resolving these preliminary issues was crucial for determining the court's jurisdiction to proceed with the substantive appeal. During the hearing, Senior Counsel Prof. Tom Ojienda, representing the 1st Respondent, emphasized the necessity of adhering to the established filing deadlines. They referenced Supreme Court precedents, arguing that the Appellant's failure to seek leave for late filing constituted a jurisdictional flaw, rendering the appeal void.

In response, the Appellant's counsel, led by Mr. Cecil Miller, requested leniency from the court to extend the filing deadline due to the Appellant's health-related delay. They argued that the delay did not harm the Respondents and that proceeding with the appeal would not violate any statutory requirements. Supporting the 1st Respondent's stance, the 2nd and 3rd Respondents' counsel contended that the Appellant's delay was both excessive and unjustified. They argued that his request for an extension was merely an attempt to bypass procedural rules, which would undermine the appeal's validity.

The court's critical decision involved determining whether to accept the late Notice of Appeal and allow the appeal to proceed or to dismiss the appeal due to procedural non-compliance. This decision would depend on whether the court found the Appellant's reasons for the delay sufficient to exercise its discretionary power to extend the filing deadline. The outcome of this procedural debate was pivotal, as it would dictate whether the court could move forward to address the substantive issues of the appeal.

Determination of the court

The court examined the Notices of Motion dated 4 April 2023 and 6 April 2023, considering the affidavits and submissions presented, both written and oral. Rule 6(2) of the Court of Appeal Election (Parliamentary and County Election Rules) 2017 stipulates that a Notice of Appeal must be filed within seven days of the decision being appealed against. The judgement in this case was delivered on 3 March 2023, making the deadline for filing the Notice of Appeal 10 March 2023. However, the Notice was not filed until 28 March 2023. Despite the Respondents' assertion that the Notice was filed 25 days late, the court clarified that the correct interpretation of the timeline ends seven days after the judgement date, indicating that the filing occurred 25 days post-judgement, exceeding the permissible seven-day period.

The court emphasised that any delay, regardless of its length, must be explained. This principle is supported by cases like ***Reliance Bank Limited (In Liquidation) v Grandways Ventures Ltd & Others*, Civil Application No. Nai. 118 of 2007**, which highlights that even brief delays necessitate justification. The court maintained that even strong appeals must adhere to prescribed filing deadlines and that delays require proper explanation. Relaxing compliance with procedural rules could lead to arbitrary discretion, legal uncertainty, and chaotic judicial processes, as underscored by ***Onjula Enterprises Ltd v Sumaria* [1986] KLR 651**, which affirmed the necessity of strict adherence to court rules to uphold legal principles.

In discussing the critical role of timely filing and serving Notices of Appeal in electoral disputes, the court referred to the Supreme Court's ruling in ***Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR**, asserting that prompt service of a Notice of Appeal is essential for fair judicial proceedings. They echoed sentiments from ***Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR**, emphasising that adherence to procedural rules ensures the integrity and predictability of legal outcomes.

The court highlighted the significant impact of timely compliance in electoral disputes, which extends beyond the litigants to the electorate, who have a right to promptly know their representatives. Delays in resolving such disputes can hinder effective governance. They cited the Supreme Court's observations in ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR**, underscoring that the Constitution mandates the prompt resolution of electoral disputes as a cornerstone of democratic governance.

The court discussed the rigorous timelines stipulated by the Constitution and the Elections Act for filing and adjudicating election petitions. According to **Article 87(2) of the Constitution**, non-presidential election petitions must be filed within 28 days after the results are declared. The Elections Act also demands that questions regarding the validity of a county governor's election be resolved within six months, and that appeals must be lodged within 30 days and heard within six months. The court explained that these stringent timelines address historical issues where prolonged election disputes undermined democratic processes and public trust. They referenced ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR**, where the Supreme Court highlighted how delays in resolving election disputes eroded the democratic process and voter confidence.

They reiterated the necessity for the timely resolution of electoral disputes to ensure that election results are confirmed with finality within a reasonable timeframe.

The court emphasised that strict adherence to the timelines for resolving electoral disputes, as set by the Constitution and the Elections Act, is essential for maintaining the judicial process's integrity and predictability. They underscored that compliance with these timelines is a substantive legal requirement that cannot be overlooked or remedied through procedural flexibility. This strict compliance is critical to ensure the swift and efficient resolution of electoral disputes, aligning with the Constitutional principle of timely justice. As the court continued to evaluate the broader implications and legal considerations surrounding these issues, it underscored the need for clear and consistent application of procedural rules to uphold the principles of fairness and certainty in the judicial process.

The Supreme Court's ruling in ***Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others*** **[2019] eKLR** underscored the critical importance of adhering to prescribed timelines in election disputes. It firmly established that petitions brought before the High Court, functioning as an election court, must be conclusively resolved within a strict 6-month window, without exception. This mandate holds true even if an appeal is lodged, and the case is remitted back to the High Court, emphasizing the imperative of timely resolution. The Court deemed any delay in adjudication as a direct infringement upon the Petitioner's right to swift justice, emphasizing the necessity of timely redressal in electoral matters. However, this decision faced challenge in the East African Court of Justice, particularly regarding the notion of dismissing cases as futile. In ***Martha Wangari Karua v The Attorney General of the Republic of Kenya*** **Reference No. 20 of 2019**, the First Instance Court rebuked the Supreme Court's stance, asserting that such dismissals violated the fundamental right to access justice and constituted an unjustifiable denial of appeal rights. Consequently, the Court awarded the Petitioner, Martha Wangari Karua, USD 25,000 in damages, denoting a significant victory in the pursuit of procedural fairness and judicial rectitude. Despite this, the Attorney General of the Republic of Kenya pursued an appeal in the Appellate Division of the East African Court of Justice, as evidenced by ***Attorney General of the Republic of Kenya v Martha Wangari Karua & 2 Others*** **Appeal No. 4 of 2021**. However, the appeal proved futile, with the Court upholding the earlier decision of the First Instance Court, thereby cementing the importance of upholding procedural standards and safeguarding the right to appeal.

The Court's deliberations were informed by Rule 17, which empowers the Court to extend or reduce prescribed timelines for sufficient reasons, as expounded in ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others***. Additionally, Rule 5 and ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** provided foundational principles governing the exercise of discretion in election matters, emphasizing equitable remedies, explanations for delays, and considerations of public interest.

Moreover, the Court invoked ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 others*** to underscore the sui generis nature of election proceedings, which operate within statutory frameworks and Constitutional provisions, necessitating adherence to procedural rules and Constitutional imperatives.

In the case under review, the Court meticulously analysed the procedural irregularities surrounding the filing of the Notice of Appeal. Citing ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others***, the Court clarified that its jurisdiction is contingent upon the filing of a Notice of Appeal or the Appeal itself, emphasizing the significance of procedural regularity in legal proceedings.

Ultimately, the Court found the Notice of Appeal to be filed out of time, rendering it null and void. Drawing upon ***Association of Member Episcopal Conference in East Africa (Amecea) v Alfred Roman T/A Romani Architects & Others***, the Court reiterated the irredeemable nature of void acts, underscoring the necessity of strict adherence to procedural requirements.

Given the failure to adequately justify the delay in filing and the improper filing of the Notice of Appeal, the Court declined to entertain the appeal's merits, instead awarding costs to the 1st Respondent, thereby reaffirming the paramount importance of procedural regularity and adherence to prescribed timelines in election disputes.

Hassan Mohamed Adam v Ahmed Abdullahi Jiir & 3 Others Nairobi Election Petition Appeal E008 of 2023

In the Court of Appeal at Nairobi

Coram: DK Musinga, HA Omondi & GWN Macharia, JJA

Ruling striking out appeal

Date: 24 July 2023

Summary of facts

Hassan Mohamed Adam, the Appellant, was a candidate in the Wajir County Gubernatorial elections, where Ahmed Abdullahi Jiir, the 1st Respondent, and Ahmed Muhumed Abdi, the 2nd Respondent, also contested for the positions of Governor and Deputy Governor of Wajir County, respectively. Dissatisfied with the outcome, the Appellant filed a petition on 9 September 2022, challenging the results declared by the Independent Electoral and Boundaries Commission (IEBC), the 3rd Respondent, as announced by the returning officer, the 4th Respondent. The Appellant alleged various illegalities and irregularities, including voter intimidation and misinformation, discrepancies in statutory forms, improper tallying and tabulation of results, failure to deploy KIEMS kits, and inflation of vote numbers through the use of the supervisor method of voter identification. He sought orders for scrutiny and recount, the setting aside of the declared results, and fresh elections.

The 1st and 2nd Respondents jointly denied all allegations in the petition, as did the 3rd and 4th Respondents, who maintained that the elections were conducted in compliance with the Constitution and relevant electoral laws, supported by an electoral management system with multiple safeguards to ensure a transparent and accountable process.

Upon hearing the petition, the trial court dismissed it with costs, upholding the election of the 1st and 2nd Respondents. The Appellant, through Sallah & Company Advocates, filed this appeal, arguing that the gubernatorial elections were not conducted in accordance with the Constitution or the requisite election laws, resulting in a flawed process that compromised the integrity of the election.

Before the appeal was heard, interlocutory applications were raised, but directions were given for the applications and the main appeal to be heard together.

During the appeal hearing, Senior Counsel Mr. Kioko Kilukumi, Mr. Nyamodi, and Mr. Issa Mansur led Mr. Sallah for the Appellant. Senior Counsel Professor Tom Ojienda led Mr. Omwanza for the 1st and 2nd Respondents, while Mr. Mahat Somane and Mr. Hassan Nura represented the 3rd and 4th Respondents. The Appellant's counsel informed the Court that the interlocutory applications would be subsumed in the main appeal.

Professor Ojienda, representing the 1st and 2nd Respondents, argued that the Notice of Appeal was fatally flawed, having been filed in the High Court registry in Garissa rather than the Court of Appeal in Nairobi. This, he argued, rendered the appeal incompetent, as it failed to comply with the provisions of rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017, which requires appeals to be initiated by a Notice of Appeal, and rule 6(2), which mandates that an appeal be lodged within seven days of the contested decision. He cited the Supreme Court decision in ***Anuar Loitiptip v IEBC and 2 Others*** **[2019] eKLR**, which emphasized that the proper and timely filing of a Notice of Appeal is an absolute requirement to invoke a court's jurisdiction.

Mr. Somane, on behalf of the 3rd and 4th Respondents, supported this position, arguing that the Notice of Appeal was a jurisdictional prerequisite and must contain sufficient information. He drew attention to the case of ***Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 others*** **[2018] eKLR**, where a similar issue arose, and despite lapses in the Notice of Appeal, the Court excused them as mere inelegance. However, counsel urged the Court not to follow this approach, as it had been superseded by the Supreme Court decision in ***Anuar Loitiptip***.

The Respondents collectively argued that the Notice of Appeal as filed violated rule 6 of the Election Petitions Rules and was thus null, void, and incapable of initiating an appeal. The Appellant, opposing the preliminary objection, argued that it was brought late and not formally as required by rule 19 of the Court of Appeal (Election Petition) Rules, 2017. The Appellant's counsel also contended that the rules did not specifically require that a Notice of Appeal be lodged in the Court of Appeal and that there was a valid Notice of Appeal on record, albeit not part of the appeal record. Counsel further argued that under Article 159(2)(d) of the Constitution, which discourages sacrificing substantive justice for procedural technicalities, the Court should allow the filing of a supplementary Record of Appeal to include the valid Notice of Appeal. They sought to distinguish the present case from ***Anuar Loitiptip***, where no Notice of Appeal had been filed, asserting that in the present case, a notice was filed but not included in the Record of Appeal.

The Respondents countered by referencing the case of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*** **[1969] EA 696**, arguing that a preliminary objection could be raised at any time and without notice, and that jurisdictional issues were not subject to the formal requirements of rule 19. They also cited ***Apungu Arthur Kabira v IEBC & 2 Others*** **[2018] eKLR** to argue that even when an appeal is against the entire judgment, the Notice of Appeal must still specify the contested issues, and that there was no competent appeal before the Court.

Ultimately, the Respondents urged the Court to resist extending time for filing a supplementary Record of Appeal, as a Notice of Appeal is a primary document that cannot be supplemented. They contended that Article 159(2)(d) was not a remedy for every procedural lapse.

The Court was tasked with determining whether it had jurisdiction to entertain a preliminary objection, despite the Appellant's counsel arguing that it had not been brought through a formal application and was raised late, in violation of Rule 17. The Court referred to the definition of a preliminary objection as outlined in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*** (supra), where it was stated that a preliminary objection involves a point of law that is either pleaded or implied from the pleadings and, if argued as a preliminary point, could dispose of the suit. The Court acknowledged that the issue of jurisdiction, being a pure point of law, is fundamental and must be addressed at any stage of the proceedings.

The Court found that it had jurisdiction to hear the preliminary objection. Regarding the competence of the Notice of Appeal, the Court cited the Supreme Court's holding in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others*** **[2012] eKLR** that a court's jurisdiction is derived from the Constitution or legislation. The Court also referred to Rule 6(1) of the Election Petition Rules, which mandates that all election petition appeals must be initiated by a Notice of Appeal, as emphasised in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*** **[2014] eKLR**. The importance of a Notice of Appeal was further underscored by the Supreme Court in ***Patricia Cherotich Sawe v IEBC & 4 Others*** **[2015] eKLR** and ***IEBC v Jane Cheperenger & 2 Others*** **[2015] eKLR**, which stressed that a Notice of Appeal is a jurisdictional prerequisite.

The Respondents' counsel argued that the Notice of Appeal was non-compliant with Rule 6 of the Election Petition Rules as it was filed in the High Court at Garissa rather than the Court of Appeal. The Court acknowledged the importance

of a Notice of Appeal in invoking jurisdiction, as highlighted in ***Anuar Loitiptip v IEBC & 2 Others*** (supra). The Court also considered Rule 8, which sets out the contents of a Record of Appeal, including the Notice of Appeal, and the need for the record to be filed within 30 days of the judgment.

The Court observed that the Notice of Appeal did not meet the requirements of Rule 6(3), making it invalid and incapable of invoking the Court's jurisdiction. The Appellant's counsel sought to rely on Rule 5 of the Election Petition Rules and Article 159(2)(d) of the Constitution to cure the defect. However, the Court noted that jurisdiction in election appeals is governed by Section 85A of the Elections Act, which limits appeals to matters of law only, as affirmed in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** **[2014] eKLR** and ***John Munuve Mati v Returning Officer Mwingi North Constituency & 2 Others*** **[2018] eKLR**.

The Court found that the Notice of Appeal filed in the High Court at Garissa was invalid as it was filed in the wrong registry and did not comply with the requirements of Rule 6. The second Notice of Appeal, dated 10 March 2023, was also found to be defective in form and content. The Court held that without a valid Notice of Appeal, there was no jurisdiction to entertain the appeal. The Court also rejected the Appellant's reliance on Article 159(2)(d) to cure the defect, citing the Supreme Court's directive in ***Apungu Arthur Kabira v IEBC & 2 Others*** **[2018] eKLR** that procedural requirements must be strictly followed in election petitions.

Ultimately, the Court upheld the Respondents' preliminary objection, finding that there was no valid appeal before the Court due to the defective Notice of Appeal. The Court reiterated that jurisdiction is everything and that without it, the Court has no power to make any further steps, referencing ***The Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Limited*** **[1989] KLR** 1. The appeal was struck out, and costs were awarded to the Respondents.

Musimba v Independent & Boundaries Commission & 2 others Makueni Election Petition E001 of 2022

High Court of Kenya at Makueni

Coram: Onyiego J

Ruling Dismissing Preliminary Objection

17 October 2022

Joinder of Deputy Governor to election petition challenging gubernatorial election-whether petition is fatally defective and incompetent for non- joinder of the Deputy Governor as a necessary a party/Respondent-whether Deputy Governor can be joined after lapse of time for filing election petition-whether there is a statutory timeline for filing an interlocutory application-whether joinder application amounts to application to extend timelines for filing election petition

Summary of facts

The Petitioner filed a petition on 9 September 2022. Contemporaneously filed with the petition under certificate of urgency was a Notice of Motion dated 8 September 2022 seeking supply of all election materials, retallying and scrutiny of all votes cast in the entire county. The Petitioner subsequently filed a notice of motion application under certificate of urgency dated September 15, 2022, and filed on September 16, 2022, seeking to join Lucy Mumbua Mulili, the Deputy Governor of Makueni County, as the 4th Respondent in the ongoing proceedings. The application also sought other ancillary orders and costs.

In response, the 1st and 2nd Respondents filed a Replying Affidavit contesting the application's validity. They argued that the application was defective for not citing the relevant legal provisions and that it contravened Article 87(2) of the Constitution and Section 76(1)(a) and 77 of the Elections Act, which stipulate the timeframe for filing petitions challenging gubernatorial elections.

Further, the 1st and 2nd Respondents filed a notice of preliminary objection and a motion seeking to strike out the entire petition for various procedural irregularities, including the failure to join the Deputy Governor within the statutory timeframe and the failure to deposit the required security amount.

The 3rd Respondent also challenged the court's jurisdiction to hear the Petitioner's application, arguing that it was filed outside the statutory timelines. They sought orders to strike out the petition for failure to include the Deputy Governor as a Respondent.

In response to these objections, the Petitioner filed a Replying Affidavit refuting the allegations and defending the timeliness and validity of their application. They argued that the petition raised substantial issues deserving of merit-based consideration and that the requirement to deposit security was fulfilled within the stipulated timeframe.

The court directed that all applications and objections be consolidated and heard simultaneously, scheduling submissions and a hearing for 13 October 2022.

The Petitioner's counsel argued that the preliminary objections raised did not meet the threshold set out in ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*** **(1969) EA 696**. They contended that the Respondent's assertion that the application for joinder should have been filed within 28 days of the declaration of results was erroneous. They further argued that rule 17(d) of the Elections (Parliamentary and County Elections) Petition Rules 2017 allows for the filing of interlocutory applications either at the point of filing the petition or during the intervening period before the matter is fixed for case management. They asserted that there were no statutory timelines set for filing interlocutory applications.

Counsel emphasized that the court was properly constituted under rule 6(1)(a) of the Elections (Parliamentary and County Elections) Petition Rules 2017 regarding the hearing of the petition challenging the election of a Governor. They pointed out that the declaration of the election of the Deputy Governor of Makueni was made on 19 August 2022, through a Gazette Notice, and thus, the 28-day period began from that date up to 16 September 2022, when the application was filed. Counsel argued that the Deputy Governor, having been duly served with the application but failing to file a response, indicated a lack of interest in participating in the proceedings.

In the alternative, they submitted that the Rules did not require or make it mandatory for a Deputy Governor to be joined as a Respondent. They argued that the non-inclusion of the Deputy Governor as a Respondent was not fatal to the petition, and the Deputy Governor could apply to be joined if she wished. They cited

case law, including ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*** **(2017) eKLR**, to support their argument that the non-joinder of the Deputy Governor was not fatal to the petition. Additionally, they referenced several other cases to reinforce their contention that non-joinder of a Deputy Governor did not render the petition incompetent.

The 1st and 2nd Respondents argued that the gubernatorial election results were declared on 13 August 2022, and thus, the 28-day period for filing the gubernatorial election petition lapsed on 9 September 2022. The petition in question was filed on 9 September 2022 but did not name the Deputy Governor as a Respondent within the 28-day period.

Counsel contended that entertaining the Petitioner's application to join the Deputy Governor would amount to sanctioning the institution of an election petition against the Deputy Governor outside the timelines allowed by Article 87(2) of the Constitution and Section 76(1) of the Elections Act, 2011. They cited the case of ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** **[2014] eKLR** to support their argument. They further argued that compliance with the electoral dispute resolution timelines is a question of law, not fact, and the court lacks jurisdiction to extend statutory timelines. They referred to the case of ***Mukisa Biscuit Manufacturing Co Ltd*** to support their contention.

Regarding the omission of the Deputy Governor as a Respondent, counsel argued that it rendered the petition fatally defective, citing the case of ***Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries Commission & 4 others*** **[2017] eKLR**. They asserted that challenging the validity of the Governor's election also challenges the election of the Deputy Governor. Counsel emphasized that the Deputy Governor is entitled to a fair hearing under Article 50 of the Constitution, citing the case of ***Joel Makori Onsando & 2 others v Independent Electoral and Boundaries Commission & 4 others*** **[2017] e KLR.**

They also argued that the Petitioner was approbating and reprobating at the same time, abandoning the initial prayer for joinder and then asserting that it was not necessary since the Deputy Governor had not responded. They concluded that the only remedy for the error of non-joinder of the Deputy Governor is by amending the petition within the allowed 28 days for filing, failing which the petition would be fatally defective and subject to striking out.

Counsel for the 3rd Respondent reiterated the position held by the 1st and 2nd Respondents that the application for joinder of the Deputy Governor had not been filed within the statutory timelines. They reiterated that the submission by the Petitioner suggested that the declaration of results referred to the gazettement of the election results was factually and legally incorrect, as the declaration of results did not pertain to the publication of the results in a gazette notice. They referred to the case of ***John Michael Njenga Muthutho v Jayne Njeri Wanjiku Kihara & 2 others*** **[2008] eKLR**, where the court had held that the result of an election was not confined to just declaring who won. Under section 39 of the Elections Act, the results were declared after the close of the polling exercise, and the declaration for the Makueni gubernatorial election had been made by the 2nd Respondent on 13 August 2022, as envisaged by the Elections (General) Regulations 2012. Therefore, the 28 days' window within which the petition could be challenged by way of a petition had closed on 10 September 2022, whereas the instant application had been filed 33 days later. They argued that attempts to enjoin the Deputy Governor outside the 28 days' window period had been a violation of the statutory timelines. To support this position, they referred to material contained in the Judiciary Bench Book on Electoral Disputes Resolution at page 29 and the holdings in the case of ***Walter Enock Nyambati v Independent Electoral & Boundaries Commission & 4 others*** **[supra]** and ***Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others*** **[2013] eKLR**. They asserted that the court had no jurisdiction or powers to enlarge time, to amend any election petition, or to join a party to it. Regarding the consequences of failure to name the Deputy Governor as a Respondent in a petition seeking the nullification of the election of a Governor, they had referred to article 180(5) and (6) of the Constitution, arguing that a Deputy Governor was not merely nominated but declared elected upon the announcement of the election results and therefore his or her election could only be challenged through an election petition. They had contended that the election of a Governor was interwoven with that of a Deputy Governor such that an election for one had been an automatic election of the other, and thus the two could not be separated in the manner the Petitioner had done in that case. They had relied on the case of ***Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries Commission & 4 others*** **(supra)**, where the court had held that a Deputy Governor had assumed office through the relevant provisions of the law and could only be removed through the process set out in the law. In that regard, they had further referenced the case of ***Samwel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 others*** **[Supra]**, where the court had also held that failure to make the Deputy Governor a Respondent in a petition

challenging the election of a Governor had been a fundamental defect that would have led to the striking out of the petition. They had argued that prayer (p) of the petition, which had sought a declaration that the 3rd and 4th Respondent had not been validly declared as Governor-elect and Deputy Governor elect respectively read together with the application for joinder of the Deputy Governor had been a concession by the Petitioner on the mandatory necessity for the joinder of the Deputy Governor. When the matter had come up on 13 October 2022, for the highlighting of submissions, counsel had reiterated their respective positions in their written submissions. However, the Respondents had abandoned the question regarding the deposit of security, which they had confirmed had been filed in time.Top of Form

Issues for determination

1. Whether the Petitioner had established a case for joinder of the Deputy Governor as a party in the proceedings.
2. Whether the petition herein was fatally defective and incompetent for non-joinder of the Deputy Governor as a necessary a party/Respondent in the proceedings.

Determination of the court

The court addressed the central issues involving three applications and two preliminary objections, highlighting the absence of the Deputy Governor as a party. Recognizing the intertwined nature of the issues, the court decided to address them simultaneously. It was acknowledged that a security deposit had been made within the stipulated ten days, therefore that ground for dismissing the petition was spent. Regarding the application for the Deputy Governor's joinder, the Petitioner presented two arguments. Firstly, they contended that since the Deputy Governor was elected alongside the Governor and declared as such on the gazette notice of 19 August 2022, she should not be excluded from the petition. Secondly, they argued that the Deputy Governor's lack of participation did not necessitate her inclusion as there was no mandatory requirement for her joinder. In addressing the necessity of joining the Deputy Governor, the court examined relevant legal provisions governing gubernatorial elections, result declarations, and petition processes. They referred to Article 180 of the Constitution, Article 87(2), and highlighted procedural rules. Although both parties agreed that the Makueni County Governor was declared duly elected on 13 August 2022, disagreements arose over the commencement of the 28-day period for challenging the Deputy

Governor's election.The court dismissed the argument that Section 76(2) and (4) of the Elections Act allowed the Petitioner to amend the petition within 28 days. They emphasized that the declaration of election results could not be divided, thus rejecting the notion of a separate petition against the Deputy Governor.

While acknowledging the Deputy Governor's potential interest, the court stated she could seek joinder through an interlocutory application. However, given the Petitioner's disavowal of the joinder application, and the Deputy Governor's lack of interest, the court dismissed the application as lacking merit.

The court cited ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** and ***Raila Odinga& 5 others v Independent Electoral and Boundaries Commission and 3 others*** to emphasize the importance of observing strict timelines.

The court then turned to the critical question of whether the non-joinder of the Deputy Governor was fatal to the petition. Referring to Article 180(1) of the Constitution, it noted that the Governor is elected by the voters, with the Deputy Governor nominated by the Governor, and the Independent Electoral and Boundaries Commission (IEBC) declaring the Deputy Governor based on the Governor's success. The court interpreted this to mean that the Deputy Governor's election hinged on the Governor's election, thus recognizing the High Court's jurisdiction in hearing election petitions concerning Governors, not Deputy Governors.

Furthermore, the court noted that the election laws define a candidate as one contesting for an elective post, excluding the Deputy Governor, who is a nominee. The court referred to the case law, including ***Japhet Muroko & another v Independent Electoral and Boundaries Commission (IEBC) & 2 others*** **(2017) e KLR**, where the court held that the Deputy Governor's position was not distinctly elective, and imposing the Deputy Governor into a petition was not warranted. The court highlighted differing views within the High Court jurisprudence on whether failure to join a Deputy Governor was fatal to a petition. Some argued that it was fatal, citing cases like ***Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries commission & 4 others (supra)***, where the court held that failure to enjoin the Deputy Governor rendered the petition incurably defective. Similarly, in ***Joel Makori Onsando & 2 others v Independent Electoral and Boundaries Commission &4 others (supra)***, the court held that condemning the Deputy Governor unheard violated the right to a fair hearing yet, other cases, such as ***Lesirma Simeon Saimanga v Independent Electoral and Boundaries Commission & 2 others*** **(2017) eKLR**, argued that joinder of the Deputy Governor was unnecessary unless specific allegations were made against them.

The court aligned with the latter school of thought, asserting that the Deputy Governor's joinder was immaterial, as their fate was tied to that of the Governor. The court emphasized that a Deputy Governor could not claim special autonomy from the Governor's fate and dismissed the Respondents' objections, concluding that the non-joinder of the Deputy Governor was not fatal to the petition. Therefore, the Respondents' notices of motion and preliminary objections were dismissed, with costs in the cause.

Musimba v Independent Electoral & Boundaries Commission & 2 others Makueni Election Petition E001 of 2022

[2023] KEHC 1380 (KLR)

High Court of Kenya at Makueni

Coram: Onyiego J

Judgment Dismissing Petition

28 February 2023

Whether electronic failure compromised voter turnout-whether there were unexplainable discrepancies between the votes cast for the County Governor's position and other elective positions-whether the 1st Respondent carried out the verification, tallying and declaration of the results in accordance with the applicable electoral laws-whether 3rd Respondent was validly elected-costs

Summary of facts

The petition related to the gubernatorial election for Makueni County. Among the candidates that contested the position of Governor in Makueni County were Mutula Kilonzo, who emerged victorious after garnering 214,088 votes; Patrick Mweu Musimba who came second with 63,252 votes; David Masika who garnered 8,378 votes, Emmanuel Mutisya who garnered 2, 929 votes and Anderson Kaloki who garnered 843 votes. On 13 August 2022, the County Returning Officer (the 2nd Respondent) declared Mutula Kilonzo Junior (the 3rd Respondent) as the duly elected Governor Makueni County. A Gazette Notice Vol CXXIV No 166 was published on 19 August 2022 by the IEBC (the 1st Respondent) declaring the 3rd Respondent as the Governor Makueni County and Lucy Mumbua Mulili as his Deputy Governor. The two were subsequently sworn in and assumed office on 25 September 2022.

The Petitioner, dissatisfied with the outcome of the gubernatorial election, lodged a petition on 8 September 2022, and formally filed it on 9 September 2022. The petition outlined a series of orders sought from the court, including access to all election materials, including electronic documents and devices used during the election process, full remote access to electronic devices used for transmitting results to constituency tallying centres, details of smartphones used by Returning Officers and access to their respective logs, certified copies of raw images

of Forms from all polling stations, IP addresses of KIEMS Kits used at polling stations, GPS locations for each KIEMS Kit and polling station, certified lists of KIEMS Kits' unique identifiers, including MAC addresses and IMEI numbers, counts of voters identified by KIEMS Kits at polling stations, KIEMS Kit logs, including user login details and timestamps, and all Forms related to voter identification, polling station diaries, and reports on assisted voting.

Additionally, the Petitioner requested scrutiny of rejected, stray, and spoilt ballot papers, a recount of all votes, retallying of all votes cast in the county, and a forensic audit of election equipment and technology. They sought a declaration of the election's invalidity due to non-compliance and irregularities, along with nullification of the election results.

Furthermore, the Petitioner challenged the validity of the Governor-Elect and Deputy Governor-Elect and requested the quashing of certificates issued to them. They also sought the annulment of the declaration made on 13 August 2022.

The court, after reviewing the petition, dismissed it on 21 December 2022, citing lack of merit. Following this decision, the Petitioner filed an application for review on 6 January 2023, which was subsequently dismissed on 3 February 2023.

The Petitioner's case was anchored on Articles 38, 10 and 81 of the Constitution as well as sections 39 and 44 of the Elections Act, which provide for results transmission and use of technology in elections respectively. In support of the petition, the Petitioner deponed that the 1st Respondent did not conduct credible, free and fair elections in Makueni County. It was his contention that contrary to the representations made at the media and county candidates briefing held on 6 August 2022 at Wote Technical Training Institute to the effect that all the systems for election in Makueni County had been tested and were ready, 140 KIEMS Kits were inoperable by the time polls opened on election day. The Petitioner faulted a lack of testing by the 1st and 2nd Respondent for this lack of functionality and asserted that the 1st Respondent had failed to meet its Constitutional and statutory obligation to provide functional KIEMS Kits to ensure credible, fair, secure and transparent elections as provided for in Article 86 of the Constitution.

The Petitioner also took issue with the use of the manual voting system, which he asserted was characterized by numerous irregularities which could have been avoided with proper preparation, planning and advance testing of the KIEMS Kits allocated to Makueni County. He blamed the failure of the KIEMS Kits for voter disenfranchisement and/or suppressed voter turnout in Kibwezi West

Constituency, where 84 out of 206 polling stations were affected. He contended that at his polling station, Sekeleni Primary School, many voters left the polling station in frustration without voting despite having queued from as early as 4:00 a.m. it was his assertion that the manual register was not available in most polling stations as it took the 1st Respondent over 6 hours from the time of the opening of the polling stations to issue directions on the use of the complementary voters' register, which caused many voters to leave without voting.

While he maintained that the voting exercise was peaceful, he took issue with the counting and tallying processes which he asserted were marred with irregularities and unexplained discrepancies between the votes cast for the various elective positions as follows: Presidential (290,491), Governor (289,538), Senator (290,550), Women Representative (289, 465). Since these discrepancies were unexplained, he took the view that they confirmed that the election exercise was not credible, fair transparent and accountable.

The 1st and 2nd Respondents denied that they had failed to preside over and conduct free, fair, transparent, reliable and credible elections. They maintained that they had discharged their duties in accordance with Articles 10, 27, 38, 81 and 86 of the Constitution and section 39 of the Elections Act.

In relation to the tallying and verification process, the 2nd Respondent maintained that he received all Forms 37A and Forms 37B from all the Constituency Returning Officers in the county, who verified and collated them in the presence of all the agents of the gubernatorial candidates, before announcing the final results.

They also took issue with the fact that the petition did not disclose the grounds forming the petition as contemplated by Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules 2017. They also contended that the 1st Respondent confirmed at paragraph 6 of its press release of 13 June 2022 titled "Response to Concerns by Azimio La Umoja One Kenya Coalition Party regarding GE 22", it had indicated that it would be guided by the ***NASA v IEBC*** **(2017) case** which adopted the 1st Respondent's protocol on the use of the printed register upon confirmation that the KIEMS kit had completely failed and there was no possibility of repair. It was also asserted that the use of an alternative mode of voter identification in the event of complete KIEMS Kit failure with no possibility of repair had been addressed in the case of ***United Democratic Alliance Party v Kenya Human Rights Commission and 12 Others*** **Civil Application Bo E288 of 2022.** They stated that the alphanumeric search was an alternative system used by the KIEMS Kit to identify voters whose biometrics could not be read, which

could only be done by a functioning KIEMS Kit, while the complementary system, which comprised the use of a manual register, would only be applicable once the KIEMS Kit failed and could not be repaired.

They confirmed that there had in fact been a media briefing on 6 August 2022 confirming that systems to be used were tested and ready, and that further tests comprising checking the availability of all the accompanying components, powering on and off of the KIEMS Kits, launching the voter identification applications at the county as well as constituency distribution centres as well as results transmission simulation in respect of the presidential election results were conducted.

In their response regarding the procurement and functionality of KIEMS Kits from Smartmatic, the 1st and 2nd Respondents emphasized several key points. First, they highlighted that an inventory of 45,000 KIEMS Kits was conducted, with 41,000 deemed to be in good condition. Additionally, Smartmatic supplied an additional 14,100 functional Kits. The defects observed during the election were primarily related to the opening of polling stations, a challenge not identifiable during pre-election testing, as it would have constituted an illegal premature opening.

Regarding the 36 additional KIEMS Kits for Kibwezi West Constituency, they argued that they were insufficient to cover the 84 affected polling stations adequately. However, the availability of manual registers ensured that all voters had the opportunity to cast their votes, thereby averting any irregularities in the voting process.

The 1st and 2nd Respondents refuted the allegations of intentional manipulation of KIEMS Kits, explaining delays as stemming from mandated procedural requirements. Compensatory measures, such as extending voting hours, were undertaken to offset lost time due to Kit malfunctions. Despite challenges, voter turnout at affected polling stations was deemed satisfactory, indicating no disenfranchisement of voters. Moreover, the prevalence of failed KIEMS Kits in Makueni County was not construed as evidence of election irregularities.

Regarding discrepancies in vote counts, they attributed them to minor and genuine reasons, refuting assertions of result inflation. They urged the court to dismiss the petition, asserting that the Petitioner had not discharged his burden of proof on inflation of votes to the required degree.

The 3rd Respondent opposed the petition, denying the allegations on the grounds that the election was conducted in a free, fair, transparent, simple, accurate, accountable and verifiable manner and that the same was conducted in accordance with the Constitution, electoral laws and regulations. The 3rd Respondent also contended that the petition did not set out firm and credible evidence of alleged departures from the Constitution, electoral laws and regulations and that he was a stranger to the press release of 10 June 2022 allegedly issued by the chairperson of the 1st Respondent. He contended that even if a declaration had been issued, it could not supersede electoral laws or the decision of the Supreme Court in ***Raila 2013 case*** where the Supreme Court noted that the manual register could not be reverted to in case there was a failure of election technology.

He maintained that there was no disenfranchisement not suppression of voters in Makueni County as alleged; that where there was alleged failure of KIEMS Kits , voting time was extended in the affected areas and no evidence of a single voter who was turned not allowed to vote on account of tailed KIEMS Kits was tendered. He urged the court to dismiss the petition with costs as the Petitioner did not sufficiently plead the issues raised in the petition, which rendered it incurably defective.

During the hearing of the petition, the Petitioner reaffirmed the details outlined in his petition and the statements made in his supporting affidavit. He described how he prepared early on election day to cast his vote but was surprised to learn that the KIEMS Kits malfunctioned, preventing voting in Kibwezi West Constituency. He highlighted that manual voting commenced only at mid-day, allowing absentee voters to participate, thus questioning the integrity of the voting process.

He raised concerns about external interference with the KIEMS kits, failure to follow ICT infrastructure guidelines, and non-adherence to tendering regulations. Despite manuals being available for ICT kits, he claimed the 1st Respondent neglected to address the issues. He argued that flawed electoral processes yield unjustified outcomes and cited voter suppression due to delayed voting commencement. He also questioned the delayed tallying of votes, particularly in Mbooni Constituency. During cross-examination by Mr. Nyaburi, he acknowledged the extension of voting time at his polling station but denied witnessing absentee or aided voters there. He also confirmed having no agents at any polling centres in the county except for the chief agent and deputy.

During the hearing, the 1st and 2nd Respondents presented three witnesses: Mr. Nderitu (RW1), the County ICT Officer for Makueni County; Evanson Githin

ji Ngomano (RW2), the Returning Officer for Kibwezi West Constituency; and Maurice Kepoi Raria (RW3), the County Returning Officer for Makueni County.

RW1, in his sworn affidavit from September 20 2022, detailed the voting process using KIEMS Kits. He explained that Makueni County received 90 kits for training election officials on July 19 2022, and 1,220 kits on August 4 2022, which were tested and stored. On August 8 2022, 84 KIEMS Kits in Kibwezi West Constituency failed to function due to a data validation error. Despite efforts to resolve the issue, manual voting commenced promptly upon authorization, compensating for lost time. RW1 affirmed that Form 32A was completed lawfully, and voters were not disadvantaged by the kit failure.

RW2, adopting his affidavit from September 20 2022, supported RW1's testimony regarding election preparedness and the response to KIEMS Kit failure. He reported the failure to the County Elections Manager and conducted manual voting upon receiving instructions from IEBC headquarters. RW2 ensured proper documentation and transparency throughout the process, with no objections raised by agents.

RW3, adopting his affidavit from September 20 2022, corroborated RW1 and RW2's accounts of the KIEMS Kit failure on August 9 2022. He received reports of 84 failed kits early on election day, leading to swift authorization for manual voting. RW3 clarified discrepancies in results for various elective positions, attributing them to specific issues like excess valid votes and missing or defective voting materials. He deemed these discrepancies insignificant to invalidate the results.

The 3rd Respondent supported the 1st and 2nd Respondents, asserting that the election adhered to legal requirements. He argued the petition lacked competence for not including the Deputy Governor and failing to address all necessary issues. He stated that the failure of KIEMS Kits was not anyone's fault and manual voting did not disadvantage voters. He denied claims of undue delay in voting and noted no complaints from alleged voters who could not vote. He highlighted that voter turnout did not significantly differ between areas with manual and electronic voting, such as Kibwezi West and Kibwezi East.

Issues for Determination

1. Whether there was electronic failure in Makueni Gubernatorial election exercise and if so, whether the said failure compromised the voter turnout.
2. Whether the use of manual voting system compromised the credibility, verifiability, integrity, accountability and transparency of the declared results.
3. Whether the 1st Respondent carried out the verification, tallying and declaration of the results in accordance with the applicable electoral laws.
4. Whether there were unexplainable discrepancies between the votes cast for the County Governor's position and other elective positions.
5. Whether the 3rd Respondent was validly elected.
6. Whether the reliefs sought can issue.
7. Who bears the costs.

Determination of the court

On the issue of whether there was electronic failure in Makueni Gubernatorial election exercise, the court noted that the crux of the petition was the failure of technology occasioned allegedly by dysfunctional KIEMS Kits deployed to about 84 polling stations in Kibwezi West Constituency, Makueni County. The court asserted that the voting exercise was managed electronically, save for exceptional circumstances where manual voting could apply through a complementary mechanism of voter identification.

The court conducted an exhaustive examination of the implications arising from technological malfunctions within the electoral framework, particularly scrutinizing Section 44 of the Elections Act, which delineates the imperative use of integrated electronic systems for various electoral processes, including voter registration, identification, and result transmission. Emphasizing the IEBC's statutory duty, the court underscored the significance of ensuring that electoral technologies adhere to principles of simplicity, accuracy, and transparency, thereby upholding the fundamental tenets of credible and transparent elections.

In the legal discourse surrounding the contested 9 August 2022 election, vigorous debates surfaced regarding the efficacy of manual registers as fallback mechanisms, prompting judicial review in pivotal cases such as ***United Democratic Alliance Party v Kenya Human Rights Commission and 12 Others***. This landmark case solidified the legality of implementing complementary mechanisms to safeguard unfettered access to the electoral process, as mandated by Section 44A of the Act. Drawing on jurisprudential insights from pivotal cases like ***Odinga & 16***

Others v Ruto & 10 Others and Raila & 5 Others v Independent Electoral and Boundaries Commission & 3 Others, the court illuminated the inherent vulnerabilities of electoral technology, advocating for robust contingency measures to mitigate technical disruptions and preserve the integrity of electoral outcomes.

In reviewing the failure of KIEMS Kits in Kibwezi West Constituency, the court evaluated allegations of external interference and manipulation, leveraging established legal precedents to discern patterns of electoral malpractice. The court found that there was no substantive evidence corroborating claims of deliberate interference. Furthermore, the court delved into the intricacies of training and testing protocols, contrasting procedural norms with practical exigencies to discern the underlying causes of technical breakdowns. The court emphasized that minor procedural omissions in election preparation do not warrant nullification of election results, especially when alternative lawful methods, such as manual voting, are available. Despite disagreements over end-to-end testing protocols, discrepancies alone do not invalidate results obtained through legitimate means. The Petitioner's demands regarding nullification or retraining of IEBC staff on testing procedures were unclear. Additionally, the court questioned how poor training affected only one constituency while others underwent similar training without incident.

The court attributed the failure of KIEMS Kits to underlying technical issues rather than deliberate interference. It dismissed claims of flawed procurement processes, highlighting the lack of evidence to isolate Kibwezi West Constituency's issues from the broader procurement framework. Overall, the court found no evidence of intentional wrongdoing or human interference in the malfunction of the kits.

On the question of whether manual voting compromised the credibility, verifiability, integrity, accountability and transparency of the declared results, the court conducted a thorough examination of the implications arising from technological malfunctions within the electoral framework, particularly scrutinizing Section 44 of the Elections Act, which mandates the use of integrated electronic systems for various electoral processes. It emphasized the statutory duty of the IEBC to ensure that electoral technologies adhere to principles of simplicity, accuracy, and transparency, thereby upholding the fundamental tenets of credible and transparent elections.

In the legal discourse surrounding the contested 9 August 2022 election, debates emerged regarding the efficacy of manual registers as fallback mechanisms, lead

ing to judicial review in pivotal cases such as ***United Democratic Alliance Party v Kenya Human Rights Commission and 12 Others***. These cases solidified the legality of implementing complementary mechanisms to safeguard access to the electoral process, as mandated by Section 44A of the Act. The court drew on jurisprudential insights from cases like ***Odinga & 16 Others v Ruto & 10 Others*** and ***Raila & 5 Others v Independent Electoral and Boundaries Commission & 3 Others***, highlighting the vulnerabilities of electoral technology and advocating for robust contingency measures to preserve the integrity of electoral outcomes.

In reviewing the failure of KIEMS Kits in Kibwezi West Constituency, the court evaluated allegations of external interference and manipulation, leveraging legal precedents to discern patterns of electoral malpractice. It found no substantive evidence corroborating claims of deliberate interference and delved into training and testing protocols, contrasting procedural norms with practical exigencies. The court emphasized that minor procedural omissions do not warrant nullification of election results, especially when alternative lawful methods, such as manual voting, are available. Disagreements over end-to-end testing protocols did not invalidate results obtained through legitimate means.

The court dismissed claims of flawed procurement processes and clarified the necessity of scrutiny for form 32A, citing a lack of evidence. Referring to the Supreme Court's ruling, it affirmed that manual voting did not disenfranchise voters or significantly impact turnout. Overall, the court concluded that there was no evidence that as a result of manual voting, the outcome was not credible, verifiable, accountable and transparent.

On the question of whether the 1st Respondent carried out the verification, tallying and declaration of the results in accordance with the applicable electoral laws, the court noted that the Petitioner alleged that the tallying process was characterised by irregularities such as inflation of results in polling stations where more people voted than were registered in the KIEMS Kit, thereby lacking transparency in tabulation of results. The Petitioner had alleged that the 1st Respondent did not adduce Forms 37A as evidence to show how tabulation of results was done and that the results were not signed by agents as required. The Court reviewed Regulation 76 of the Elections (General) Regulations on the process of counting of votes.

The Court noted that from the testimony of RW2, the Constituency Returning Officer, he populated the Form 37B after receiving all forms 37A from Presiding Officers at the Constituency Tallying Centre and in the presence of agents repre

senting all candidates signed the requisite form for declaration and transmission of results before handing over to the County Returning Officer who also populated Form 37C and declared the winner without objection. The Petitioner was represented by King'ola Muthusi, who signed the result declaration form as an agent, despite claiming that he did not have any agent at the tallying centre. The court noted that there were no anomalies or irregularities in the manner in which the verification, tallying and declaration of results was done. The court deprecated the Petitioner for claiming that voter verification was not properly done and results inflated without proof. There were also no agents who came forward to prove that anomalies or malpractices occurred. The court was also satisfied with the explanation regarding the four polling stations where votes cast exceeded registered voters and therefore did not find any ground on which the glaring irregularities or malpractices in verification, tallying and declaration were of such a magnitude as to vitiate the results.

On the question of whether there were unexplainable discrepancies between the votes cast for the position of Governor and other elective positions, the Petitioner asserted that there were unexplained discrepancies in the votes cast for the six elective positions. The Petitioner asserted that there was no explanation to justify the discrepancies, given that each voter was given 6 ballot papers. In response, the 1st Respondent, through the affidavit of Maurice Kepoi Raria explained that the discrepancies were explainable on the basis that the results for County Women Representative in Kasyelia Primary School, Kaseuni Nursery School, Kithiini Primary School and Komboyoo were disregarded due to the total number of votes exceeding the number of registered voters; no Governor and women representative results were received from Ngaaka Primary and Kathulimbi Primary as the same were misplaced, thereby calling for police action; that no votes were cast at Muvuti Primary for the position of Senator as the station did not receive the Senate ballot papers and there were spoilt and stray votes which were accounted for in the polling station diary.

The court noted that there was no dispute that there were discrepancies in the votes cast in the four elective positions. It was also trite that infractions, omissions and commissions were bound to occur in any election exercise. Taking into account the explanation given to justify the vote discrepancies, which the court found convincing, the court was satisfied that the discrepancies were not created with any mischief in mind and were in any case too negligible to vitiate any election result. Guided by the ***Raila 2017*** decision to the effect that for irregularities or procedural infractions to invalidate an election they had to be of such a

profound nature as to affect the actual result or the integrity of the election, the court ruled that the discrepancies were not so glaring as to call for a nullification of the results. Reference was also made to the decisions in ***Wavinya Ndeti v IEBC & 4 Others*** **(2013) eKLR** and ***Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others*** **(2014) e KLR** where the courts took a similar position.

Guided by the decision in ***Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 Others*** **(2013) e KLR,** to the effect that not all non-compliances, acts or omissions or breaches of election regulations or procedures would render an election invalid, the court found that the Petitioner had not established to the required standard how the vote discrepancies affected the validity of the election results.

On the question of whether the 3rd Respondent was validly elected, Mr. Kimathi argued two main points regarding the Makueni gubernatorial election. Firstly, he contended that the election was marred by irregularities that invalidated the declared results. Secondly, he highlighted the impact of delayed voting due to KIEMS Kits failure, which prevented over 91,000 voters from casting their ballots. In response, the Respondents emphasized the significant margin of votes obtained by the 3rd Respondent, indicating a valid election outcome even without the entirety of Kibwezi West constituency votes.

While acknowledging that an election is not solely about numbers but also about the process, the court noted that winners are determined by the highest number of votes obtained. Citing the case of ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*** **[2017] eKLR**, the court highlighted the critical importance of numbers in an election. Since there were no significant irregularities or malpractices that would invalidate the election results, the court concluded that the 3rd Respondent was validly elected, reflecting the will of the people of Makueni County.

The court reiterated the ultimate goal of any competitive election: to elect leaders who represent the will and choice of the people through universal suffrage. Citing the case of ***Justin Ringa Chirume and 2 others v Independent Electoral and boundaries commission and 3 Others*** **[2022] eKLR**, the court emphasized that upholding the will of the people is paramount when irregularities are not substantiated in an election petition.

On the question of reliefs, seeing as the application for scrutiny had already been determined and having ruled that the 3rd Respondent had been validly elected, the court found that there were no reliefs to grant the Petitioner.

On the question of costs, the court made reference to Section 84 of the Elections Act and Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules 2017. It was underscored that while costs typically follow the event, the court retains discretion in determining cost allocation based on the circumstances of each case. Precedents such as ***Denis Magare Makori & another v Independent Electoral & Boundaries Commission &3 Others*** **(2018) e KLR** and ***Martha Wangari Karua v Independent Electoral & Boundaries Commission &3 Others*** **(2018) e KLR** were cited, emphasizing that fairness, justice, and access to justice should guide cost decisions.

It was emphasized that costs should not impede access to justice and should consider factors like the time taken for preparation, the complexity of the case, and the number of counsels involved. In the current case, the Respondents were awarded costs capped at three million, with the 1st and 2nd Respondents sharing one million equally, supported by taxpayer funds, and the 3rd Respondent receiving two million.

Before concluding, the court commended the parties for their conduct during the proceedings, highlighting their sobriety. Additionally, the court acknowledged the professionalism and respect demonstrated by the counsels and expressed gratitude to the judicial staff for their dedication and commitment to duty throughout the process.

Mutula Kilonzo Junior v Independent Electoral and Boundaries Commission & 2 Others Nairobi Election Petition Appeal E002 of 2022

Court of Appeal at Nairobi

Coram: Omondi, Laibuta & Ali-Aroni JJA

Judgment Dismissing Interlocutory Appeal

6 October 2023

Joinder of deputy governor in petition concerning election of governor-whether failure to join deputy governor in a petition challenging gubernatorial election is fatal to the petition-whether deputy governor can be joined to petition as interested party-whether non-joinder of deputy governor as a party renders petition fatally defective

Summary of the facts:

The 3rd Respondent, by way of an application dated 21 September 2022, had sought to join the deputy governor as a party to the petition before the High Court. Simultaneously, the Appellant herein, by an application dated 20 September 2022, had sought to have ethe 3rd Respondent's petition struck out with costs for failure to join the deputy governor as party to the petition. Two preliminary objections were filed by the 1st and 2nd Respondent and the 3rd Respondent respectively. The High Court heard the objections and two applications together. Two issues for determination were isolated by the trial court: whether the Appellant had made a case for joinder of the deputy governor as a party in the proceedings; and whether the petition was fatally defective and incompetent for non-joinder of the deputy governor as a necessary party/Respondent in the proceedings. Vide a ruling dated 17 October 2023, the trial court dismissed the two applications, taking the view that the deputy governor was not a necessary party to the petition. The Appellant, aggrieved by this ruling, preferred an appeal on the grounds that the learned judged had erred in law and fact in holding that a deputy governor was not a candidate or contestant for purposes of an election but merely a nominee who rode on the success or failure of the governor; by holding that the deputy governor should have applied to be joined in the petition as an interested party; by failing to appreciate that if joined as interested party, the deputy governor would never enjoy the rights of a substantive party; in finding that the deputy governor did not show interest in the petition and by failing to appreciate the

Supreme Court decision in the case of ***Zakariah Okoth Obado v Edward Akong'o Oyugi & 2 Others*** **[2014] eKLR.**

While the substantive appeal had been heard at the time of hearing of this interlocutory appeal, the counsel for the parties were of the view that the issue of joinder or non-joinder of a deputy governor in an election petition challenging the election of a governor remained unsettled, and that it was time that the Court of Appeal made a pronouncement on the subject. It was also urged on behalf of the Appellant that it was not clear whether the 3rd Respondent would challenge the outcome of the main petition and that a withdrawal of the appeal could adversely affect the governor. The court therefore proceeded to hear the appeal.

In support of the appeal, the Appellant relied on Article 180 (5) of the Constitution, urging that the provision required every candidate seeking to be elected as a governor to nominate a candidate with similar qualifications as deputy governor. It was urged that no separate elections would be conducted for deputy governor and that Article 185(5) of the Constitution stipulated that the person so nominated would become deputy governor if the candidate for the office of governor won. It was therefore submitted that the elections of governor and deputy governor were intertwined and inseparable as both candidates were elected during the same election and therefore the deputy governor could not be said to be a mere nominee who rode on the success or failure of a governor. In support of his arguments, the Appellant relied on the cases of ***M'nkiria Petkay Shem Miriti v Ragwa Samuel Mbae & 2 Others*** **[2013] eKLR**; ***Josiah Taraiya Kipelian Ole Kore v Dr. David Ole Nkedienye & 3 others*** **[2012] eKLR**; & ***Mugambi Imanyara v The Independent Electoral and Boundaries Commission of Kenya*** **[2022] KEHC 12252 (KLR).**

Further, the Appellant's counsel urged that even if the deputy governor were to apply to be joined as an interested party, it was not available as of right as it depended on the discretion of the court and even if it were granted, the deputy governor would not participate fully in the suit. In support of this argument, counsel relied on the case of ***Francis Muruatetu & Another v Republic & 4 Others*** **[2016] eKLR.**

The 1st and 2nd Respondents supported the appeal, contending that the deputy governor was equally elected upon the election of the Appellant, which was demonstrated by the way a deputy governor ought to be removed from office, which is by way of petition. Counsel for the 1st and 2nd Respondents, relying on the case of ***Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries***

Commission & 4 Others **[2017] eKLR** urged that excluding a deputy governor from an election petition challenging the election of governor would create an incurable absurdity. Counsel also contended that rule 2 of the Elections (Parliamentary and County Elections) Petition Rules to the effect that a deputy governor would be affected by an election petition against a governor and therefore ought to be given an opportunity to be heard on the issues before the court. It was also asserted that the electoral justice system was founded on the Constitution and natural justice; that Article 50 of the Constitution required everyone to be accorded a fair hearing.

The 3rd Respondent opposed the appeal, asserting that a reading of Articles 180 (5) and (6) made it clear that the person elected was the governor and the deputy governor was a mere nominee. Further, from a reading of rule 2 of the Election Petition Rules, non-inclusion of the deputy governor as a party in the petition challenging the governor was not fatal, as the deputy governor was not directly elected by the voters as provided for in Article 180 (1) of the Constitution. In support of his arguments, counsel relied on ***Kithinji Kiragu v Martin Nyaga Wambora & 2 others*** **[2013] eKLR;** ***Japhet Muroko & Another v Independent Electoral and Boundaries Commission*** **[2017] eKLR;** ***Wavinya Ndeti & Another v IEBC and Others*** **Machakos Election Petition No. 1 of [2017] eKLR;** and ***Walter Enock Nyambati Osebe v IEBC & 2 Others*** **Nyamira Election Petition 1 of 2017 [2018] eKLR**, in all of which the court took the view that while joinder of deputy governor was desirable, non-joinder did not render a petition fatal. Relying on the cases of ***Lesirma Simeon Saimanga v Independent Electoral Commission & 2 Others*** **[2017] eKLR** & ***Dziwe Pala Zuma & Another v The Election Boundaries Commission & 2 Others*** **[2023] eKLR,** counsel for the 3rd Respondent further contended that the case concerned the validity of the election of the governor and not the deputy, and even where the election courts found that the deputy governor ought to have been made a party to an election petition, the courts did not find the petition so defective as to warrant striking out. In any case, despite non-joinder, the deputy governor had been served with all pleadings, but of her own volition, had not sought to be joined to the proceedings. Furthermore, counsel's argument drew upon precedents such as ***Raila Amolo Odinga & Another v Independent Electoral & Boundaries Commission & 2 Others*** **[2017] eKLR** and ***Raila Amolo Odinga & Another v Independent Electoral & Boundaries Commission & 8 others*** **[2022] eKLR**. These cases established that the absence of the deputy president as a party did not invalidate the petitions. Similarly, since no allegations were made against the deputy governor in this instance, the petition was deemed legally sound.

Since this was a first appeal, the court, guided by the principles in ***Selle v Associated Motor Boat Company & 3 Others*** **[1968] EA 123** was enjoined to evaluate the evidence afresh in order to arrive at its own independent conclusion. It isolated the issues for determination as follows

Issues for determination

1. Whether the trial court failed to give regard to the principle of stare decisis;
2. Whether a deputy governor is a necessary party in an election petition involving the gubernatorial elections; and, if so,
3. Whether non-joinder of the deputy governor as a party renders the petition fatally defective.

Determination of the court

On the question of whether the trial court had failed to rely on the Supreme Court decision in the ***Obado*** case, which the Appellant's counsel contended had settled the issue of joinder of a deputy governor in an election petition, the court noted that this proposition was opposed by the 3rd Respondent's counsel. However, the court also observed during the hearing of the appeal that there appeared to be consensus on the part of all counsel that the ***Obado*** case did not address the subject issue and still remained unsettled, more so because of the conflicting pronouncements by different election courts.

The court agreed with the parties that the issue of joinder of the deputy governor was still a grey area, seeing as it was never an issue for determination before the Supreme Court in the ***Obado*** case. Moreover, in ***Gatirau Peter Munya v Dickson Mwenda Kithinji*** **[2014] eKLR**, the Supreme Court observed that it was unusual for a Constitution to be as preoccupied with the question, scope and methodology of its own interpretation as the Kenyan 2010 was. The robust nature of the 2010 Constitution was such that there still remained provisions relating to election matters that required the court's interpretation and/or intervention. The court was therefore minded to restate the principles necessary in interpreting the Constitution as it considered the spirit, intent and purpose in relation to the question of joinder.

On whether the deputy governor was a necessary party in an election petition involving gubernatorial elections, the court began by restating the principle in ***Tinyefuza v Attorney-General*****, Const. Pet. No. 1 of 1996 [1997 UGCC3]**, where the Court of Appeal of Uganda asserted the importance of reading the Constitution

as an integrated whole. The court emphasised that the Articles of the Constitution must be read and interpreted alongside one another, purposefully and holistically in order to appreciate the spirit, purport and intent of the Constitution, rather than interpreting the Articles of the Constitution in isolation and in a manner that suits particular circumstances or situations.

In her dissenting opinion in the case of ***Re the Speaker of the Senate & Another v Attorney General & 4 Others*, Supreme Court Advisory Opinion No. 12 of 2013**, Justice Njoki Ndungu highlighted the critical role of the Judiciary in Constitutional interpretation. She emphasized that every case presented to the Court should be seen as an opportunity to provide insightful guidance on the Constitution. Justice Ndungu stressed the importance of interpreting the Constitution in a manner that advances its objectives, gives effect to its intentions, and clarifies any ambiguities or contradictions that may arise from compromises made during its drafting. She underscored that Constitution-making is an ongoing process that extends beyond promulgation, with the courts playing a vital role in resolving disputes and elucidating Constitutional principles. Justice Ndungu emphasized the need for courts to invoke the spirit of the Constitution to illuminate and eliminate legal uncertainties, recognizing that the text alone may not fully capture the framers' intentions or the people's aspirations. Her opinion underscored the Judiciary's duty to ensure the enduring integrity and relevance of the Constitution through diligent interpretation and application.

With regard to Article 180 of the Constitution, the court noted that with regard to Articles 180 (5) and (6), the parties were in agreement that a candidate for the gubernatorial election was required to nominate a candidate for the position of deputy governor, who upon the election of the governor was deemed duly elected. However, the court was baffled by the differing decisions of the election courts on where to place the deputy governor when the election of the governor was challenged. The court summarised the three positions taken by election courts as follows: first, that the deputy governor was a necessary party in an election petition challenging the gubernatorial election and failure to be joined as a substantive party rendered the petition fatally defective; second, that the deputy governor did not need to be joined as a party to the election petition as he was a mere nominee, riding on the election of a governor and thus unaffected by the outcome of the election petition; and third, that the election petition of a governor directly affects the deputy governor but non joinder was not fatal. In the last scenario, the deputy governor could still participate as a witness or seek to be enjoined.

The court also acknowledged the argument by the 3rd Respondent that in some cases, the deputy president election was not joined as a party related in election petitions, yet the presidential petitions were fully heard and determined. Such was the case in ***Raila Odinga 2017***. The court noted that in ***Raila 2013*** and ***Raila 2022,*** the presidential candidate and his running mate were both parties to the election petitions.

The court drew a parallel between Article 148 and Article 180 (5) and (6) of the Constitution, where the former provides that the candidate nominated by the person who is elected as the President is declared by the IEBC to be elected as the Deputy President. However, the court noted that the joinder or non-joinder of a presidential candidate's running mate had not been an issue placed before the Supreme Court for determination and therefore the apex court had never pronounced itself on this issue. In ***Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission (IEBC) & 2 others*** **[2017] eKLR**, the court took the view that unless there was an election act or omission alleged against a deputy governor during the election, it was not necessary for them to be joined to the petition. In ***Hassan Omar Hassan & Another v Independent Electoral and Boundaries Commission & 2 Others*** **[2017] eKLR**, the court similarly held the view that joinder of the deputy governor was not crucial as they would suffer the same fate as the governor if election results were to be nullified.

Conversely, the election courts in ***Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries Commission & 4 Others*** **[2017] eKLR,** the court found that it would go against the principles of natural justice to proceed to hear the petition without the participation of the deputy governor. Similarly, in ***Samuel Kazungu Kambi v Nelly Ilongo & 2 Others*** **[2018] eKLR**, the court ruled the petition incurably defective for failure to include the deputy governor. Having reviewed the above Constitutional provisions and the decision in the ***Obado*** case, the court affirmed the decision in ***Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 4 Others*** **(supra) &** ***Samuel Kazungu Kambi v Nelly Ilongo & 2 Others*** **(supra)**, where the election courts found in favour of joinder of the deputy governor as a party alongside the governor in election petitions.

While the law did not prescribe the joinder of the deputy governor, the spirit, intent and purport of the Constitution and rule 2 of the Election Petition Rules militate in favour of joinder of the deputy governor as a substantive party to an election petition. The court was emphatic that the deputy governor was not a

bystander. Since they would be affected by the outcome of an election petition, it would only be fair for a deputy governor to be joined as a party, notified of the proceedings and given a chance to participate. To do otherwise would be to violate the principles of natural justice, illogical, unfair and unjust.

In light of the above, the court reached the inescapable conclusion that any petition that failed to name the deputy governor as a substantive party would be against the principles of natural justice, the letter and spirit of the Constitution and was therefore defective for all intents and purpose and ought to be struck out.

Since the interlocutory appeal had been overtaken by events, it was not necessary for the court to pronounce itself on the merits, save to clarify the law on the issue raised by the parties for the court's determination. In the circumstances, the court directed that each party bear their own costs.

Ngirici & another v Independent Electoral and Boundaries Commission & 3 Others Kerugoya Election Petition E001 of 2022

High Court of Kenya at Kerugoya

Coram: Mwongo J

Judgment allowing withdrawal of petition

Date: 27 February 2023

Withdrawal of election-whether costs are payable upon withdrawing petition-appropriate order of costs upon withdrawal

Summary of facts

The Petitioner unsuccessfully contested the gubernatorial election for Kirinyaga County in the August 9 general election. Dissatisfied with the results, the Petitioner filed a petition on 7 September 2022. All the Respondents filed their responses on time, save that the 1st and 2nd Respondents also filed an application to put in further affidavits to supplement their response. At the pre-trial conference, counsel for the Petitioners made an oral application to withdraw the petition. The court directed that a formal application for leave to withdraw be filed, complying with the statutory procedures and requirements, including advertising the withdrawal. The formal application was filed on 6 October 2022. While the 1st and 2nd Respondents were not opposed to the withdrawal, they sought that the same be subject to payment of their costs which they estimated at Kshs. 3,000,000. The 3rd and 4th Respondents did not participate in the issue of costs.

The applicant invoked Rule 21 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 to withdraw their election petition, emphasising the court's discretion on costs. They argued that Rule 30(2a) allowed cost orders even for successful parties, unlike regular civil suits. The Petitioners sought withdrawal without orders as to costs due to their early withdrawal, which they claimed had saved court time and expenses. Additionally, they asserted that the petition's nature as public interest litigation for electoral system compliance and the fact that it addressed the failures of the Respondents, not solely Petitioners' losses, warranted no cost orders. They cited Rule 30's provision for cost orders and proposed capping costs if deemed payable. Notably, the 3rd and 4th Respondents agreed to withdrawal without costs.

Conversely, the 1st and 2nd Respondents sought compensation for legal expenses, basing their argument on ***Ombati Richard v Independent Electoral and Boundaries Commission & 2 others*** **[2017] eKLR**, where costs were awarded due to the Petitioner's actions of filing a petition and causing the Respondents to incur expenses they would otherwise not have incurred. They also cited ***Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission and 2 Others*** **[2018] eKLR**, emphasizing the court's discretion in awarding costs.

The Petitioners argued against the proposed costs, deeming them excessive and contrary to precedents such as ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 5 others*** **[2018] eKLR**. They emphasized the fact that there were minimal court appearances i.e., there was only one physical appearance and two virtual appearances in court before the petition was formally withdrawn, and Respondents' admissions of flaws. They suggested a cap of Kshs 200,000 as reasonable costs, citing section 78 of the Elections Act for legislative guidance. They proposed using the security for costs deposit to cover any awarded costs, releasing the surplus to the depositor.

The 1st and 2nd Respondents argued that Rule 21 of the Elections (Parliamentary & County Elections) Petition Rules, 2017 permitted the court to make orders regarding costs. They emphasised that the rule stated a petition could not be withdrawn without the election court's leave and that the court could grant leave to withdraw a petition on terms concerning the payment of costs or as otherwise determined by the court.

They asserted that the Petitioner's actions had led to them incurring expenses they would not have otherwise, such as hiring counsel to handle the extensive election petition, which spanned 691 pages and required thorough research, witness interviews, preparation, filing, and serving of responses and witness affidavits, as well as court attendance. Consequently, they argued that they should be compensated for these costs.

The Respondents cited ***Mugambi Imanyara v Independent Electoral and Boundaries Commission & 2 others*** **[2018] eKLR**, wherein the court had exercised discretion in ordering payment of costs upon granting leave to withdraw. In that case, a global sum of Kshs 500,000 was awarded for a withdrawn election petition. They also referenced ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 5 others*** **[2018] eKLR**, where an initial cost award of Kshs 5,000,000 for a withdrawn election petition had been reduced to Kshs 2,500,000. The 1st and 2nd Respondents requested an award of Kshs 3,000,000 in costs.

Issue for determination

1. Whether costs should be awarded for the withdrawn petition, and if so, how much.

Determination of the court

The court, having allowed the withdrawal of the petition, proceeded to deliberate on the matter of costs. This deliberation involved a thorough examination of the parties' arguments and the legal precedents cited. Rule 30 (previously known as rule 32) of the 2017 Rules was central to the discussion, as it grants the court discretionary powers regarding the awarding of costs.

In its assessment, the court took into consideration several factors outlined in previous cases and legal provisions. These factors included the extensive nature of the pleadings, which encompassed 691 pages, and the responses filed by the Respondents. Despite the voluminous documentation, it was noted that there was only minimal court activity following the filing of responses, with just one physical court appearance and two virtual appearances before the petition's formal withdrawal.

Drawing from precedents such as ***Mugambi Imanyara v Independent Electoral and Boundaries Commission & 2 others*** **[2018] eKLR**, the court acknowledged the expenses incurred by the Respondents in hiring legal counsel and preparing responses to the petition. Additionally, it considered the principles laid out in ***George Thata Ndia v Independent Electoral and Boundaries Commission (IEBC) & 2 others*** **[2021] eKLR**, where reasonable costs were awarded based on the complexity and stage of the proceedings.

After careful consideration, the court exercised its discretion to award costs to the 1st and 2nd Respondents. However, the court deemed it appropriate to cap the costs at a global sum of Kshs 500,000. This decision took into account the fact that the Petitioner had withdrawn the petition at an early stage, thereby avoiding further costs and time expenditure.

Consequently, the court directed that the entire security deposit of Kshs 500,000 held in court be paid to the 1st and 2nd Respondents as party and party costs. This ruling aimed to provide fair compensation to the Respondents for the expenses incurred due to the Petitioner's actions while ensuring that the costs remained proportionate to the circumstances of the case.

V. PARLIAMENTARY ELECTION PETITIONS

Abdikadir Hussein Mohammed v Abass Ibrahim Kafow & 3 Others Nairobi Election Petition Appeal No E004 of 2023

In the Court of Appeal at Nairobi

Coram: M'Inoti, Omondi & Ngenye, JJ.A.

Judgment allowing appeal

Date: 25 August 2023

Scope of scrutiny and recount-principles of pleadings-scrutiny report-impact of unpleaded irregularities revealed during scrutiny on election result

Summary of facts

This appeal challenges the judgment delivered by Cherere, J. on 3 March 2023, as well as rulings from 26 January 2023 and 6 February 2023 regarding interlocutory applications. The parties opted not to consolidate the appeals but agreed to hear them concurrently. Key issues included the scrutiny process, its outcome, and whether the noted variances justified nullifying the election.

The appeal arose from the general elections held on 9 August 2022 for the Member of National Assembly seat for Lagdera Constituency in Garissa County. Abdikadir Hussein Mohammed, running on an ODM party ticket, was initially declared the winner with 5,929 votes, surpassing his closest rival Abdulqani Saytun by 1,049 votes. Mohammed Hire received 3,482 votes.

Dissatisfied with the results, the 1st and 2nd Respondents, both registered voters in Lagdera, filed a petition seeking vote scrutiny, invalidation of the election, and a fresh election. They alleged violence and intimidation by the appellant's supporters, which affected the voting process. The 1st Respondent, chief agent for the United Democratic Alliance (UDA) party, filed a motion on 4 October 2022 requesting scrutiny and recount of votes from several polling stations. The scope included examination of various election materials such as statements from Returning Officers, biometric data, and ballot papers.

The 1st Respondent detailed incidents of violence and intimidation at polling stations and accused the 4th Respondent of extending voting times and mishandling ballot box seals. The 2nd Respondent, though not witnessing malpractice, reported hearing of assaults on UDA agents.

The 1st and 2nd Respondents, along with their witnesses, claimed that the violence and intimidation extended to vote counting, undermining the election's transparency and accountability. They accused the 3rd and 4th Respondents of failing to safeguard election materials.

The 3rd and 4th Respondents contested the application, arguing that no material errors or legal breaches warranted scrutiny. They denied any misconduct, claiming that the incidents occurred outside polling stations and did not affect the election outcome.

The trial court, following a ruling on 26 January 2023, directed the opening of ballot boxes and scrutiny of various election materials. The 2nd Respondent subsequently requested a review to include additional materials such as Form 32 and other records. This application was allowed in a ruling dated 6 February 2023.

The trial court found numerous irregularities during scrutiny, particularly discrepancies between votes cast and the number of voters identified by the KIEMS Kit. Despite the irregularities not being specifically pleaded, the court, guided by ***Richard Nyagaka Tongi v IEBC and 2 Others*** **[2013] eKLR**, held that such discrepancies could not be ignored. The court concluded that votes in affected polling stations were cast without proper identification, thus breaching constitutional principles of transparency and accuracy.

As a result, the court invalidated the 1,268 votes from the affected polling stations, revising the results to show that the appellant's total votes fell below the runner-up's tally, leading to the nullification of the appellant's declared victory. In the appeal, the appellant challenged the trial court's findings on several grounds. The appellant contended that the trial court had erred by treating scrutiny as a fact-finding mission to address issues that were neither pleaded nor raised during the trial. Specifically, the appellant argued that the trial court had selectively allowed scrutiny for certain polling stations while excluding others, such as Shanta Abak 1 and 2, which had been requested for scrutiny. Furthermore, the appellant claimed that the ballot papers in the ballot boxes had been verified against the available counterfoils and that the vote variance of 125 votes was minor and did not affect the overall result. The appellant also alleged that the nullification of the election results was based on erroneous presumptions, violating the standard and burden of proof.

The appellant submitted that the trial court's scrutiny revealed irregularities regarding the variance between votes cast and voters identified by the KIEMS Kit. The appellant argued that these irregularities should have formed part of the issues for determination only if they were raised in the petition, as per article 87(2) of the Constitution of Kenya, which mandates that petitions must be filed within 28 days and include all relevant averments. This position was supported by the 3rd and 4th Respondents, who cited ***Obare Mochache Walter vs. Samwel Apoko Onkwani & 2 Others*** **[2018] eKLR** and ***Jacktone Nyanungo Ranguma vs. IEBC & 2 Others*** **[2018] eKLR**, asserting that a petitioner must prove the case as pleaded and cannot introduce new issues not raised in the petition.

Regarding the magnitude of the irregularities, the appellant argued that, under section 83 of the Elections Act, for an election to be invalidated, the petitioner must demonstrate that the irregularities affected the results. The appellant contended that the trial court's decision to disregard results from Benane Primary School Polling Station 1 of 2 was unjustified, as no issues regarding the absence of counterfoils at this station had been raised by the Respondents. The appellant described the missing counterfoils as an administrative oversight rather than evidence of intentional manipulation.

The 3rd and 4th Respondents supported the appeal by arguing that the trial court's findings were flawed, particularly regarding the disregarding of votes from Benane Primary School Polling Station 1 of 2. They posited that had these results been included, the margin between the appellant and the other candidates would have been sufficient to affirm the initial outcome.

The 1st and 2nd Respondents opposed the appeal, asserting that the trial court had appropriately addressed all issues raised in the petition and applied relevant laws and precedents, including ***Raila Odinga & 5 Others vs. IEBC & 3 Others*** **[2013] eKLR**. They argued that Articles 38, 81, 82, and 86 of the Constitution had been violated, and these violations were sufficient to warrant the nullification of the election. They referred to ***Manson Onyongo Nyamweya vs. Thomas Omingo Magara and 2 Others*** **[2009] eKLR** and ***Timamy Issa Abdala vs. Swaleh Salim Swaleh Imu & 3 Others*** **[2014] eKLR** to emphasize the importance of counterfoils and the requirement to disregard results from polling stations with discrepancies.

The 1st and 2nd Respondents argued that the trial court had properly nullified the election based on significant irregularities, including missing counterfoils and discrepancies between the KIEMS Kit and the Form 35A. They cited ***Mohamed Mahamud Ali vs. Independent Electoral and Boundaries Commission & 2 Others***

Election Petition Appeal No. 7 of 2018 to support their stance that the results from polling stations with discrepancies should be disregarded entirely.

The Supreme Court cases ***Evans Odhiambo Kidero & 4 Others vs. Ferdinand Ndungu Waititu & 4 Others*** **[2014] eKLR** and ***Abdirahman Ibrahim Mohamud vs. Mohamed Ahmed Kolosh and 3 Others*** **Petition No. 26 of 2018** were cited to underscore that scrutiny is crucial in assessing election credibility and that courts can consider irregularities uncovered during scrutiny, even if not initially pleaded.

The appellant argued that the trial court's findings on vote variance, which were not part of the original petition, contravened article 87(2) of the Constitution. The appellant contended that this variance should not have been considered unless the petition was amended to reflect it and provide an opportunity for response.

In ***IEBC & Another v Stephen Mutinda Mule & 3 Others*** **[2014] eKLR**, it was established that parties are generally bound by their pleadings and cannot introduce new issues outside of what was initially presented. The learned trial Judge's handling of the pleadings came into question, particularly regarding the scope of the scrutiny and recount of votes. The scrutiny application was within the scope of the pleadings, but the mention of the KIEMS Kit was vague and not elaborated upon.

The trial court ordered a detailed inspection and partial scrutiny of election materials, including ballot boxes and KIEMS SD cards. The Deputy Registrar's scrutiny report was submitted and amended in February 2023. While such reports are not binding, they must be considered, as stated in ***Milliah Nanyokia Masungo v Robert Mwembe & Another*** **[2014] eKLR** and cited in the Supreme Court's decision in the Timamy Case. ***Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others*** **[2014] eKLR** emphasised that scrutiny aims to assess the election's adherence to legal standards.

The trial court's judgment, particularly paragraphs 97-101, showed that the scrutiny report was considered. However, the appellant argued that the court overstepped by addressing issues not originally pleaded, particularly regarding discrepancies between votes and KIEMS Kit data. The trial court's findings on irregularities, despite not being raised in the pleadings, were crucial in its decision. ***Lenny Maxwell Kivuti v IEBC & 3 Others*** **[2019] eKLR** held that scrutiny reports should not introduce new grounds beyond the pleadings.

The court highlighted that, while the scrutiny report could reveal new issues, these should not affect the court's decision unless properly pleaded and addressed. The trial court's decision was influenced by the KIEMS Kit data, which was pivotal in the scrutiny report but not explicitly detailed in the pleadings.

The court examined whether the alleged irregularities were significant enough to justify the nullification of the election results. The appellant contended that any irregularities were insufficient to warrant such a drastic measure and argued that the trial court wrongly considered the irregularities uncovered during scrutiny as grounds for nullifying the elections in specific polling stations. The appellant particularly challenged the trial court's conclusion regarding the absence of counterfoils at Benane Primary 1 and 2 polling stations, asserting that this did not meet the threshold for nullification under section 83 of the Elections Act. The absence of counterfoils was not contested by the Respondents nor was it significant enough to affect the vote count.

The 1st and 2nd Respondents argued that counterfoils are crucial for verifying the legitimacy of votes and ensuring that ballots belong to the correct polling station. They asserted that without these counterfoils, it would be impossible to confirm the votes' authenticity.

The court acknowledged that no election is entirely free of irregularities due to human fallibility and potential manipulation. Citing previous cases, the court noted that irregularities do not necessarily invalidate an election unless they substantially affect the result. For instance, in ***Re Kensington North Parliamentary Elections*** **[1960] 2 ALL ER 150**, it was emphasised that irregularities must be assessed in terms of their impact on the true result of the election. Similarly, in ***Mashall vs. Gibson [1995]*** and ***Fitch vs. Stephenson & Others*** **[2008] EWHC 501 (QB)**, it was noted that an election can only be declared invalid if it is not substantially conducted in accordance with the law, and if the result would have been materially different.

The court concluded that the trial court's finding that the election was invalid due to irregularities was incorrect. The scrutiny revealed variances, but these were deemed within acceptable limits and not substantial enough to affect the overall result. The trial court's reliance on the KIEMS Kit data, while disregarding manually cast votes and failing to consider certain polling stations, was found to be erroneous.

The Supreme Court in ***Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others SC Petition No. 2B of 2014*** **[2014] eKLR** had reaffirmed that electoral results should not be interfered with if the irregularities do not affect the election's outcome. Similarly, ***Martin Nyaga Wambora vs. Lenny Maxwell Kivuti & 3 Others*** **[2018] eKLR** underscored that procedural and administrative errors should not lead to nullification unless they significantly impact the election results. The court also referenced ***Raila Amolo Odinga vs. IEBC & 2 Others*** **[2017] eKLR**, which placed the burden of proof on the petitioner to demonstrate significant violations of electoral principles or substantial irregularities affecting the outcome.

In conclusion, the court found that the trial court's nullification of the election was excessive. Scrutiny should not be used to explore unpleaded matters, and the irregularities were not significant enough to overturn the results. The appeal was allowed, and the nullification was overturned, with costs awarded to the appellant and the 3rd and 4th Respondents.

Abdisalan v Abdi & 2 others Garissa Election Petition E007 of 2022

In the High Court of Kenya at Garissa

Coram: Nyakundi J

Ruling allowing partial scrutiny

Date: 10 January 2023

Summary of facts

On 4 October 2022, the Petitioner, *Ibrahim Ahmed Abisalan*, filed a Notice of Motion Application seeking judicial intervention in relation to the Wajir North Constituency National Assembly election held on 9 August 2022. The application, represented by Mr Omwanza Ombati, aimed to address various alleged irregularities and safeguard the integrity of the electoral process.

The Petitioner highlighted the urgency of the application, given the narrow margin of 65 votes between himself and the 1st Respondent. He argued that immediate court action was necessary to protect the electoral materials and ensure the proper adjudication of the disputed results.

Among the key requests, the Petitioner sought the immediate transfer of all election materials, including ballot boxes from specific polling stations, into the court's custody to prevent any tampering. He also requested access to several crucial electoral documents, including the Returning Officer's Polling Day Diary and certified copies of Forms 35A and 35B from the contested polling stations.

To further investigate potential discrepancies, the Petitioner called for an inventory of the result declaration forms distributed to the presiding officers. Access to the Kenya Integrated Electoral Management System (KIEMS) logs and results transmission logs was also requested to verify the electronic recording and transmission of votes.

The Petitioner emphasised the importance of scrutinising the Polling Station Diaries, arguing that these documents would provide a detailed account of the election day activities and were essential for evaluating the election's conduct. He also sought an inventory of the serial numbers of ballot boxes and their seals, which would help verify the integrity of the election materials.

Given the concerns regarding rejected and spoilt ballot papers, the Petitioner requested that these be made available for detailed examination. Similarly, he sought the counterfoils of the used ballot papers to uncover any discrepancies in the ballot issuance and voting process.

The Petitioner argued for access to the KIEMS devices' transmission logs and any associated error logs to assess their functionality during the election. Furthermore, he requested access to the written statements made by the Returning Officer concerning the election, which could provide critical insights into any anomalies observed.

To ensure the accuracy of the election results, the Petitioner requested the packets of counted ballot papers from the specified polling stations. He also sought documentation of any instances where the KIEMS devices failed to identify voters, necessitating manual identification.

Additionally, the Petitioner demanded access to all Forms 32A used for assisted voting, particularly in light of the significant number of voters who reportedly required assistance. He questioned whether the procedures for assisting voters complied with legal requirements and sought to obtain the relevant forms for verification.

The Petitioner sought leave to file a supplementary affidavit based on any new information that might emerge from the requested scrutiny. He also contended that the Respondents should bear the costs of the application, considering their alleged role in the irregularities.

In his submissions, Mr Omwanza Ombati highlighted significant concerns regarding the safekeeping and integrity of the electoral materials. He cited an instance where the Petitioner found an original pre-filled Form 35A amidst violence at the tallying centre, indicating a failure by the Respondents to adequately secure the election materials.

Counsel identified specific discrepancies at various polling stations. For example, at Tuluroba Polling Station, the number of votes cast exceeded the number of voters identified by the KIEMS kit by 41 votes. The Presiding Officer's testimony supported claims of irregularities, recommending the nullification of the elections at his station.

Further concerns were raised regarding the large number of voters who were allegedly assisted illegally, without the requisite statutory forms. Counsel argued

that the Respondents failed to provide sufficient documentation or evidence to refute these claims, particularly regarding the handling of assisted voters.

The Petitioner also pointed to instances where the total number of valid votes cast exceeded the number of votes garnered by candidates, suggesting possible inflation and manipulation of the results. Examples included polling stations such as Ajawa Primary and Sirey Primary School, where the actual number of votes cast did not align with the recorded figures.

Counsel emphasised the critical importance of the Polling Station Diaries, which record all activities on election day. He argued that inconsistencies or the absence of these diaries could undermine the credibility of the election results. He referenced the Supreme Court decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** **[2014] eKLR**, which underscored the need for transparency and competence in the electoral process to maintain public confidence.

Further, the Petitioner raised substantial doubts about the timing and conduct of the tallying process. By the time violence disrupted the tallying at the Bute Arid Zone Tallying Centre, results from five polling stations had not been tallied or announced as mandated by law. This created significant uncertainty regarding the validity and accuracy of the tallying process.

Counsel noted discrepancies with two sets of Form 35B, both dated 13 August 2022. One set was used to declare the 1st Respondent the winner, despite discrepancies and the absence of witness signatures from any candidates or agents. The Form 35C was dated three days after the purported tally was concluded, suggesting further irregularities in the process.

The Petitioner's counsel argued that the 2nd Respondent tallied the results from the remaining five polling stations without notifying candidates or their agents, apart from the Chief Agent of the 1st Respondent, suggesting a biased process favouring the 1st Respondent. They further contended that there was an unjustified 17-hour delay in announcing the results from Tuluroba Polling Station 1 of 1, received on 10 August 2022, which violated the Constitutional mandate for prompt result announcements and led to unrest on 11 August 2022.

Additionally, a video clip presented by the Petitioner showed the 1st Respondent admitting to electoral malpractices in the wards cited by the Petitioner. In response, the 1st Respondent's counsel argued that the Petitioner had initially requested only a limited scrutiny of the Kenya Integrated Elections Management

System (KIEMS) and expanding this request to include ballot boxes, papers, and other materials exceeded the original petition, lacking a legal basis.

To buttress his submissions, the 1st Respondent's Counsel relied on the decisions in the following cases: ***Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others; Silverse Lisamula Anami & another v Independent Electoral and Boundaries Commission & 2 Other;*** and ***Kalla Jackson Musyoka v Independent Electoral & Boundaries Commission (I.E.B.C) and another***. They emphasised that parties are bound by their pleadings, and the Petitioner did not provide enough evidence for a broader scrutiny of specific polling stations. The 1st Respondent also asserted that no irregularities were proven in the polling stations where the Petitioner sought scrutiny and that any discrepancies were minor arithmetic errors corrected in the final tally. Furthermore, they stated that the process for assisted voting adhered to legal regulations, with no evidence suggesting improper conduct. It was urged that the claims about Form 35A being pre-filled be dismissed as lacking credible evidence.

Counsel for the 2nd and 3rd Respondents also opposed the Petitioner's request, arguing that the scope of scrutiny requested exceeded the initial pleadings. They noted that the Petitioner did not contest results in the specific polling stations where scrutiny was sought. They explained that the electronic transmission requirements under section 39 of the Elections Act apply only to presidential results, not to the election of Members of the National Assembly. Regarding voter identification, they maintained that the data from the KIEMS kit, as presented by the Petitioner, did not substantiate claims of irregularities. The 2nd and 3rd Respondents viewed the application for scrutiny as an attempt to introduce new evidence, which they contended was not permissible.

Issue for determination

The central issue before the court was whether the Applicant had met the necessary criteria for an order of scrutiny in this electoral petition.

Determination of the court

Scrutiny, as provided under Section 82 of the Elections Act and Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017, allows an election court to examine votes either at its discretion or upon application by a party to the petition. This process is crucial for parties dissatisfied with election outcomes to validate or challenge the legitimacy of votes cast.

The legal framework for scrutiny was clarified by the Supreme Court in ***Peter Gatirau Munya v Dickson Mwenda Kithinji and Others*** **[2014] eKLR**, affirming that the right to scrutiny and recount of votes is contingent upon establishing a sufficient basis. It is not an automatic entitlement but must be substantiated with evidence or pleadings presented during the hearing. Similarly, in ***Raila Amolo Odinga & Another v IEBC & 2 Others*** **[2017] eKLR**, the court stressed the importance of adherence to pleadings in determining the scope and necessity of scrutiny, restricting it to specific polling stations where irregularities are alleged or disputed.

The Court of Appeal, in ***IEBC v Maina Kiai & 5 Others*** **[2017] eKLR**, underscored that scrutiny at polling stations serves to uphold transparency and finality in the electoral process, preventing unfounded challenges. It emphasised the limited scope of scrutiny beyond what is specifically pleaded and supported by evidence.

Applications for scrutiny can be made either by parties to the petition or initiated by the court itself based on evidence presented. The threshold for granting such applications requires the Applicant to demonstrate a prima facie case that scrutiny will materially assist in resolving the issues raised in the petition, as seen in ***Rishad A. A Amama v IEBC and Others*** **[2013] eKLR**.

In ***Nathif Jama Adama v Abdikhaim Osman Mohamed and Others*** **[2014] eKLR**, the court reiterated that scrutiny must be confined to the polling stations where results are disputed, with a clear basis established in the pleadings. The principle of specificity was further underscored in ***Ledama Ole Kina v Samwel Kuntai Tunai & 10 Others*** **[2013] eKLR**, where a blanket request for scrutiny over an entire constituency was denied due to lack of specificity in identifying polling stations.

In the present case, the Applicant sought scrutiny orders for specific polling stations in the Wajir North Constituency, alleging irregularities and discrepancies in vote counts. These allegations were supported by evidence such as Form IAA-5C from the tallying centre and testimonies of witnesses regarding mismatches between KIEMS kit records and Form 35A.

The Respondents opposed the application, challenging the authenticity and relevance of the evidence presented by the Applicant. They argued that the allegations did not meet the threshold for scrutiny as they are either unsubstantiated or relate to isolated incidents that do not affect the overall election outcome.

The Respondents contended that Mr. Mogire's testimony indicated the incident of excess ballot papers was isolated to the MCA election and did not affect the Member of National Assembly election. They disputed the Petitioner's assertion that the KIEMS kit at Tuluroba Polling Station 1 of 2 recorded 255 voters, asserting it identified 266 voters. Additionally, they raised concerns about the authenticity of the alleged KIEMS kit screenshot presented by the Petitioner.

Moreover, the Respondents argued that Mr. Adan Abdullahi Omar, the Petitioner's agent, had signed Form 35A for Tuluroba Polling Station 1 of 2, thereby accepting and confirming the validity of the results announced on 10 August 2022. They highlighted that Mr. Omar's affidavit sworn on 8 September 2022 contained no allegations of votes exceeding those identified by the KIEMS kit. The Respondents asserted that there was no evidence to disprove Mr. Omar's claim of signing the form or challenge its authenticity.

Regulation 83(1) of the Elections (General Regulations) 2013 sets out clear procedures for returning officers to tally final results in the presence of candidates' agents and observers. It mandates disregarding results from polling stations where votes exceed registered voters or voter turnout, ensuring the integrity of the electoral process. The Respondents acknowledged the 2nd Respondent's admission to not announcing results from five polling stations due to safety concerns, which necessitated relocating to the National Tallying Centre at Bomas of Kenya. However, they acknowledged the procedural lapse in only contacting the winning candidate's agent, thus raising concerns about transparency and public confidence in the election results.

The Kriegler report, known as the Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007, underscores the importance of transparent counting and tallying procedures to uphold electoral integrity. This report forms the basis for the development of stringent election regulations, aligned with Constitutional requirements under Article 86 of the Constitution.

The failure to announce results from the five polling stations called into question the integrity of the entire election process and the verification of final results. This omission, as argued by the Petitioner, constituted non-compliance with election regulations and denied the Petitioner the opportunity to verify and contest the results effectively.

Considering the arguments presented by both parties and the legal threshold for scrutiny, the court leaned towards granting limited scrutiny to ensure justice in the case. The court ordered scrutiny of Form 35As, Form 35B, and Form 35C used in the Wajir North Member of National Assembly Election, limited to specific polling stations identified by the Petitioner, i.e. Tuluroba Polling Station 1 of 2, Malkagufu Dispensary Polling Station 2 of 2, Cherate Mobile 1 of 1, Buna Sub County Hospital 1 of 1 and Ajawa Primary School 2 of 2. The Deputy Registrar would oversee the scrutiny process and submit a comprehensive report by 19 January 2022. The Deputy Registrar was directed to carry out the scrutiny as follows: Firstly, the Deputy Registrar was to confirm whether the entries in the original Form 35As for the specified polling stations matched those in the original Form 35B provided by the 2nd and 3rd Respondents. Secondly, the Deputy Registrar was to tally the number of votes garnered by each candidate in Form 35B, including those from the specified stations. Each party was permitted to have no more than two counsels, their representatives, and up to three additional individuals present during the opening of the ballot boxes, the retrieval of Forms 35A, and the actual scrutiny exercise.

A pre-scrutiny meeting was scheduled to address logistical and administrative issues to facilitate the timely execution of the court's orders.

Arale v Independent Electoral and Boundaries Commission & 4 Garissa Election Petition E004 of 2022

In the High Court of Kenya at Garissa

Coram: Riechi J

Judgment dismissing petition

Date: 6 March 2023

Swapping of results-failure to hold elections in two polling stations-police intimidation and violence-election offences-variance of votes-security of election materials-disenfranchisement of voters-declaration of results

Summary of facts:

In the elections held on 9 August 2022, under the 2010 Constitution, Kenyans voted for six elective positions, with the Independent Electoral and Boundaries Commission (IEBC) overseeing the process in line with its mandate under Article 88 of the Constitution and the Elections Act No. 24 of 2011. In Eldas Constituency, the IEBC gazetted the election for the Member of the National Assembly. The IEBC declared three candidates: Ahmed Boray Arale, Adan Keynan Wehliye, and Salat Omar Haji. Eldas Constituency had 72 polling stations and 23,356 registered voters. The IEBC appointed presiding officers and their deputies for each polling station, as required by the Elections Act, and forwarded the shortlisted names to the participating political parties 14 days before the election. Ahmed Boray Arale, the petitioner, was dissatisfied with the names provided and filed ***Garissa Petition No. 14 of 2022***. He sought several orders, including the nullification of the recruitment process for presiding and deputy presiding officers in Eldas Constituency, claiming it violated Articles 10, 81, and 232 of the Constitution and Regulation 5 of the Elections (General) Regulations 2012. However, the petitioner later filed a notice of withdrawal before a ruling could be delivered by Lady Justice Abida Ali Aroni. Following the withdrawal, the IEBC published the list of presiding officers and their respective polling stations on 8 August 2022 at the constituency tallying centre. Arale, unhappy that his concerns were not considered, protested to the Returning Officer, Abdi Bashir Ali Noor Ibrahim. Chaos ensued at the CDF Hall, where officers were collecting election materials. As a result, the Returning Offi cer resigned, and his deputy, Maryan Hassan Mohamed, took over.

The situation escalated to the IEBC Chairman, Wafula Chebukati, who assigned Commissioner Guliye Guyo to handle the matter. Commissioner Guyo advised that, due to security concerns, the election for Eldas Constituency was postponed to 10 August 2022. The election was subsequently held, and the results announced showed Adan Keynan Wehliye receiving 7,517 votes, Ahmed Boray Arale receiving 6,836 votes, and Salat Omar Haji receiving 66 votes. Hon. Adan Keynan Wehliye was declared the winner and was issued a certificate on 13 August 2022.

Aggrieved by the results, Arale filed this petition, seeking several remedies, including orders for securing election materials, scrutiny and recount of votes, and invalidation of the election results. He contended that the election and the declaration of the results were not free, fair, credible, verifiable, or transparent. The petitioner sought a declaration that the election was invalid, an order for a fresh election, and recommendations for action against the second and third Respondents for election offences. He also requested that the court quash the gazette notice declaring the 5th Respondent, Adan Keynan Wehliye, as the elected Member of Parliament for Eldas Constituency and that the Respondents bear the costs of the petition.

The petitioner, Ahmed Boray Arale, testified as the ninth witness in the petition, stating that he was a candidate for the National Assembly for Eldas Constituency, nominated by the Orange Democratic Party under the Azimio Coalition. He expressed concerns regarding the recruitment of presiding officers and deputy presiding officers by the Independent Electoral and Boundaries Commission (IEBC), alleging the process was unfair and biased towards the 5th Respondent, Hon. Aden Keynan. Arale filed Garissa Petition No. 14 of 2022 over these grievances but withdrew it after reaching an agreement with IEBC. However, when the final list of officials was published on 8 August 2022, his concerns remained unaddressed.

On visiting the Constituency Development Fund (CDF) hall to speak with the returning officer, Mr. AbdiBashir Ali Noor Ibrahim, Arale claimed that 68 of the 72 officers were affiliated with the 5th Respondent. Following protests, the election was postponed to 10 August 2022. Arale submitted a list of 17 preferred presiding officers, but the list was not considered, and the elections proceeded. He participated in the elections, casting his vote at Bulla Shair polling station, but was later informed of violence at Dela Yarey polling station where election materials were destroyed. He also received reports of delayed voting at some polling stations.

On 11 August 2022, Arale visited the tallying centre at 8 pm, where he raised concerns about alleged vote swapping. Gunshots were fired, and chaos ensued, leading to his evacuation from the tallying centre. The next day, he learned that a helicopter transported the deputy returning officer to the county tallying centre, where the 5th Respondent was declared the winner.

Arale conducted his own independent tally of results from 70 out of 72 polling stations, excluding Orote and Dela Yarey due to irregularities. His tally indicated he had 7,190 votes, the 5th Respondent had 6,893, and Salat Omar Haji had 42 votes. During cross-examination, Arale confirmed his issues with the recruitment of presiding officers and acknowledged that no official minutes were taken during discussions with the IEBC. He denied causing any chaos and confirmed that he received Forms 35B and 35C, though he could not recall where they were obtained from.

Further testimony from witnesses, including PW1 Mohamed Sheikh Omar and PW2 Hashim Jimale Omar, supported Arale's claims of irregularities. PW1, an ODM party agent, detailed issues with KIEMS kits and alleged that results for the 5th Respondent were altered in Form 35A at Waradey polling station. PW2, a Wiper Democratic Party agent, testified about broken ballot boxes, delays in voting, and chaos at the tallying centre, further supporting allegations of irregularities in the election process.

The following witnesses were examined during the hearing: PW3 testified that he did not know what time voting started at Dera Yarey polling station, adding that the two stations were opposite each other with visibility between them. He mentioned that the commotion at Dera Yarey lasted ten minutes, that he saw an ODM agent complain but could not recall the agent's name, and that he did not know the presiding officer or the deputy presiding officer.

PW4, Alibashir Gumow Abdi, a registered voter at Dela Yarey polling station, testified that he arrived at 6:30am to vote and joined a queue that did not seem to move. He witnessed a commotion outside the polling station where people were fighting, breaking windows, and entering through the windows. Ballot boxes were thrown outside, and ballot papers were scattered. The chaos lasted for 40 minutes, and security officers failed to contain it. Military officers arrived at 2:00pm after the situation had ended. When PW4 inquired about voting, the presiding officer told him it was impossible as the polling station had been compromised. PW4 stayed at the compound until the next day before leaving for Nairobi.

On cross-examination, PW4 confirmed that he had arrived at the polling station at 6:30am and stayed in the queue until 3:00pm. He also confirmed witnessing the commotion but clarified that he was about 10 metres away. He did not count the number of destroyed ballot boxes, could not identify the ballot papers that were flying, and did not return to the station.

PW5, Abdullahi Abdi Bakay, the Orange Democratic Movement (ODM) party chief agent, testified that there were 72 polling stations in Eldas Constituency, but Dela Yarey and Orote Primary School did not deliver results. He stated that agents of the 5th`````` Respondent walked out of the tallying centre but returned later with police officers who took command of the centre. PW5 noted discrepancies in the announced results, where votes had been swapped in favour of the 5th Respondent at Masalale Stream 2 of 3 and Waradey polling station. When the chief agents protested, security officers intervened, leading to gunshots and violence inside the tallying centre. PW5 and other agents were beaten and forced to hand over their mobile phones.

On cross-examination, PW5 admitted that his appointment as chief agent was not supported by any documentation. He further testified that he did not visit Orote polling station and that the tallying started at 5:00pm on 11 August 2022. He confirmed that agents of the 5th Respondent walked out of the hall and returned with Mr. Osando, the officer commanding the police division. PW5 claimed that Osando took command of the centre without the county commander's knowledge and that there were vote-swapping incidents at Masalale Mobile 2/3.

PW6, Ruweitha Farah Abdi, the ODM agent for Dela Yarey polling station, testified that voting began at 9:00am and most voters required assistance. She observed that the presiding officer intentionally placed the Member of Parliament ballot papers into the Member of County Assembly ballot boxes during three assisted voting incidents. After raising concerns, chaos erupted, resulting in the destruction of election materials, and voting did not resume. PW6 fled to Della Primary School and did not return to the polling station.

PW7, Noordin Ibrahim Ahmed, ODM agent for Masalale Mobile Polling Station, testified that voting began at 8:46am but closed earlier than announced, resulting in protests. He reported that the Petitioner had garnered 295 votes while the 5th Respondent received 33 votes at Masalale Stream 2 of 3. However, the results were swapped at the tallying centre, leading to a protest. Soon after, the police stormed the room and ordered the agents to lie down.

On cross-examination, PW7 admitted he did not have an appointment letter as an ODM agent but claimed that the presiding officer allowed him access to the polling station. He confirmed that he had protested the results at the tallying centre and provided a carbon copy of the form to the chief agent.

PW8, Mohamed Nunow Shuriye, the ODM agent at Eldas Primary School, testified that voting at his station went on smoothly with no issues.

In the case of the 1st to 4th Respondents, RW1 Abdibashir Alinoor Ibrahim adopted his affidavit dated 24 September 2022 as his evidence. He stated that he was gazetted as the Eldas Constituency Returning Officer under Gazette Notice No. 4961 on 20 April 2022. He was responsible for the recruitment and deployment of Presiding and Deputy Presiding Officers. He confirmed that the recruitment process was transparent, and he responded to a complaint from the petitioner regarding the recruitment process. The petitioner later withdrew their complaint. Ibrahim further testified that he resigned from his position on 8 August 2022 due to concerns over his personal safety following protests and unrest at the CDF Hall.

RW2 Superintendent Abduba Hussein, the Police Commander for Eldas, testified that he was responsible for the security of the 72 polling stations. He described the protests that took place on 8 August 2022 over the deployment of election officials, which later escalated into violence. The election, scheduled for 9 August, was postponed to 10 August due to the violence. On cross-examination, he confirmed that supporters of the petitioner were involved in the protests, though he did not witness the petitioner protesting directly. He also testified about incidents of violence on 11 August 2022, during which an election official was shot, and the tallying centre was attacked.

RW3 Jimale Daud Mohamed, the Presiding Officer at Anole Primary School, testified that voting began late on 10 August 2022 due to issues with the KIEMS kit. He acknowledged an error in recording votes on Form 35A but stated that the voting process continued smoothly, and the results were handed over to the Returning Officer.

RW4 Mahat Adow Ismael, Presiding Officer at Junction Polling Station, confirmed that voting started late on 10 August 2022 but concluded successfully. He provided the final vote counts and stated that all processes were conducted transparently.

RW5 Ali Ibrahim, the Presiding Officer at El-Nur Primary School, testified that voting started on 10 August 2022 and concluded without incidents of violence. He confirmed that the petitioner's agent was present during the voting and counting process.

RW6 Abdulahi Ibrahim Mohammed, the Presiding Officer at Biladul Amin Primary Polling Station, testified that voting was delayed due to damage to the presidential ballot box but later proceeded. He confirmed the vote counts and denied any irregularities, asserting that the KIEMS kit functioned properly after an initial issue with charging.

The 5th Respondent, Adan Keynan Weliye, testified that he was a candidate for the Member of National Assembly for Eldas Constituency in the August 2022 election under the Jubilee Party, while the Petitioner was a candidate under the ODM Party. The results were declared by the Constituency Returning Officer as follows: Ahmed Boray – 6,838 votes, Salat – 66 votes, and Adan Keynan – 7,517 votes, after which he was issued a certificate of election. He denied the Petitioner's allegation of vote swapping and maintained that the results announced at polling stations were the same as those announced at the tallying centre. Regarding chaos at Dela Yare, where ballot boxes were destroyed, he confirmed that voting continued after the situation was restored. He also mentioned the arrest of three individuals known to support the Petitioner.

In response to the Petitioner's allegations of vote swapping at Masalale Mobile Polling Station and Waradey Polling Station, the 5th Respondent explained that due to chaos, the declaration of results was moved to the County Tallying Centre in Wajir Town. He refuted the claim of a variance in votes in six polling stations, asserting that the forms were signed by ODM Party agents. On alleged police intimidation, he stated that incidents were isolated and instigated by the Petitioner. The election in the constituency was postponed from 9 August 2022 to 10 August 2022 due to security concerns, and no specific polling stations were cited as having been disenfranchised.

The 5th Respondent also testified that while there was an attack on the building housing election materials on 24 August 2023, which resulted in their destruction, he had no involvement in the recruitment or deployment of presiding officers. He affirmed that voting proceeded smoothly at Eldas Primary Polling Station on 10 August 2022, where he cast his vote. Additionally, he described incidents of disruption to his campaign, allegedly by the Petitioner's supporters.

During cross-examination, the 5th Respondent reiterated his position regarding allegations of vote-swapping, denied affiliation with presiding officers, and stated that the votes attributed to him at Masalale Polling Station were accurately reflected in IEBC forms. He followed the tallying results via a WhatsApp group and denied any involvement in the burning of the CDF Centre.

Several witnesses were called by the 5th Respondent to support his case. RW1, Said Abdille Mohamed, served as a polling agent and testified that voting at Biad Primary Station proceeded smoothly, with results reflecting that 30 out of 33 registered voters participated. RW2, Abdi Malik Ahmed Muhumed, testified as a polling agent at Junction Polling Station, confirming the results and that voting ended smoothly, with 559 registered voters and 371 valid votes cast. RW3, Edow Mohamed Abdi, testified as a polling agent at Anole Primary Polling Station, where he witnessed peaceful voting and counting, confirming that the results were announced without objections.

RW4, Jimale Mohamud Abdullahi, a polling agent at El-Nur Primary Polling Station, similarly testified that voting proceeded peacefully, with results announced and agents present signing the necessary forms. RW5, Said Mohamud Abdullahi, a polling agent at Biladul Amin Polling Station, confirmed that voting ended on 11 August 2022, with 390 total votes cast and no objections raised to the results.

The witnesses testified that voting processes were smooth, the KIEMS Kit functioned, and the results reflected the true outcome of the election without any challenges from agents.

The witness testified that he was not a supporter of Keynan and had campaigned for other candidates, attending several rallies, including one on 1 July 2022 for the 5th Respondent, where disruptions were caused by Boray's supporters, identified by their t-shirts. He confirmed he did not attend a rally on 28 June 2022 but was present at a rally on 6 July 2022, which also experienced disruptions. At the polling station from 8 to 11 August 2022, he did not go to the tallying centre. He reported a malfunction of the 1st KIEMS Kit, which was replaced around 4 p.m., but did not photograph the statistical summary. He did not record the breakdown of the KIEMS Kits in the polling station diary. During re-examination, he clarified that the two KIEMS Kits used identified 54 and 149 votes respectively, and there was no variance at the station.

RW7 Abdi Nasir Bulle Mohamed, appointed as a Jubilee polling agent, confirmed that voting at Warade Primary Polling Station started smoothly at 9 a.m. on

10 August 2022 and closed at 9 p.m. The results, declared at 9.30 p.m. as shown in Form 35A, were Boray 93, Salat 1, and Keynan 197, with 3 rejected votes. He disputed the results on page 277 of the Petition, claiming the form was not issued at the polling station.

RW8 Abdirahman Salat Maalim, a Jubilee agent at Masalale Mobile Polling Station 2 of 3, reported smooth voting from 8.30 a.m. to 8.30 p.m. on 10 August 2022. The counting for Member of National Assembly began at 3.00 a.m., and the results were Boray 34, Salat 0, and Keynan 294, with a total of 328 votes. He noted a discrepancy in the total votes cast versus the recorded total, attributing it to a mathematical error. He confirmed that results were declared as per Form 35B, with no votes lost.

RW9 Hussein Farah Guliye, a Jubilee polling agent for Della Yare polling station, described disruptions on 10 August 2022 caused by protests from Mr. Noor and Mr. Siyat Abdi. Voting, which started at 7 a.m., was interrupted around 8.30 a.m. but resumed after 30 minutes. The results were Boray 10, Salat 0, Keynan 351, with a total of 361 votes. Guliye left before signing the form, which was signed by another Jubilee agent, Mahad Osman.

RW10 Mohammed Bulle Muhumed, the Chief Agent for Jubilee Party, testified that on 10 August 2022, he received reports of disruptions and visited various polling stations. Results for all 72 polling stations were announced by the 3rd Respondent, with the final declaration made on 13 August 2022. He confirmed the results were announced in batches, with no proof of results being swapped.

Before delving into the issues for determination, the court restated certain principles regarding elections.

Constitutional Principles in Elections

Article 38 of the Constitution of Kenya guarantees the political rights of every Kenyan citizen, ensuring the right to free, fair, and regular elections based on universal suffrage and free expression of the electors' will. Article 81 establishes general principles for the electoral system, which include conducting elections by secret ballot, ensuring they are free from violence, intimidation, or corruption, administering them transparently, and ensuring the process is impartial, neutral, efficient, accurate, and accountable. Article 86 mandates that the electoral system be simple, accurate, verifiable, secure, accountable, and transparent.

Burden and Standard of Proof

Election disputes are unique, and the standard of proof in such cases is higher than the balance of probabilities but lower than beyond reasonable doubt. Allegations of criminal or quasi-criminal nature must be proven beyond reasonable doubt. This principle was reaffirmed by the Supreme Court in ***Odinga and Another v Independent Electoral and Boundaries Commission & 2 Others; Aukot & Another (Interested Parties); Attorney General & Another (Amicus Curiae)*** **[2017] eKLR**.

According to Section 83 of the Elections Act, an election will not be declared void for non-compliance with election laws if the election was conducted according to constitutional principles and if non-compliance did not substantially affect the election results. In ***John Munyes Kivonga v Josephat Kolil Nanok*** **Lodwar Election Petition 1 of 2017**, it was reiterated that the burden of proof lies with the petitioner who alleges the need for election nullification. The standard of proof is generally higher than a balance of probabilities but does not reach beyond reasonable doubt. Allegations involving criminal conduct require proof beyond reasonable doubt. The petitioner must establish that irregularities, illegalities, or violations affected the election outcome in a manner that did not reflect the will of the people.

Issues for determination

1. Swapping of results
2. Results in stations where elections allegedly not held
3. Variance of votes
4. Disenfranchisement of voters
5. Police intimidation and violence
6. Declaration of results
7. Security of election materials
8. Election offences

Swapping of Results

The petitioner alleged that results from certain polling stations were swapped. For example, results initially declared for the petitioner were later announced as belonging to the 5th Respondent, and vice versa. Evidence was required to prove such swapping, including documentation from the polling station and discrepan cies between results at the polling station and the tallying centre.

Witness Noordin Ibrahim Mohamed (PW7), an ODM Party agent, claimed vote swapping at Masalale Mobile Polling Station Stream 2 of 3. However, his evidence was contested by the presiding officer, RW11 Omar Noor Abdille, who denied any irregularities. The presiding officer testified that the Form 35A used for declaring results was accurate, although there were minor errors in recording.

The petitioner's evidence, including photographs of Form 35A, was questioned due to issues such as missing security features and a lack of certification of electronic evidence. The court considered the strict conditions for admissibility of electronic evidence to ensure its authenticity.

The **Court of Appeal in *County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others* Civil Appeal Nos 17 and 18 of 2015 [2015] eKLR** highlighted the importance of ensuring electronic evidence is authentic and not manipulated.

In ***Dziwe Pala Zuma and Suleiman Ali Mwanguku v IEBC and 2 Others*, Mombasa Election Petition E002 of 2022**, the court reiterated the necessity of proving that alleged irregularities affected the election outcome to the extent that it did not reflect the will of the people.

Justice Mwongo in ***Abdirahman Adan Abdikadir & Another v Independent Electoral & Boundaries Commission & 2 Others* [2017] eKLR**, clarified that the petitioner must prove that irregularities affected the results in a way that did not reflect the will of the people. The evidentiary burden shifts to the Respondents once the petitioner establishes this.

The Petitioner claimed discrepancies in the vote counts and procedural issues across several polling stations. At Biad Primary, the Petitioner observed a variance between the number of registered voters, those authenticated by the KIEMS Kit, and the votes cast as recorded in Form 35A. The discrepancy indicated that votes meant for one candidate were attributed to another. However, the Respondents argued that the Petitioner had not contested the results or the competency of the presiding officer, and any discrepancies were attributed to an error in recording that did not affect individual results.

At Biladul Amin Primary Stream 1 of 2, the Petitioner noted a discrepancy of 132 votes. However, evidence from the Presiding Officer showed that the total votes cast did not exceed the number of registered voters, suggesting no substantial variance. For Junction Primary Polling Station, the Petitioner identified a variance

of 44 votes. Yet, it was clarified that the number of votes cast was within the limit of registered voters, so no significant variance was found.

No issues were raised by the Petitioner regarding Anole Primary Polling Station. At El Nur Primary Polling Station, the Petitioner noted a discrepancy of 13 votes but acknowledged that the Form 35A was signed by two ODM agents, and when including rejected votes, the results tallied correctly. For Dalantalai Primary Polling Station, the Petitioner alleged a variance of 54 votes due to discrepancies between KIEMS Kit authentication and the total votes cast. The Presiding Officer explained that this was due to the use of two KIEMS Kits and the discrepancy was recorded in the polling station diary. This explanation was deemed credible, and no substantial variance was found.

The Petitioner alleged no elections were held at Della Yarey Polling Station, asserting that the results were fabricated. However, evidence from the Presiding Officer and witnesses showed that voting did occur despite initial disruptions. The Petitioner's agent admitted to leaving the station during the chaos, and the results were deemed valid as the process was managed and results were declared. At Orote Polling Station, it was confirmed that no voters turned up, so claims about the station's closure or failure to open were not valid.

Regarding disenfranchisement, the Petitioner claimed that Masalale Polling Station closed early, denying some voters the chance to vote. The Presiding Officer testified that voting began and ended as per regulations, and everyone in the queue by closing time was allowed to vote.

On allegations of police intimidation and violence, evidence showed that while there was violence and security issues, the police acted within their constitutional role to manage the situation. Allegations of police intimidation were not substantiated.

The Petitioner also accused the 3rd Respondent of failing to perform duties correctly and making false returns. The 3rd Respondent, the Deputy Returning Officer, denied swapping results and explained that the final declaration could not be made due to violence. The evidence did not support the claim of election offences. The court found the explanations for discrepancies and procedural issues credible and concluded that the Petitioner's allegations did not significantly impact the election results.

The Petitioner alleged that on 11 August 2022, while at Eldas Tallying Centre, he saw the OCPD and individuals in plain clothes removing election materials from the hall. Consequently, he sought a court order for the protection of these materials and a recount to ensure the election's credibility. The court issued an order for the custody and preservation of the materials, which were to be held by the Senior Principal Magistrate of Wajir.

However, it was later reported that the CDF Hall, where the materials were stored, was set on fire on 24 August 2022, destroying all election materials. Both parties acknowledged this fact during the hearing, although the court had initially been unaware. The Petitioner argued that this destruction compromised the election's verifiability, citing the need for scrutiny and recount of results from Masalale Mobile 2 of 3, Waradey Primary Polling Station, and Della Yarey Polling Station.

The court, however, declined the application for scrutiny, noting that the essential materials outlined in Rule 33 of the Elections (Parliamentary and County Election) Petition Rules, 2013 were no longer available due to the fire. Therefore, the scrutiny and recount could not proceed.

Regarding the illegal declaration of results, the Petitioner contended that declaring results at the County Tallying Centre in Wajir, rather than the designated Eldas Tallying Centre, was unlawful. The Respondents defended this decision by citing security concerns due to violence on 11 August 2022, justifying the use of the County Tallying Centre as a more secure location. The court agreed that the change of venue was appropriate under the circumstances and did not affect the election's outcome.

The court found that the election was conducted in accordance with constitutional principles and electoral laws. The discrepancies and irregularities identified did not significantly impact the election results. Consequently, the petition was dismissed.

The court ordered the Petitioner to pay the costs for the 1st to 4th Respondents and the 5th Respondent, capping the costs at Kshs. 1,000,000 each. The Deputy Registrar was tasked with taxing the Bill of Costs, and the money deposited by the Petitioner in court was to be used for this purpose. A Certificate of determination was to be issued to conclude the petition.

Arale v Independent Electoral and Boundaries Commission & 4 others Nairobi Election Petition Appeal E013 of 2023

In the Court of Appeal at Nairobi

Coram: HM Okwengu, JM Mativo & GWN Macharia JJA

Judgment striking out appeal

Date: 28 July 2023

Notice of Appeal-timelines for filing Notice of Appeal, Memorandum and Record of Appeal-Service of Notice of Appeal, Memorandum and Record of Appeal

Summary of facts

Kenyans went to the polls on 9 August 2022. Among the contested seats was the Member of National Assembly for Eldas Constituency, with Ahmed Boray Arale (Appellant), Adan Keynan Wehliye (5th Respondent), and Salat Omar Haji as candidates. The 5th Respondent was declared the winner, prompting the Appellant to file Election Petition No. E004 of 2022 in the High Court.

The IEBC had appointed election officials for the 72 polling stations, but the Appellant was dissatisfied and filed Petition No. 14 of 2022 at Garissa High Court, seeking to void these appointments. He later withdrew the petition. On 8 August 2022, the IEBC published the names of the election officials. The Appellant's protest led to chaos, disrupting election preparations, and the Returning Officer resigned. The elections were postponed to 10 August 2022, and the 5th Respondent won with 7,517 votes, with the Appellant garnering 6,836 votes, and Haji 66 votes.

Dissatisfied, the Appellant filed another petition in the High Court on 8 September 2022, seeking various orders, including securing election materials, scrutiny and recount of votes, declaring the election invalid, and conducting fresh elections. He contended that his concerns about election officials were ignored, leading to chaos on election day, vote swapping, and irregularities. His independent tally showed different results. The 1st to 4th Respondents opposed the petition, arguing that the Appellant withdrew his earlier petition voluntarily, the appointment of election officials was transparent, and the election adjournment was lawful. They claimed there were no significant errors or irregularities in the election results, and prayed for the dismissal of the petition with costs.

The 5th Respondent opposed the petition in a response dated 27 September 2022. He argued that he was a Jubilee Party candidate for Member of National Assembly for Eldas Constituency, while the Appellant represented the Orange Democratic Movement (ODM) Party. He stated that he was declared the winner with 7,517 votes, while the Appellant received 6,838 votes, and Mr. Salat garnered 66 votes. He denied any vote swapping, asserting that the results declared at the polling stations matched those at the tallying centre. He acknowledged chaos at Dela Yare polling station but said voting resumed after order was restored. He also mentioned that three known supporters of the Appellant were arrested due to the chaos. The Appellant claimed vote swapping at the Constituency tallying centre, but the results were declared at the County tallying centre due to the disturbances. The 5th Respondent asserted that no voter was disenfranchised and blamed the Appellant for the security incidents.

The petition proceeded with the Appellant calling 8 witnesses, the 1st to 4th Respondents calling 14 witnesses, and the 5th Respondent calling 10 witnesses. The court identified key issues including vote swapping, results from stations where elections allegedly did not occur, vote variances, voter disenfranchisement, police intimidation and violence, result declaration, election material security, and election offences. The court concluded that the Appellant failed to prove any allegations and ruled that the election was conducted in accordance with the Constitution and electoral laws. Any irregularities did not affect the outcome. The petition was dismissed, with the Appellant ordered to pay costs of Kshs. 1,000,000 each to the 1st-4th Respondents and the 5th Respondent.

Aggrieved by the judgment, the Appellant filed an appeal listing 22 grounds in a Memorandum of Appeal dated 3 April 2023. The grounds included claims that the judge misinterpreted election laws, disregarded Constitutional violations, failed to consider the Appellant's arguments and evidence, and erroneously upheld the election results despite admitted errors and irregularities. The Appellant sought to have the judgment set aside, a declaration that the 5th Respondent was not validly elected, and an order for a fresh election. He also requested that costs of the appeal and High Court proceedings be borne by the Respondents.

The Respondents filed two applications. The first application was by the 1st to 4th Respondents, dated 13 April 2023. It sought to strike out the Appellant's Record of Appeal dated 3 April 2023, on grounds of being filed and served out of time and lacking a Notice of Appeal. They also requested to strike out the memorandum of appeal dated 3 April 2023 and the entire appeal, with costs to be borne by

the Appellant. This application was supported by an affidavit from the 3rd Respondent, sworn on 17 April 2023, which highlighted the late filing of the appeal beyond the 30-day limit, late service of the appeal, and the absence of a proper Notice of Appeal, which they argued was a jurisdictional prerequisite. The second application was by the 5th Respondent, dated 17 April 2023. It sought to strike out the Notice of Appeal dated 7 March 2023, the memorandum of appeal dated 3 April 2023, and the Appellant's Record of Appeal, arguing the appeal should be dismissed and costs awarded to the 5th Respondent. This application was supported by affidavits from the 5th Respondent and an advocate, Jacinta Wangeci Wang'ombe, detailing the late filing and service of documents, the defective nature of the Notice of Appeal, and asserting that the Court lacked jurisdiction due to these procedural errors.

The Appellant opposed these applications through five replying affidavits. In affidavits sworn on 22 April 2023, he argued that the Notice of Appeal dated 7 March 2023 was properly filed electronically on the same date and subsequently lodged physically, although the Court of Appeal registry refused to stamp the physical copies. He contended that the Respondents failed to demonstrate that they accessed the e-filing portal in the relevant period to claim no Notice of Appeal was filed. The Appellant maintained that the appeal was filed within the 30-day limit and that the service of the Notice of Appeal was acknowledged by the 5th Respondent, who filed a notice of address of service but failed to serve it within the required timeframe. The Appellant asserted there was no requirement for grounds of appeal to be in the Notice of Appeal and defended the legal basis of his appeal, stating it was not defective. The Appellant contended that the Record of Appeal was filed on 5 April 2023, despite technical issues with the judiciary e-filing system on 4 and 5 April 2023. He and his advocate visited the Court of Appeal registry to submit hard copies but were refused. The system resumed working at 1:20 am on 6 April 2023, allowing them to receive a case number and serve the Record of Appeal within the required five-day period, considering rule 3(d) of the Court of Appeal Rules, which excludes days where the period is less than six days. On 14 April 2023, the Appellant's advocate's e-filing portal was hacked, delaying their ability to manage their filings until 25 April 2023. The Appellant argued that the 5th Respondent had not demonstrated any prejudice from the appeal and that striking it out would deny justice. He urged the Court to exercise its discretion under Article 159(2)(d) of the Constitution to ensure substantive justice, empha sizing the appeal's public importance regarding voters' rights in Eldas Constituency.

The Appellant's second affidavit reiterated his compliance with filing and service timelines. He noted the judiciary's failure to issue a timely receipt after payment on 5 April 2023, which should not be held against him. The third affidavit by advocate Sandrah Moraa Muturi detailed attempts to file the Record of Appeal amid system downtimes on 4 and 5 April 2023, eventually succeeding online despite challenges.

The fourth affidavit by process server Elisha Wanga confirmed the filing of the Notice of Appeal at the High Court and Court of Appeal registries, though physical documents were not stamped. The fifth affidavit by ICT officer Joseph Ondier Onyango described technical issues with the judiciary e-filing portal, including system errors, downtime, and hacking of the firm's portal. He detailed efforts to file the Notice and Record of Appeal amid these challenges, ultimately filing the record on 5 April 2023 and receiving a case number on 6 April 2023.

On 14 April 2023, they discovered their e-filing account was compromised, regaining control only on 25 April 2023 after significant efforts. These issues, attributed to technical failures and hacking, were beyond the Appellant's control. The matter was scheduled for hearing on 5 June 2023.

The 1st to 4th Respondents filed submissions on 14 May 2023, while those of the 5th Respondent are dated 16 May 2023, and for the Appellant, they are dated 30 May 2023. Regarding the appeal itself, the Appellant's submissions are dated 16 May 2023, and those for the 1st to 4th Respondents and 5th Respondent are dated 26 May 2023 and 29 May 2023, respectively. Counsel representing the parties appeared before the Court, which directed that both the applications and the appeal would be heard sequentially, with the applications considered first. If the applications were found to have merit, the Court would halt proceedings; otherwise, it would proceed to hear the appeal on its merits.

Ms. Hashi, representing the Appellant, argued that the Notice of Appeal was filed electronically on 7 March 2023 and physically lodged on 8 March 2023 at the Court of Appeal and High Court registries. She noted system errors and downtime on 4 and 5 April 2023 but maintained that filing fees were paid on 5 April 2023, resulting in a receipt issued on 6 April 2023. Ms. Hashi contended that the Notice of Appeal complied with the Court of Appeal (Election Petition) Rules, 2017, and service was within the prescribed time limit. She questioned the Respondents' standing, citing procedural irregularities, and argued that the hacking of their law firm's e-filing system should not prejudice the Appellant.

Mr. Mwiti, representing the 1st to 4th Respondents, asserted that the Record of Appeal lacked a Notice of Appeal, violating the rules. He argued that the Appellant failed to prove lodging of the notice electronically and that the appeal was filed beyond the 30-day limit. Mr. Mwiti emphasized the jurisdictional importance of complying with the law and urged the Court to strike out the appeal and memorandum of appeal.

Mr. Issa contended that a Notice of Appeal must be filed within 7 days of its lodgement. He argued that it was untrue that the judiciary electronic system was not operational on 7 March 2023. Moreover, he highlighted that the specific time of the alleged downtime was not indicated. To support this argument, counsel submitted a further affidavit, sworn by one Jecinta Wangechi Wan'gombe, an advocate in his law firm, on 5 May 2023. This affidavit annexed email communications between the law firm and the Registrar Court of Appeal. In these communications, the law firm informed the registry on 7 March 2023 of their intention to file a Notice of Appeal, as the e-filing system did not have a provision for filing such a notice. The registry responded on the same day, stating that they could file the document through the judiciary e-filing system and make payment of court fees. The law firm forwarded two notices of appeal on the same date, copying all advocates for the Respondents.

The law firm also annexed a communication from the Deputy Registrar of this Court regarding another election petition involving Mr. Issa. The communication indicated that the Notice of Appeal was filed on the evening of 7 March 2023. It also stated that the system would generate an election petition appeal number and an invoice for payment. Additionally, counsel annexed a tracking number page which showed that on 7 March 2023, three payments were made in regard to the Notice of Appeal. These payments were allocated a case number 'Court of Appeal Election Petition Number E003 of 2023'. Three court fee receipts were issued on the same day, totalling Kshs. 1300. Mr. Issa argued that in this case, the petition number was generated on 6 April 2023, which exceeded the 30-day limit since the filing of the appeal. He further submitted that even if the first attempt to file the Notice of Appeal failed, there was no proof that the Appellant made subsequent attempts to file and was unsuccessful. He emphasised that the filing of a Notice of Appeal is not a matter of faith but a fact that must be proven. He urged the court to dismiss the appeal due to the failure to comply with mandatory provisions of the law, and to strike out the Notice of Appeal and Memorandum of Appeal for their non-compliance with the Court of Appeal (Election) Petition Rules, 2017.

In response, Ms. Hashi argued that the law had been established by the Supreme Court in ***Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others*** **(Application 3 (E008) of 2022**). The court, dealing with inadequacy of technology, placed only one requirement as evidence that a party attempted to file documents: that the party must demonstrate that they were at the Registry within the prescribed timelines. To show that this requirement was met, counsel referred to the 'Visitor's Notes' annexed to the affidavit of Joseph Ondier Onyango, sworn in opposition to the Respondents' applications. These notes confirmed that the Appellant and his counsel were present at the Court's registry on 5th April 2023, intending to file documents.

Ms. Hashi reiterated that a Notice of Appeal is not subject to payment of court fees, and therefore, no invoice would have been generated. She argued that it is common knowledge that technology fails, and when it does, parties must lodge their documents physically at the registry, as required by law. She asserted that the Notice of Appeal complied with this requirement and should be upheld.

The court acknowledged the issues raised in the applications as preliminary in nature, challenging its jurisdiction to hear and determine the main appeal. It was deemed prudent to first dispense with the applications, as jurisdiction is fundamental, and without it, the court cannot proceed with the main dispute.

Issues for determination

1. Whether the Notice of Appeal, Memorandum and Record of Appeal were filed within the required timeframe.
2. Whether the Notice of Appeal, Memorandum and Record of Appeal were served within the required timeframe.
3. Whether the Notice of Appeal was incompetent and/or defective.
4. Whether the appeal was merited.

Determination of the court

In considering the first issue, the court examined whether the Notice of Appeal was actually filed and, if so, whether it was filed within the stipulated timelines. The Appellant contended that he attempted to file the Notice of Appeal on 7 March 2023 but encountered an 'e-filing program error'. Following this failure, his counsel and he attempted to file it physically at the Court's registry but were unsuccessful. Consequently, they filed it both electronically and physically at the High Court on 8 March 2023.

The court noted that the impugned judgment was rendered on 6 March 2023, meaning the Notice of Appeal had to be filed by 13 March 2023. According to rule 2 of the Court of Appeal (Election Petition) Rules, 2017, a 'Notice of Appeal' must be lodged in accordance with rule 6. Rule 6 stipulates that anyone wishing to appeal a High Court decision in an election petition must lodge a Notice of Appeal within seven days of the decision. The term 'registry' refers to the Court of Appeal registry, as defined by rule 2 of the Rules.

The court emphasised that filing a Notice of Appeal at the High Court did not meet the requirements set out in the Court of Appeal (Election Petition) Rules, 2017. This was supported by the Supreme Court's ruling in ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*** **[2019] eKLR**, which confirmed that the notice must be filed at the Court of Appeal registry. The court further referenced ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** **[2014] eKLR**, which underscored the jurisdictional necessity of filing a Notice of Appeal correctly.

The Appellant claimed a system error prevented the filing on 7 March 2023, yet the court found it notable that he successfully filed the notice at the High Court the next day. The court questioned why the Appellant did not make further attempts to file it at the Court of Appeal within the remaining six days. It was pointed out that the judiciary's e-filing system is uniform across all courts, which contradicts the Appellant's claim of being able to file at the High Court but not the Court of Appeal.

Further inconsistencies were highlighted by the court. The Appellant's counsel and ICT officer confirmed the system was not working on the relevant dates, yet no judiciary notice of downtime was produced, which is customary when such issues arise. Additionally, evidence from the Respondents, including a 'judiciary tracking number', indicated the filing occurred later than claimed by the Appellant.

The court also noted the affidavit of Jecinta Wangechi Wan'gombe, showing that the 5th Respondent's law firm successfully filed a Notice of Appeal on the same date the Appellant claimed the system was down. This undermined the Appellant's assertions. The court also considered ***Raila Odinga 2013***, which advised on taking the unique circumstances of each case into account when determining the extent of the application of Article 159(2)(d) of the Constitution. The court emphasised that a Notice of Appeal is not merely a technicality but a jurisdictional prerequisite, as highlighted in ***Nicholas Salat***.

Ultimately, the court concluded that the judiciary's e-filing system was operational on the relevant dates, and the Appellant failed to file the Notice of Appeal within the prescribed time. The court referred to ***Patricia Cherotich Sawe v IEBC & 4 Others*** **[2015] eKLR**, which emphasised the critical role of a Notice of Appeal in signalling the intent to appeal and triggering the jurisdiction of the court.

Based on these findings, the court determined that the Appellant did not meet the requirements for filing the Notice of Appeal within the required timeframe, rendering the invocation of the court's jurisdiction to hear the appeal time-barred.

In considering the second part of the first issue, the Court examined whether the Record of Appeal was filed within the stipulated timelines. The Record of Appeal was dated 3 April 2023, with the Appellant asserting it was filed on 5 April 2023, while the Respondents claimed it was filed on 6 April 2023. According to the Court of Appeal (Election Petition) Rules, 2017, the Record of Appeal should be filed within 30 days from the date of the High Court judgment, which was 6 March 2023, making the deadline 5 April 2023.

The Court noted that the Appellant's counsel had incorrectly referred to rule 9(1) and (2) of the Court of Appeal (Election Petition) Rules, 2017 regarding the filing deadlines. Instead, rule 8(5) specifies that the Record of Appeal must be filed within 30 days from the High Court judgment. This requirement is also supported by section 85A(1)(a) of the Elections Act, which mandates that appeals from High Court election petitions must be filed within 30 days.

The Court explained the current e-filing procedures, emphasising that the Judiciary's system is unified. If the e-filing system experiences downtime, a notice is issued, and parties are advised to send their documents via the Judiciary email. The Appellant claimed that when he and his counsel attempted to file the documents physically on 5 April 2023, they were turned away. However, there was no evidence that they utilised the Judiciary email as expected. Additionally, the emails presented as evidence of system issues were dated after the filing deadline, suggesting that any issues occurred post-deadline.

The Court found it incredulous that the Appellant argued the e-filing system was not working at the Court of Appeal but was operational at the High Court, without demonstrating how this was possible within the unified system. The Court referenced ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR***, which emphasised that current rules must be strictly observed, given the strict timelines for election petition appeals.

Despite the Appellant's contention that the Record of Appeal was filed on 5 April 2023 but stamped on 6 April 2023, the Court clarified that the process of lodging an appeal involves several steps, including payment of court fees and the issuance of a receipt. The Court concluded that the Record of Appeal was filed on 6 April 2023, one day late, thus rendering it out of time. This conclusion was reinforced by the Court's examination of its registry procedures, which showed that all steps must be completed for the filing to be deemed successful. The process of lodgement must be understood as working conjunctively and not disjunctively, meaning all required steps must be completed together for the filing to be valid.

On the second issue, the focus was on whether the Record of Appeal was served within the stipulated timelines, given that the Court had determined no Notice of Appeal was filed. Rule 8(5) of the Court of Appeal (Election Petition) Rules, 2017 mandates that the Record of Appeal be filed within thirty days from the date of the High Court judgment. Additionally, sub-rule (6) requires the Appellant to serve a copy of the Record of Appeal to all parties named in the Notice of Appeal within five days of filing the Record of Appeal.

It was uncontested that the Appellant served the Record of Appeal on 12 April 2023. The Appellant's counsel argued that this was timely, as Good Friday and Easter Monday (7 and 10 April 2023, respectively) were excluded days under section 2 of the Public Holidays Act and as contemplated under rule 3 of the Court of Appeal Rules, 2022. Therefore, serving the Record of Appeal on 12 April 2023 was within the five-day limit stipulated by rule 8(6). The Appellant relied on the case of ***KCB Bank Kenya Limited v Mwandoro (Civil Application E044 of 2021) [2023] KECA 260 (KLR) (17 March 2023) (Ruling)*** to support this argument.

Although the Court of Appeal (Election Petition) Rules, 2017 do not specify provisions for the computation of time, rule 4 of the Rules allows the application of the Court of Appeal Rules, 2010 (now 2022 Rules) where there is no applicable provision regarding election petition appeals. Consequently, rule 3 of the 2022 Rules on computation of time applies. Rule 3 stipulates that any period of days fixed by the Rules or any Court decision for performing any act shall be computed by excluding the day of the event, extending the period to the next day if the last day is a Sunday or public holiday (excluded days), and not counting excluded days when the period is six days or fewer.

The Appellant should have filed the Record of Appeal by 5 April 2023, according to section 85A(1)(a) of the Elections Act, and served it by 10 April 2023. However, the period from 5 to 10 April 2023 included two public holidays, which are

excluded in the computation of time under rule 3 of the Court of Appeal Rules, 2022. Therefore, the Record of Appeal was required to be served by 12 April 2023, which it was. Thus, the Court held that the Record of Appeal was served in accordance with the provisions of the law.

On the third issue, which was whether the Notice of Appeal was incompetent and/or defective, the Respondents argued that it was, on the grounds that it sought to appeal matters of fact and did not contain the grounds of appeal. Section 85A (1) of the Elections Act stipulates that 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 must be filed within thirty days of the decision of the High Court and heard and determined within six months of the filing of the appeal.

Rule 6(3)(c) of the Court of Appeal (Election Petition) Rules, 2017 mandates that a Notice of Appeal should identify the judgment being appealed and set out the grounds of appeal in separate numbered paragraphs. The provisions are mandatory, allowing no leeway for non-compliance. Counsel for the Respondents correctly noted that there is no provision for filing a Memorandum of Appeal in the Record of Appeal in an election petition appeal; the grounds of appeal must be included in the Notice of Appeal.

Rule 6(5) of the Court of Appeal (Election Petition) Rules, 2017 specifies the format for the Notice of Appeal as per Form EPA 1 in the Schedule of the Rules. The Supreme Court, in ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*** **[2023] eKLR**, emphasised the importance of filing a Notice of Appeal at the Court of Appeal Registry in the prescribed format. Further, the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*** **[2014] eKLR** stated that filing a Notice of Appeal is a jurisdictional prerequisite and not a mere technicality.

The Court, in ***Raila Odinga 2013***, highlighted the need to consider the unique circumstances of each case when determining procedural technicalities. In ***Abdullahi v Independent Electoral and Boundaries Commission & 3 others*** **(Election Petition Appeal E004 of 2022) [2023] KECA 207**, it was affirmed that an appeal from the High Court to the Court of Appeal in an election petition must be filed within thirty days as stipulated by section 85A (1)(a) of the Elections Act.

Counsel for the Appellant requested the application of Article 159(2)(d) of the Constitution to do substantive justice despite procedural errors. However, the

Court reiterated that election petition appeals have strict timelines, and compliance with procedures is crucial. Justice Kiage, in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*** **[2014] eKLR**, argued that Article 159 of the Constitution and the oxygen principles should not be used to undermine procedural rules.

The Court of Appeal has consistently held that strict adherence to the Election Petition Rules is necessary, as seen in ***Apunga Arthur Kibira v IEBC & 2 Others*** **[2018] eKLR**, which emphasised that the Court cannot assume jurisdiction it does not have. Thus, the Appellant's failure to comply with mandatory provisions and statutory timelines rendered the appeal incompetent. The Court concluded that, having found no Notice of Appeal filed, it had no jurisdiction to proceed and could do no more than dismiss the appeal.

Accordingly, the applications were allowed as follows: the Notice of Motion by the 1st to 4th Respondents dated 13 April 2023 was allowed. The Notice of Motion by the 5th Respondent dated 17 April 2023 was allowed. The Notice of Appeal dated 7 March 2023 was struck out. The Record of Appeal dated 3 April 2023 was struck out. The costs of the applications and the struck-out appeal were to be borne by the Appellant.

Bardad Mohamed Farah v IEBC & 2 Others Nairobi Election Petition Appeal No E007 of 2023

In the Court of Appeal at Nairobi

Coram: HA Omondi, KI Laibuta & G Ngenye-Macharia JJA

Ruling striking out appeal

Date: 14 July 2023

Failure to file Notice of Appeal on time-whether the Court of Appeal has jurisdiction to extend time for filing appeal-whether filing Record of Appeal on time can cure late filing of Notice of Appeal

In the general elections held in August 2022, the Independent Electoral and Boundaries Commission (IEBC) conducted elections for the Mandera North Constituency. The Appellant, Bardad Mohamed Farah, and the 3rd Respondent, Abdullah Bashir Sheikh, contested the seat of Member of the National Assembly. The 2nd Respondent, the Returning Officer for Mandera North Constituency, declared the 3rd Respondent as the winner with 9,214 votes, while the Appellant garnered 6,999 votes.

Dissatisfied with the outcome, the Appellant filed a petition at the High Court challenging the results declared by the 2nd Respondent. He alleged that the election was not free and fair and was conducted contrary to the principles enshrined under Article 81 of the Constitution, section 39 of the Election Act, and relevant Regulations. The Appellant's claims included allegations of deliberate manipulation of KIEMS Kits by various presiding officers, the deployment of the complementary identification system to facilitate irregular ballot marking, ballot stuffing, and exaggerated voter turnout in favour of the 3rd Respondent. Further, he alleged the unilateral alteration of certain polling stations, the removal of election materials by the 1st and 2nd Respondents, voter bribery and undue influence by the 3rd Respondent, aided by various presiding officers and the 2nd Respondent, and the ferrying of voters to different polling stations. The Appellant also accused the 1st and 2nd Respondents, along with the Mandera County security apparatus, of meting out violence on agents and candidates whenever objections were raised regarding the election process.

The Appellant requested the High Court to order the delivery of all election materials, including ballot materials, all forms, Polling Station Diaries, and KIEMS Kits related to the election. He further sought a recount, re-tally, and verification of all polling stations within Mandera North Constituency or, alternatively, that the declared election result be rendered invalid, null, and void. Additionally, the Appellant urged the Court to hold that the 3rd Respondent violated Sections 9 to 12 of the Elections Offences Act and that he lacked the personal integrity, character, and suitability to hold public office. He also sought an order for the 1st Respondent to conduct a fresh parliamentary election for Mandera North Constituency and costs.

The Respondents opposed the application. The 1st and 2nd Respondents argued that the Appellant did not present any set of results other than what was declared by the Respondents. They contended that the orders sought by the Appellant were overly broad and beyond the scope of the original petition, that no sufficient basis was laid to warrant the orders sought, and that the Appellant failed to specify the particular polling stations where the alleged malpractices occurred, rendering that limb of the prayers speculative. They also stated that any challenges in using KIEMS Kits were remedied through legally established procedures before resorting to using manual registers to identify voters, and they maintained that the 3rd Respondent won the elections fairly with a clear margin.

The trial judge found a basis for partial scrutiny and recount in the listed polling stations but ruled that there was no justification for a scrutiny, recount, and re-tallying in all polling stations within the entire constituency. The allegation of manipulation of the KIEMS Kits was rebutted by the scrutiny report. The court also found no evidence to support the allegations of voter bribery, voter ferrying, or violence in any of the polling stations. Ultimately, the court held that there were no irregularities or illegalities that substantially impacted the results announced by the 2nd Respondent. It concluded that the election was conducted substantially in a free, fair, transparent, and credible manner, in accordance with the Constitution and electoral laws. Consequently, the court dismissed the Appellant's petition with costs awarded to the Respondents.

The Appellant challenged this decision on 17 grounds of appeal, focusing primarily on the issues of scrutiny and recount, as well as the disproportionate, unreasonable, and excessively high costs awarded. In response, the 1st to 3rd Respondents raised preliminary objections, urging the Court of Appeal to strike out the Memorandum of Appeal on the grounds that it was incompetent, having been

filed out of time. They relied on section 85A of the Elections Act and rule 9(1) of the Court of Appeal (Election Petition) Rules, 2017, which mandate that an appeal from the High Court in an election petition must be filed within 30 days of the High Court's decision. The 3rd Respondent submitted that the appeal, filed on 10 April 2023, was seven days late, as the impugned judgment was delivered on 3 March 2023. The 3rd Respondent argued that failure to comply with the timelines extinguished the right to appeal, as section 85A of the Elections Act is mandatory and does not allow for an extension of time.

In support of this position, the 3rd Respondent cited the Court of Appeal's decision in ***John Munuve Mati v Returning Officer, Mwingi North Constituency & 2 Others*** **[2018] eKLR**, where the Court stated that an election petition appeal must be filed within 30 days from the date of the High Court's judgment and heard and determined within six months of its filing. The Court emphasised that this commitment to the timely resolution of election disputes stems directly from the Constitution, where Article 87 mandates Parliament to establish mechanisms for the timely settlement of electoral disputes.

The 3rd Respondent also relied on the case of ***Wavinya Ndeti v IEBC & 4 others*** **[2014] eKLR**, where the Court addressed the issue of extending time under section 85A, noting that the provision is mandatory and that the court does not have the discretion to extend time.

The Appellant acknowledged that the High Court judgment was rendered on 3 March 2023 and that the record of appeal was filed on 10 April 2023. However, he maintained that the appeal was still within the 30-day timeline provided under section 85A of the Elections Act. The Appellant argued that the appeal was effectively filed on 10 March 2023, when the Notice of Appeal was lodged, and security for costs was paid. He contended that the definition of filing an appeal should be regarded as the date on which the record of appeal is filed, and that by counting calendar days in the normal manner, the last day for filing the record of appeal would have been 4 April 2023. If public holidays and Sundays were included in the computation, the Respondent's objections would be sustainable.

The Appellant's counsel further argued that section 57 of the Interpretation and General Provisions Act (Cap 2) offers reprieve by excluding Sundays and public holidays in the computation of time. Although the Court of Appeal (Elections Petition) Rules, 2017, do not specifically address the computation of time, the Appellant urged the Court to adopt the approach under rule 4 of the 2017 Rules, which allows the Court to apply the Court of Appeal Rules, 2022, where there

is no applicable provision in relation to election petition appeals. The Appellant also sought the Court's reliance on rule 3 of the 2022 Rules, which mirrors section 57 of the Interpretation and General Provisions Act in excluding Sundays and public holidays from the computation of time. In support, the Appellant referred to the case of ***John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others*** **[2018] eKLR**.

The Appellant also drew support from the case of ***Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others*** **[2014] eKLR**. In this case, Justice Kiage, JA, emphasised that when reckoning the days for filing an appeal, certified days for preparing proceedings should be excluded. He argued that the letter requesting the proceedings was written within time and copied to all Respondents and advocates, triggering the exclusionary element in the proviso to Rule 82 of the Court of Appeal Rules. Justice Kiage also highlighted that the right of appeal is integral to access to justice and the right to a fair hearing under the Constitution, and that the construction of section 85A should not curtail or render illusory the right of appeal.

However, the Court of Appeal acknowledged the persuasive reasoning of Justice Kiage but ultimately relied on the Supreme Court's pronouncement in ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*** **[2014] eKLR**, which held that election petitions filed outside the prescribed timelines cannot avoid the consequences of their dilatoriness, as the prescribed timeframe opens the jurisdiction of the courts. The Court also cited ***Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others*** **[2014] eKLR**, where the Supreme Court stated that the Court of Appeal erred in law by admitting and determining an incompetent appeal filed out of time, thereby acting without jurisdiction.

The Court of Appeal found that the timelines for filing an appeal from the High Court are clearly stipulated in section 85A of the Elections Act. The Court noted that election petitions are *sui generis*, and where the Rules make no provision regarding the computation of time, the fallback statute is not section 57 of the Interpretation and General Provisions Act, but section 85A of the Elections Act. The Court reiterated that an appeal must be filed within 30 days of the High Court's decision, and there is no provision for enlarging time.

In conclusion, the Court upheld the preliminary objections raised by the Respondents, finding that the appeal was incompetent as it was filed seven days late.

Karisa v Independent Electoral and Boundaries Commission & 2 others; Kingi (Interested Party) Malindi High Court Election Petition E001 of 2022

High Court at Malindi

Coram: Mabeya J

Judgment allowing petition

Date: 3 March 2023

Non-compliance with the Constitution and election laws-election offences-standard of proof- impact of irregularities on election result-whether consent of agents was sufficient to validate re-opening of ballot boxes after declaration of results at polling station-nullification of election result

Summary of facts

On 9 August 2022, the people of Magarini Constituency held elections for various positions, including for Member of National Assembly (MNA). The Petitioner, 3rd Respondent, and Interested Party were amongst the candidates vying for that seat under different political parties. The 3rd Respondent garnered the most votes, with 11,940, and was declared as the duly elected MNA. The Petitioner received 11,925 votes, losing to the 3rd Respondent by a margin of 21 votes.

The Petitioner rejected those results and moved this Court via a petition dated 7 September 2022, which was amended on 12 October 2022, seeking the nullification of those elections. The grounds were that there were grave errors, flaws, fraud, illegalities, and irregularities committed by the Respondents, which constituted fundamental contraventions of the letter, spirit, and objects of the Constitution and the electoral laws. It was the Petitioner's case that the Respondents failed to ensure or secure a free, fair, and credible election and the will of the people of Magarini Constituency.

The petition was based on five grounds: denial of the Petitioner's agents to three polling stations; false or inaccurate Statutory Declaration Forms in 12 polling stations; differences in the number of votes cast in the G elections in 2 polling stations; vote result padding or manipulation in 4 polling stations; and election offences due to the manner in which the 1st Respondent through its officers conducted the elections.

The Petitioner sought prayers for a declaration invalidating the election of the 3rd Respondent as the MNA, Magarini Constituency; a declaration that the Petitioner was duly elected as having attained the majority vote in that election, or in alternative, an order for fresh MNA elections in Magarini Constituency. They further sought a declaration that the non-compliance, irregularities, and improprieties in the impugned election were substantial and significant that they affected the integrity and quality of the election and the result thereof. An order for scrutiny and recount of the ballots cast in 19 polling stations and that such election offences by the 2nd Respondent and 1st Respondent's Presiding Officers be reported to the DPP for appropriate action plus costs of the petition.

The 1st and 2nd Respondent responded to the petition via a response dated 27 September 2022. The 3rd Respondent opposed the petition via the amended Response to Petition dated 28 October 2022. The Respondents generally denied all the allegations and contended that the election was conducted in accordance with the Constitution, specifically Articles 81 and 88, and electoral laws and rules, and that there were no irregularities. They argued that the 3rd Respondent gathered the most votes in the elections and the 2nd Respondent validly declared him as the duly elected MNA.

It was contended that accredited agents were allowed in polling stations, and all agents signed Form 35As without any complaints or dissatisfaction with the processes. The differences in results were attributed to human error, and it was argued that no candidate benefited from the errors. It was also contended that all errors were realized and corrected/rectified, thus no candidate lost votes. Errors such as vote interchange were claimed not to affect the votes or results of any candidate. Ballots lacking an IEBC stamp were rightly rejected to avoid ballot stuffing. Neither election offences nor irregularities were reported to the 1st Respondent, and the errors in Forms 35A and 35B were honest mistakes of human error and were rectified in the presence of the agents and chief agents. A total of 35 witnesses testified at the trial. At the pre-trial conference held on 3 November 2022, the parties agreed on the following broad issues for determination: Whether the election of the MNA for Magarini Constituency was conducted in accordance with the Constitution and the law; whether there was non-compliance with the Constitution and the law in the conduct of the elections of Magarini Constituency; whether there were election offences committed as alleged; whether the alleged irregularities affected the results of the election of the MNA for

Magarini Constituency; what orders should be made as to costs.

Issues for determination

1. Whether the election of the MNA for Magarini Constituency was conducted in accordance with the Constitution and the law.
2. Whether there was non-compliance with the Constitution elections of Magarini Constituency.
3. Whether there were election offences committed as alleged.
4. Whether the alleged irregularities affected the results of the election of the MNA for Magarini Constituency
5. What orders should be made as to costs.

Determination of the court

Before delving into the agreed issues for determination, the court began by noting that election petitions were in the nature of public interest disputes and as such, the standard of proof applicable to them varied from that applicable in civil cases. Citing the decision of the Supreme Court in ***Raila Odinga and Another v The Independent Electoral and Boundaries Commission and Others*** **[2017] eKLR,** the court reiterated that the applicable standard of proof in election petitions is beyond the balance of probabilities but lower than beyond reasonable doubt, which is the standard applicable in criminal cases. However, as stated by the Court of Appeal in the case of ***Khatib Abdalla Mwashetani v Gideon Mwangangi Wambua*** **[2014] eKLR**, where the allegations are of a criminal or quasi-criminal nature, the applicable standard remained one beyond reasonable doubt.

Accordingly, in this petition, the standard of proof was the intermediate one: higher than the balance of probabilities but lower than beyond reasonable doubt, but beyond reasonable doubt for allegations of a criminal or quasi-criminal nature.

On the question of burden of proof, the court, relying on section 107 of the Evidence Act, reiterated that he who alleges must prove. The burden was therefore on the Petitioner throughout to prove not only non-compliance with the Constitution and electoral law, but also that the said non-compliance affected the outcome. Citing ***Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others*** **[2018] eKLR,** the court further restated, drawing from the ***2013 Raila Odinga*** case, that an election court would not easily upset an election by substituting its decision, conviction or will to that of the electorate and that it had to be satisfied that the alleged irregularities affected the will of the electorate. Moreover, the Petitioner was obligated to prove not only non-compliance

with the law, i.e. violations, omissions, malpractices, irregularities and illegalities in the conduct of the Magarini Constituency MNA election, but also that the non-compliance affected the validity of the elections and did not reflect the will of the people of Magarini. It was only when this was done that the Respondent would bear the burden of proving the contrary. This was based on the common law principle that all acts are presumed to have been done rightly or regularly, *Omnia praesumuntur rite et solemniter esse ecta,* meaning that the Petitioner was obligated to produce firm and credible evidence of the public authority's departures from the prescriptions of law before the burden could shift to the Respondents to establish the contrary.

Further, citing ***John Fitch v Tom Stephenson & 3 Others*** **[2008] EWHC 501 QB6,** the court was emphatic that it had to be guided by the principle that an election court had to be cautious not to substitute its will for that of the voters.

Having laid down these foundational principles, the court proceeded to analyse the agreed issues for determination. The first two issues revolved around whether the elections were conducted in accordance with the Constitution and the law.

After laying down the principle that the official acts of the 1st and 2nd Respondent were presumed to be lawful, valid and in accordance with the Constitution unless satisfactory evidence was tendered to the contrary, the court interrogated the Petitioner's allegations aimed at dislodging this presumption.

The Petitioner alleged denial of access to polling stations for their agents, citing instances at Mjanaheri Primary School, Mapimo Primary School Streams 3 and 4, and Mapimo Youth Polytechnic Streams 2 and 5. They testified that UDA agents signed Form 35A at some stations despite not representing them, while their agents were denied access. The returning officer stated that due to space constraints, only one agent per party was allowed inside, a claim supported by the 3rd Respondent. The Presiding Officers refuted the allegations.

In analysing the case, the court referenced ***Ahmed Abdullahi Mohamed & Anor V Hon Mohamed Abdi Mohamed & 2 Others Election Petition No 14 Of 2017 eKLR***, emphasising that the opening of sealed ballot boxes without a court order was irregular. Despite this, the Returning Officer broke the seals to correct an error in vote interchange between the Petitioner and the 3rd Respondent. Regarding discrepancies in vote counts at Vuga Primary School and Mapimo Central Primary School, without evidence from other elective seats, the court could not verify the claim.

On false or inaccurate forms and vote manipulation, instances were cited where Form 35As did not match results on the Respondent's portal. Anomalies were highlighted, including a Petitioner's agent forced to sign a blank Form 35A, leading to vote interchange. The court questioned why a recount was conducted at the tallying centre, contradicting the finality of polling station results, referring to ***IEBC V Maina Kiai & 5 others Civil Appeal 105 of 2017***. Ultimately, the court deemed the opening of the ballot box a serious irregularity, especially with the established error in result transfer.

During the trial, several witnesses provided testimony regarding irregularities in various polling stations. PW5 testified that in Kinyaule polling station, there was a discrepancy between the number of votes recorded in Form 35A and Form 35B, indicating inaccurate results. PW7 recounted an incident at Kaembeni Primary School where rejected votes were not properly addressed, leading to objections being dismissed and threats of eviction. PW6 testified about discrepancies at Kayadagamra Primary School, where the Presiding Officer failed to rectify errors until further measures were taken. R1W1, the PO at Mjanaheri Primary School, admitted to inaccuracies in the tabulation of votes and the incorrect indication of the polling station. The Petitioner argued that such errors compromised the credibility of the results. Citing ***Manson Oyongo Nyamweya v James Omingo Magara & 2 Others*** **[2009]** ***eKLR***), the Court emphasised the importance of the Presiding Officer's signature in validating the results.

The Court noted that several Form 35A documents were unsigned by candidates or agents without explanation, raising questions about their credibility. Additionally, admissions by the 1st and 2nd Respondents revealed discrepancies between Forms 35A and 35B in multiple stations. Regulation 83 was cited to highlight the returning officer's responsibility for ensuring the accuracy of Form 35B.

Concerns were raised about the absence of agent signatures in the Vuga polling station, with the explanation of elephant threats deemed unsatisfactory. Instances of altered votes without countersigning were noted, particularly affecting the Petitioner's votes. The Court concluded that false or inaccurate statutory forms influenced the declaration of results, indicating irregularities and non-compliance with the law.

In light of the evidence presented, the Court found that the Petitioner had proven the MNA elections in Magarini Constituency were not conducted in accordance with the Constitution and the law.

The Petitioner alleged that electoral fraud occurred during the election, citing instances of Presiding Officers altering and stamping Forms 35A to manipulate voter turnouts and transmit manipulated results, particularly at Mapimo Youth Polytechnic 1 of 6. However, despite the Petitioner's claim, there was no concrete evidence to prove fraudulent intent by the Presiding Officer in that station. While there were instances of altered results and inaccuracies in statutory forms, the Petitioner failed to establish these actions were carried out with fraudulent intent.

Regarding violence, IPW1 testified to being physically assaulted by ODM supporters, but there was no evidence that the 1st Respondent was informed of the attack for action to be taken. Moreover, the incident occurred outside the election area under the jurisdiction of the IEBC.

The allegation of bribery and campaigning at polling stations was also raised. IPW3 testified to witnessing supporters soliciting votes and offering bribes, but there was no evidence that these incidents were reported to the 1st Respondent. Additionally, while an IEBC official was accused of campaigning within a polling station, it was argued that the official was merely assisting voters, which is permissible under regulations.

The court conducted a thorough examination of the numerous irregularities and their possible implications for the election's validity. A review of Regulation 79 showed that counterfoils and ballot papers were the only documents that required stamping under the Regulations. Regulation 77(e) mandated a Returning Officer not to count a ballot paper which could not be verified from the counterfoil of ballot papers used at the polling station. The scrutiny revealed a total of 37 unstamped counterfoils out of the 24 polling stations. Several ballots were also unstamped. The court noted that counterfoils served an important role in verifying the ballots used to cast votes. Without counterfoils, it was impossible to relate the votes found in a ballot box to any particular polling station or the votes cast.

Drawing on the precedent set by ***IEBC and Another v Stephen Mutinda Mule*** [**2014**] **eKLR**), the court reiterated the critical importance of adhering to Regulation 79 of the Elections (General) Regulations, which mandates the stamping of ballots. It emphasized how the absence of these stamps, coupled with the discovery of numerous unstamped counterfoils during the scrutiny process, severely hampers the ability to verify the ballots' authenticity, thereby undermining the credibility of the election results.

Further complicating matters were the discrepancies uncovered in various polling stations, notably at Mjanaheri Primary School and Kinyaule Nursery School. These discrepancies, such as the disparity between the total valid votes recorded in Form 35A and Form 35B, raised significant doubts about the accuracy and integrity of the electoral process. Citing the precedent established in ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others*** [**2014 eKLR**), the court underscored that substantial non-compliance with electoral laws could potentially invalidate the election results.

Additionally, the court cited ***Wabuge v Limo & Another*** [**2008**] **1 KLR**) to emphasise the pivotal role of substantial compliance with electoral laws. It also invoked ***Joho v Nyange*** [**2008**] **3 KLR (EP)**) to highlight the legal precedent that even minor irregularities, when cumulatively significant, could warrant the nullification of an election.

After carefully considering the evidence presented and the gravity of the irregularities uncovered, the court reached the decisive conclusion that the election had not been conducted in accordance with Constitutional provisions and statutory requirements. Considering the slim margin of 21 votes, the irregularities and illegalities revealed irresistibly pointed towards an election that was flawed and unverifiable, which definitely affected the results of the election. The court was emphatic that it was not just about the numbers but the process of how the numbers were arrived at.

Accordingly, the court found that the MNA election for Magarini Constituency was not conducted in accordance with the Constitution and the law. Further, the massive errors, irregularities and illegalities committed by the 1st and 2nd Respondent affected the validity and results of the election. Consequently, the court declared the election null and void. The 3rd Respondent was therefore not validly elected as the MNA for Magarini Constituency.

In determining the allocation of costs, the court adhered to the principle that costs should follow the outcome of the litigation, with the party initiating the suit bearing the costs if unsuccessful. Accordingly, costs were awarded to the Petitioner, with the 1st Respondent being held liable for these expenses. To ensure fairness, the Petitioner's costs were capped at Kshs. 1 million, while the Interested Party, having failed to substantiate their case, was not entitled to any costs.

Garama v Karisa & 3 Malindi Election Petition Appeal (Application) 1 of 2023

Court of Appeal at Malindi

Coram: SG Kairu, GV Odunga & JW Lesiit, JJA

Ruling dismissing application to strike out appeal

Date: 28 July 2023

Jurisdiction-Filing Notice of Appeal out of time-Whether 'omnibus' Notice of Appeal which introduces unknown party is valid-impact of failure to introduce proceedings of the High Court and decree on competence of an appeal

Summary of facts

In a judgment delivered on 3 March 2023 in Malindi Election Petition No. E001 of 2022, the High Court at Malindi (Mabeya, J.) allowed a petition by the 1st Respondent, Kenga Stanley Karisa, (the Applicant in the present application dated 5 April 2023) and found that the Member of the National Assembly election for Magarini Constituency was not conducted in accordance with the Constitution and the law and that the massive errors, irregularities and illegalities committed by Independent Electoral and Boundaries Commission (IEBC) and Amina Abubaker Seng, the Returning Officer, the 2nd and 3rd Respondents respectively, in the conduct of the election affected the validity and results of the election and declared that election null and void and that, Kombe Harrison Garama, the Appellant herein (a Respondent in the present application) was not validly elected as the Member of the National Assembly for Magarini Constituency. The High Court ordered that a certificate to that effect issue forthwith, and that IEBC should therefore proceed to conduct a by-election as required under the law.

Aggrieved by that judgment, the Appellant, Kombe Harrison Garama, intending to appeal against the same, filed a Notice of Appeal dated 9 March 2023 and lodged in Court on 10 March 2023. Subsequently, the Appellant filed the Record of Appeal dated 30 March 2023 and a supplementary Record of Appeal dated 3 April 2023.

By his application the subject of this Ruling dated 5 April 2023, the Applicant, Kenga Stanley Karisa, invoking Article 87(1) of the Constitution, Sections 85(A)(1)(a) of the Elections Act No. 24 of 2011, Rules 6, 8, 9, 17(2) and 19 of the Court of

Appeal (Election Petition) Rules 2017 sought Orders that: the Notice of Appeal dated 9 March 2023 and filed in court on 10 March 2023 be struck out with costs; that the supplementary Record of Appeal dated and filed on 3 April 2023 be expunged or be struck out with costs; and that the appeal be struck out with costs. The grounds on which those orders were sought were that: the Notice of Appeal was filed out of time without the court's sanction; was incompetent and fatally defective; was not a valid and legal Notice of Appeal as prescribed by law; that the Record of Appeal did not contain all documents prescribed in law and was incomplete and deficient for non-compliance with the mandatory provisions of the law; that the supplementary Record of Appeal dated 3 April 2023 was filed outside the timelines prescribed by law; that the record did not contain proceedings of the High Court; that the appeal did not lie in law; and that the defects were incurable under Article 159 of the Constitution.

In his replying affidavit sworn on 5 April 2023, the Appellant Harrison Garama Kombe deposed that contrary to the Applicant's claim, the Notice of Appeal was filed seven days after the delivery of the judgment in line with Rule 6 of the Court of Appeal (Election Petition Rules) 2017; that the claims that the Notice and the Record of Appeal were defective were baseless; that Rule 8(5) of the Court of Appeal (Election Petition Rules) 2017 allowed for filing of a supplementary record within 7 days of filing of the Record of Appeal in the event the High Court failed to avail all documents required under Rule 8(1) of those Rules; that owing to the failure by the High Court to avail certified proceedings and decree on time, the Appellant filed his Record of Appeal on 31 March 2023 and the supplementary record three days later once the proceedings and decree had been made available and that the proceedings were contained in the supplementary record.

At a pre-hearing conference held on 17 April 2023, the Court directed, with the concurrence of the parties, that the Applicant's application dated 5 April 2023, which sought orders for striking out of the appeal, be subsumed in and heard together with the appeal. Directions were also given, with which all parties complied, regarding the filing and service of written submissions and the hearing date was fixed for 12 June 2023. During the hearing, the parties were represented by learned counsel. Mr. Gikandi, Mr. Wakwaya and Mr. Ometa appeared for the Appellant. Mr. Bwire appeared with Mr. Gichaba for the 1st Respondent/Applicant. Mr. Momanyi appeared for the 2nd and 3rd Respondents. Mr. Bwire also held brief for Mr. Busiega for the 4th Respondent.

Orally highlighting the written submissions dated 15 May 2023 in support of the application, Mr. Bwire and Mr. Gichaba submitted, on the strength of the decision of this Court in ***Abdikadir Farah Mohammed & another v Independent Electoral and Boundaries Commission & 3 others*** **[2018] eKLR**, that a valid Notice of Appeal was a pre-requisite jurisdictional document without which the jurisdiction of the court was ousted; that Rule 6(2) of the Court of Appeal (Election Petition Rules) 2017 required that a Notice of Appeal shall be filed within seven days of the date of the decision appealed against; that in this case the Notice of Appeal was filed after seven days having been filed on 10 March 2023; that in election dispute resolution mechanisms, there were no exempted days, and time under Rule 6(2) began to run on the date judgment of the High Court was delivered; that under the Chief Justice's Guidelines to Facilitate Management of Electoral Dispute Resolution dated 26 August 2022, all filing in election petitions was online on any day of the week; and that the last day on which a Notice of Appeal should have been filed was 9 March 2023; that the Notice of Appeal in this case was a day late which ran afoul of Rule 6(2) of the Court of Appeal (Election Petition Rules) 2017.

Counsel for the Applicant submitted further that under Section 85A of the Elections Act, an appeal to this Court should be confined to matters of law; that the Appellant's Notice of Appeal in this case was an omnibus Notice of Appeal as the expressed intention is to challenge "the entire decision" of the High Court and such notice could not qualify as a valid Notice of Appeal. In support, the decision in ***Abdikadir Farah Mohammed & another v Independent Electoral and Boundaries Commission & 3 Others*** **[2018] eKLR** was cited.

Counsel further faulted the Notice of Appeal for introducing "a new party by the name Kombe Harrison Garama as the 4th Respondent"; and that no such person participated in the proceedings before the High Court. It was submitted that for a court to have jurisdiction over a matter, proper parties must be identified. The other ground on which counsel urged that the appeal should be struck out is that the Record of Appeal filed on 31 March 2023 did not contain a certified copy of the decree as required under Rule 8(1)(h) of the Court of Appeal (Election Petition Rules) 2017. The decision of this Court in the case of ***Moses Masika Wetangula v John Koyi Waluke & 2 others*** **[2008] eKLR** was cited in support.

Regarding the supplementary Record of Appeal, counsel submitted that the same was filed and served outside the timelines set out in Article 87(1) of the Constitution and Section 85A of the Elections Act as the same was filed beyond the 30 days set out under Section 85A of the Elections Act. The decision of the Court

in ***Abdikadir Farah Mohammed & another v Independent Electoral and Boundaries Commission & 3 Others*** **[2018] eKLR** was again cited in support. Other decisions cited for the proposition that failure to file the appeal within the prescribed timelines was fatal, include ***Jeremiah Nyangwara Matoke v Independent Electoral and Boundaries Commission & 2 others*** **[2018] eKLR**; and the Supreme Court decision in ***Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & 7 others*** **[2014] eKLR**. It was urged that Rule 8(5) of the Court of Appeal (Election Petition Rules) 2017 did not, and could not, being a subsidiary legislation, extend time for filing of the Record of Appeal beyond the timelines stipulated under the Constitution and the Elections Act. In support of that proposition, the Supreme Court decision in ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu*** **[2014] eKLR** was cited. Counsel concluded by submitting that the Notice of Appeal filed was a nullity; that the Record of Appealed filed on 31 March 2023 lacked an essential and mandatory document; that the supplementary Record of Appeal was filed out of time; and that for those reasons this Court lacked jurisdiction to proceed to hear and determine the appeal.

Mr. Gikandi and Mr. Wakwaya, in highlighting the Appellant's written submissions dated 23 May 2023 in opposition to the application submitted that Rule 6 of the Court of Appeal (Election Petition Rules) 2017 required filing of a Notice of Appeal within 7 days of the judgment of the High Court; that in this case the notice was filed on 10 March 2023 which was within the stipulated period. It was submitted that in computing time, the first day is excluded and that the Notice of Appeal as well as the record and supplementary Record of Appeal were filed within the stipulated period. It was submitted that Section 57(b) of the Interpretation and General Provisions Act provides that computation of time will exclude non-working days and that where the last day for filing is a non-working day, the period is to include the immediate next working day. The decision of the Court in ***Evans Nabwera Taracha v Independent Electoral and Boundaries Commission (IEBC) & 2 others*** and the case of ***John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others*** **[2018] eKLR** were cited in support.

Regarding the complaint that the Notice of Appeal was defective, it was submitted that unlike the circumstances in the case of ***Lesirma Simeon Saimanga v Independent Electoral and Boundaries Commission & 7 others*** **[2018] eKLR** where the court found a Notice of Appeal to be irregular on account of omitting grounds of appeal, the Notice of Appeal in this case did contain the grounds challenging the decision of the High Court. It was urged that the grounds set out in the Notice of Appeal in the present case raise matters of law within the parameters of the de

cision of the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** **[2014] eKLR** as the court was called upon to evaluate the conclusions reached by the High Court against the evidence on record and to interpret the law.

As to the complaint that the Record of Appeal did not contain the proceedings and decree and that the supplementary Record of Appeal was filed without leave, counsel submitted that the Record of Appeal was filed within 30 days of the decision of the High Court in accordance with Rule 8 of the Court of Appeal (Election Petition Rules) 2017; that under Rule 8(5) of those Rules, provision was made for the filing of supplementary record 7 days after filing of the Record of Appeal and that the Appellant complied with the same in that the supplementary record was filed within 3 days of filing the Record of Appeal which record was filed within 30 days of the decision of the High Court. Citing Article 159 of the Constitution and the decisions in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others*** **[2013] eKLR** and ***Hunker Trading Company Limited v Elf Oil Kenya Limited*** **[2010] eKLR** it was submitted that the law did not allow technicalities to overrun substantive justice and that the application should be dismissed with costs.

The 2nd and 3rd Respondent, IEBC and the Returning Officer opposed the application. Their written submissions dated 18 May 2023 as orally highlighted by learned counsel replicate the arguments put forth by the Appellant as set out above and the court considered it is unnecessary, for the avoidance of repetition, to regurgitate the same.

Issues for determination

1. Whether the Appellant's Notice of Appeal was filed out of time
2. Whether the Notice of Appeal was incompetent on account of being an 'om nibus notice' and introducing an 'unknown party'.
3. Whether the Record of Appeal was incompetent on account of omission to include the proceedings of the High Court and the decree. Related to this, the court also isolated for determination the question whether the Supple mentary Record of Appeal was properly on record.

Determination of the court

The Court of Appeal thoroughly examined the issue of timeliness concerning the Notice of Appeal. According to Rule 6(2) of the Court of Appeal (Election Petition

Rules) 2017, appeals must be filed within seven days of the High Court's decision. Notably, the High Court issued its judgment on 3 March 2023, with the Notice of Appeal filed on 10 March 2023. A contention arose regarding the computation of the seven-day period, with the applicant asserting that time commenced on 3 March 2023, whereas the opposing argument posited initiation on 4 March 2023. This discrepancy hinged on the interpretation of Section 57 of the Interpretation and General Provisions Act (IGPA), which excludes Sundays, public holidays, and non-working days. Although the Election Petition Rules lack explicit provisions on time computation, Rule 4(2) incorporates the Court of Appeal Rules, 2010, governing civil appeals, which are consistent with Section 57 of the IGPA. Consequently, the exclusion of the judgment day led the court to conclude that the Notice of Appeal, filed on 10 March 2023, fell within the prescribed seven-day period. Thus, the challenge on timeliness was dismissed.

Next, the applicants argued that the Notice of Appeal was defective and incompetent on the grounds that it constituted an "omnibus notice." They contended that by expressing an intention to challenge the "whole decision" in the Notice of Appeal, it contravened Section 85A of the Elections Act, limiting the court's jurisdiction to matters of law. The Notice of Appeal, as presented by the Appellant, stated, "Take Notice that Kombe Harrison Garama, the Appellant herein, being aggrieved with the decision of the Honourable Justice A. Mabeya FCIArb delivered at Malindi on the 3 March 2023 intends to appeal against the whole of the said decision on the following grounds:" It then enumerated eleven separate grounds of appeal.

The court found no defect in the Notice of Appeal due to the indication that the Appellant "intends to appeal against the whole of the said decision…", as it aligned with Rule 6(3)(a) of the Court of Appeal (Election Petition Rules) 2017, specifying whether all or part of the judgment was being appealed. The eleven grounds of appeal, including complaints about the reduction of the standard of proof, errors in interpretation of relevant laws, imposition of unrecognized obligations, and determinations on matters not pleaded, were deemed matters of law within the ambit of Section 85A of the Elections Act and were consistent with the parameters set out by the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji*** (**2014 eKLR**). Therefore, the court found no merit in this complaint.

The Court then addressed the issue regarding the completeness of the Record of Appeal and its timeliness, which was raised alongside concerns about the

suplementary Record of Appeal. According to Rule 8 of the Court of Appeal (Election Petition Rules) 2017, the Record of Appeal should include the trial judge's hearing notes and a certified copy of the decree or order, as correctly noted by the applicant. However, Rule 8(5) permits the Appellant to file the Record of Appeal and a supplementary Record of Appeal within seven days if the High Court fails to provide the required documents.

In his affidavit sworn on 5 April 2023, the Appellant affirmed that the High Court did not promptly provide the certified proceedings and decree. Once these documents were made available, a supplementary Record of Appeal was submitted three days after the initial Record of Appeal. The Record of Appeal included various letters sent to the Deputy Registrar of the High Court at Malindi by the Appellant's advocates, the latest of which was dated 31 March 2023, requesting the prompt provision of the proceedings.

Notably, the proceedings in the supplementary Record of Appeal were certified as true copies by the Deputy Registrar of the High Court on 31 March 2023, while the decree was certified on 3 April 2023. Consequently, the supplementary Record of Appeal was filed within the stipulated period. Therefore, the Court determined that there was no merit in this complaint.

The Court, likening the issue to "clutching at straws," addressed the final complaint concerning the misidentification of an unknown party, Kombe Harrison Garama, as the 4th Respondent in the Notice of Appeal. In the High Court petition, the parties were clear: Kenga Stanley Karisa as the Petitioner; the Independent Electoral and Boundaries Commission and Amina Abubakar Seng (Magarini Constituency Returning Officer) as the 1st and 2nd Respondents, respectively; and Kombe Harrison Garama as the 3rd Respondent.

It was evident that naming Kombe Harrison Garama as the 4th Respondent in the Notice of Appeal was an inadvertent error, as shown by the correct identification of Michael Thoyah Kingi as the 4th Respondent in the Record of Appeal. The Court found no discernible prejudice resulting from this mistake. Consequently, the application was dismissed, with costs awarded to the Appellant and the 2nd and 3rd Respondents.

Garama v Karisa & 3 Others Malindi Election Petition Appeal 1 of 2023

Court of Appeal at Malindi

Coram: SG Kairu, GV Odunga & JW Lesiit, JJA

Judgment dismissing appeal

Date: 28 July 2023

Whether the election for Magarini Constituency was conducted in accordance with the Election offences-impact of irregularities on declared election result

Summary of facts

Among the candidates for the 2022 elections in Magarini Constituency were the Appellant (also the 3rd Respondent in the High Court), the 1st Respondent (the Petitioner in the High Court), and the 4th Respondent (the Interested Party in the High Court). Oversight of the electoral process rested with the Independent Electoral and Boundaries Commission (IEBC), with the Constituency Returning Officer serving as the 3rd Respondent.

The Appellant emerged triumphant, securing 11,946 votes and subsequently being declared the Member of the National Assembly (MNA). However, the 1st Respondent, with 11,925 votes, contested the outcome, citing various irregularities, including denial of access to polling stations, discrepancies in forms, differences in vote counts, and alleged election offences. Thus, the 1st Respondent lodged a petition on 7 September 2022, later amending it on 12 October 2022, seeking the annulment of the election results.

Following a thorough hearing involving 35 witnesses, the High Court pronounced its verdict on 3 March 2023, ruling in favour of the 1st Respondent. The Court unearthed significant errors, irregularities, and illegalities in the electoral process, leading to the nullification of the election and the invalidation of the Appellant's victory. Consequently, a by-election was mandated to rectify the electoral malpractices.

In response, the Appellant filed a Notice of Appeal on 9 March 2023, challenging the High Court's decision. The grounds of appeal encompassed several legal errors and misinterpretations made by the trial judge. The grounds of appeal assert

ed that the learned judge had erred in various aspects. They claimed that he had reduced the standard of proof required in election petitions to mere speculation and supposition. Additionally, they argued that the judge had misinterpreted Constitutional and electoral laws. They contended that he made determinations on matters not pleaded by the 1st Respondent, exceeding the scope of the parties' pleadings. Furthermore, they criticized the judge for allowing an amendment to the petition outside the stipulated timelines. They also objected to the judge's decision to order a scrutiny and recount of votes without a basis for doing so. Moreover, they alleged that the judge selectively relied on a scrutiny report to favour the 1st Respondent and failed to consider relevant matters while considering irrelevant ones in his decision.

Concurrently, a Notice of Cross-Appeal was submitted on behalf of the 2nd and 3rd Respondents on 14 April 2023, contesting various legal aspects of the High Court's judgment. The grounds for the cross-appeal included that the Trial Judge had erred in shifting the burden of proof, as stated by the Appellants' counsel. They cited provisions such as Article 159(2)(c) of the Constitution of Kenya, 2010, and Section 82 of the Elections Act, 2011, to support their argument. Furthermore, they highlighted the neglect of crucial evidence from the Registrar's report, a violation of the requirements outlined in Section 83 of the Elections Act, 2011. Counsel also claimed that the Trial Judge had relied solely on the 1st Respondent's evidence, failing to consider that of the other Respondents, which they believed conflicted with the principle of fair hearing as enshrined in Article 50(1) of the Constitution of Kenya, 2010.

Moreover, they contested the directive for the 3rd Respondent to bear the petition costs, referring to Rule 40 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. They also took issue with the decision to allow petition amendments expanding its scope, citing Rule 18 of the Election Petition Rules. Lastly, they raised concerns about the alleged misinterpretation of Constitutional and electoral laws, indicating a potential challenge under Article 259(1) of the Constitution of Kenya, 2010, which mandates the interpretation of the Constitution in a manner that promotes its purposes, values, and principles. After considering both the grounds of appeal and grounds of the cross appeal, the court noted that the two were interconnected and proceeded to consider them together.

The Appellant challenged the trial court's interpretation and application of pertinent laws. Regarding Regulation 69 of the Elections (General) Regulations, they argued that the trial court's findings on issues like vote stuffing and the scrutiny

report were not supported by evidence and were based on outdated legal requirements. They contended that Regulation 69, which required counterfoils to be stamped by presiding officers, had been amended or repealed, rendering the cited legal requirement obsolete.

Additionally, the Appellant contested Regulation 81 of the Elections (General) Regulations 2017. They argued that the legal obligation, as stated in Regulation 81, to place rejected votes in the same ballot box as cast ballots contradicted the practice mandated by Regulation 81, which requires rejected votes to be placed in separate ballot boxes.

Furthermore, the Appellant challenged the trial court's application of Section 83 of the Elections Act. They argued that the irregularities identified, including those related to petition amendments and alleged offences, did not meet the legal standards set forth in Section 83. They cited precedent from the case ***Clement Kungu Waibara v Anne Wanjiku Kibe & Another*** **[2019] eKLR** to support their argument that these irregularities did not have a material impact on the election outcome, as required by law.

The Appellants argued that improper handling of rejected votes does not automatically lead to nullifying election results, citing the case of ***Raila Odinga & 16 Others v Ruto & 10 Others*** **[2022] eKLR**. Additionally, they stated that the error of writing incorrect names of a polling station on the forms of another station does not invalidate the results of that station. They raised this issue based on scrutiny findings, which they used to broaden the scope of the petition, referencing the case of ***Walter Enock Nyambati Osebe v Independent Electoral and Boundaries Commission & 2 others*** **[2019] eKLR**.

The Appellants contended that unproven allegations against only 19 out of 191 polling stations should not be sufficient grounds to nullify the elections. They argued that Section 83 of the Elections Act should be interpreted conjunctively, requiring a Petitioner to demonstrate substantial irregularities and substantial non-compliance with the law, citing the ***Morgan v Simpson*** case **[2019] eKLR**. They asserted that "substantial effect" referred to in the section implies something significant and powerful, highlighting that no election is flawless and errors are inevitable. They deemed the mere detection of irregularities and a narrow margin of 21 votes insufficient to affect the results.

Counsel for the Appellants further urged that since there was no evidence of bribery or violence, and considering the substantial compliance with the law along

side well-explained irregularities, the court should conclude that there were no substantial irregularities that affected the result. They appealed for judicial consideration of the financial implications of a by-election in Magarini, questioning the wisdom of engaging in such a costly process unless strong evidence demonstrated a badly conducted election.

On behalf of the 2nd and 3rd Respondents, who filed the notice of cross-appeal, it was argued that the allegations of denying access to Petitioners' agents at Polling Stations, false or inaccurate statutory declaration forms, discrepancies in the number of votes cast in six elections, false results padding and manipulation, and election offences were not substantiated. They contended that even after scrutiny, it was evident that the Appellant was in the lead, notwithstanding minor errors. Similarly to the Appellant's stance, the 2nd and 3rd Respondents urged us to consider the monumental task of conducting an election in a constituency with over 290 polling stations across six different elections within 12 hours, a feat requiring significant financial and human resources in terms of stamina and strength.

It was highlighted that the minor mistake at Majenjeni polling station was attributed to fatigue. Counsel argued that the qualitative test should be applied, where the overall perception of the conduct of elections in Magarini Constituency should be the decisive factor. If applied, it was asserted that it should be concluded that the elections were free and fair; any irregularities, if present, did not cause prejudice. According to learned counsel for the 2nd and 3rd Respondents, internal regulations permitted the retrieval of materials as a method of dispute resolution, as long as the results remained unchanged. In opposition to the appeal, it was argued on behalf of the 1st Respondent that once the Petitioner presented evidence warranting impugning the result, the burden shifted to the 2nd and 3rd Respondents. In support of this submission, the 1st Respondent cited the case of ***Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)*** **Presidential Election Petition 1 of 2017 [2017] eKLR**. It was therefore contended that there was admission of the interchange of the 1st Respondent's votes at Mapimo Youth Polytechnic Stream 1, reopening of Ballot box, and recount at the Tallying Centre. Counsel argued that Regulations 81, 83, 86, and 93 prohibited the reopening of ballot boxes once sealed at the Polling Station, without a court order. The case of ***Ahmed Abdullahi Mohamed & Anor v Hon. Mohamed Abdi Mohamed & 2 Others*** **Election Petition No. 14 of 2017 eKLR**, was cited to support the proposition that breaking seals and opening the ballot box by the Returning Officer constituted irregularity.

It was contended on behalf of the 1st Respondent that subsidiary legislation could not override the primary statute. Regarding the interchange of results, it was argued that there was evidence of unexplained reduction of the 1st Respondent's votes by 20 in two polling stations (Kayadagamra Primary School Polling Station and Mapimo Youth Polytechnic Station). Since there was non-countersigning of alterations resulting from the interchange of results, it was argued that the credibility and integrity of the declarations were called into question, citing cases such as ***William Kabogo Gitau v George Thuo and 2 Others*** **[2010] eKLR**, ***Simon Nyaundi Ogari & Another v Joel Omagwa Onyancha & 2 Others*** **[2008] eKLR**, and ***Maina Kiai***. The superior court's correct identification of the law and consideration of oral evidence, witness affidavits, and the totality of evidence leading to the proper shifting of the burden of proof was affirmed by the 1st Respondent.

During the proceedings, it was argued that the court lacked jurisdiction to entertain an appeal against the decision permitting the amendment of the petition. This stance was supported by the reference to the case of ***Justus Mungumbu Omiti v Walter Enock Nyambati Osebe & 2 Others*** **EP No. 1 of 2008**. It was asserted that the court had the authority to investigate any illegalities or issues arising during the hearing, as cited in the same case.

Furthermore, it was submitted that the trial court was justified in addressing matters that arose during the trial, whether or not they were pleaded. Reference was made to the scrutiny report, which revealed missing form 42As for rejected votes in some polling stations, violating Regulation 81(1) of the Election Regulations. This led to the conclusion that there was non-compliance with the law and the Constitution. Counsel referred to the threshold defined in ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another*** **[2017] eKLR**, where parties in an election petition must either demonstrate that the election was not conducted in accordance with Constitutional principles and written law, or that non-compliance substantially affected the result of the election. In this case, it was argued that both aspects were proven.

Additionally, counsel for the 1st Respondent highlighted the slim margin of vote difference and non-compliance with the law, asserting that this sufficiently demonstrated how non-compliance substantially affected the results. The breach of Article 38 of the Constitution regarding the handling of rejected votes was emphasized, alongside admissions by the authenticating party regarding alterations of results. Reference was made to the case of ***James Omingo Magara v Manson***

Onyongo Nyamweya & 2 others **[2010] eKLR** to illustrate instances of non-compliance with the law, such as contraventions of Regulations 69, 71, and 79.

Regarding costs, counsel for the 1st Respondent cited ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** **[2014] eKLR**, Section 84 of the Election Act, and Rule 30 of the Election Petition Rules, 2017, to support the proper exercise of discretion in awarding costs. It was argued that the Appellant should bear the costs incurred by the 1st Respondent in traversing the country to appear in Malindi on an indemnity basis

On behalf of the 4th Respondent, it was argued that the 1st Respondent adequately substantiated their allegations in the petition, leading to the court's accurate determination. Reference was made to the ***Gatirau Peter Munya*** case for the assertion that scrutiny was appropriately ordered and revealed significant election issues, aiding the court in nullifying the election. Additionally, the case of ***Lenny Maxwell Kivuti v IEBC & 3 Others*** **[2018] eKLR** was cited. The Judiciary Bench Book on Electoral Disputes Resolution and ***Musa Cherutich Sirma v IEBC & 2 Others*** **[2017] eKLR** were also cited to support the argument that petition amendments were permissible with leave and that the 4th Respondent's amendment merely corrected a misnomer. It was contended that the 4th Respondent had a legitimate interest in the petition as an election witness and that their joinder did not introduce new issues. Any paragraphs deemed to introduce new issues were reportedly expunged, and the hearing proceeded with the framed issues without objections from any party.

In order to determine the appeal, the court considered it important to revisit the grounds upon which the petition in the High Court was allowed.

Issues for determination

1. Whether the election of the MNA for Magarini Constituency was conducted in accordance with the Constitution and the law.
2. Whether there was non-compliance with the Constitution and the law in the conduct of the elections of Magarini Constituency
3. Whether there were election offences committed as alleged.
4. Whether the alleged irregularities affected the results of the election of the MNA for Magarini Constituency
5. What order as to costs.

Determination of the court

The court began by setting out the jurisdiction of the court when dealing with appeals from the High Court sitting as an election court. A review of section 85A of the Elections Act indicated that an appeal lay to the Court of Appeal on matters of law only. What amounted to a matter of law was established by the Supreme Court in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others*** **[2014] eKLR**, where it was established that matters of law had three elements: the technical, which involved interpretation of a Constitutional or statutory provision; the evidentiary, which involved evaluation of the evidence on record; and the evidentiary, which involved evaluating the conclusions the trial court reached based on the evidence on record.

The court's determination of the appeal therefore had to be based on the above principles, and the court would, where necessary, revisit the facts of the case purely as regards the evidentiary element in order to satisfy itself whether the conclusions of the High Court were based on evidence on record.

On the question of whether there were irregularities that affected the result, the court ruled that it was evident from the evidence of R1W2 that upon realising the mistake at Mapimo Youth Polytechnic stream 1, she directed the opening of the ballot boxes to retrieve the original Form 35A, leading to a recount at the tallying centre. This action contradicted the principle established in the ***Maina Kiai Case*** that vote counting at the polling station is final. The issue was compounded by the admission of the Presiding Officer (R1W7) that he failed in his duty to comment on alterations made and that only some polling agents witnessed the recount without specifying which ones. The reliance on internal manuals by the 2nd Respondent to bypass this decision was also criticised. Although the Appellant argued that this issue was not pleaded, it was noted that it was indeed raised in paragraph 33 of the petition.

Regarding the allegation of vote transfer, the Learned Judge relied on PW5's evidence, which was factually verified, to establish irregularities in Kinyaule polling station. While the Appellant acknowledged these irregularities, they contended that they did not affect the election outcome. However, upon review, it was agreed that while individual irregularities might not have influenced the outcome, their cumulative effect warranted further consideration.

Concerning the declaration of results for Majenjeni instead of Mjanaheri, attributed to fatigue and human error, it was argued that this issue was not pleaded

and thus should not form the basis for nullifying the election results. This stance was supported by the ruling in ***Walter Enock Nyambati Osebe v Independent Electoral & Boundaries Commission & 2 others*** **[2018] eKLR**, which highlighted the importance of basing decisions on pleaded grounds. Similarly, the cases of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** **[2014] eKLR** and ***Raila Amolo Odinga & another v IEBC & 2 others*** **[2017] eKLR** underscored the necessity for evidence to align with pleaded grounds for nullification. Therefore, it was concluded that allegations not pleaded should not influence the election outcome. R1W2's evidence highlighted the discovery of an error at ***Mapimo Youth Polytechnic stream 1***, leading to the decision to break the seals on the ballot boxes to retrieve the original Form 35A locked inside. Subsequently, a recount occurred at the tallying centre. However, this action contradicted the legal principle established in the ***Maina Kiai Case***, which emphasizes the finality of vote counting at the polling station.

Further scrutiny revealed that the Presiding Officer (R1W7) failed to fulfil their duty by neglecting to comment on alterations made during the recount. Additionally, it was admitted that only some polling agents were present during the recount, and their identities were not properly documented. This lack of transparency raised concerns about the integrity of the recount process. The 2nd Respondent's attempt to justify their actions by resorting to internal manuals was deemed inappropriate. Despite the Appellant's argument that the issue was not pleaded, it was clearly stated in paragraph 33 of the petition, emphasizing the importance of transparency and adherence to procedural guidelines.

Regarding vote transfers, the Learned Judge relied on the evidence provided by PW5, particularly focusing on Kinyaule polling station, where Chad Karisa Hamadi's votes increased by 7, leading to discrepancies between Form 35A and 35B. While the Appellant acknowledged the existence of irregularities, they argued that these irregularities did not significantly impact the overall election outcome. However, it was emphasized that the cumulative effect of these irregularities should be considered in the final judgment. The issue of declaring results for Majenjeni instead of Mjanaheri was attributed to human error and fatigue. However, it was agreed that this issue was not properly pleaded and, therefore, could not serve as a basis for nullifying the election results. The scrutiny report's findings could not impugn election results not explicitly mentioned in the pleadings, as established in the case of ***Walter Enock Nyambati Osebe v Independent Electoral & Boundaries Commission & 2 others***

[2018] eKLR. This principle was further supported by the decisions in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** **[2014] eKLR** and ***Raila Amolo Odinga & another v IEBC & 2 others*** **[2017] eKLR**, emphasizing the importance of evidence linked to pleadings in election nullification cases. The court concluded that it was deemed improper for the Learned Judge to consider allegations regarding reliance on Majenjeni results or unstamped counterfoils, as these issues were not pleaded and, therefore, should not have been used as grounds for nullifying the election.

The crux of the matter revolved around the interpretation of Section 83 of the Election Act. The Appellant contended that the section should be interpreted conjunctively, requiring a Petitioner to demonstrate both substantial irregularities and non-compliance with the law. In contrast, the 1st Respondent argued for a conjunctive interpretation.

This section underwent scrutiny in the Supreme Court decision in ***Odinga & another v Independent Electoral and Boundaries Commission & 2 Others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)*** (**Presidential Election Petition 1 of 2017**) **[2017] KESC 42 (KLR)** (referred to as ***Raila 2017***). Paragraph 374 of the majority judgment clarified that the inquiry into electoral irregularities becomes necessary only if the election court concludes that non-compliance with the law did not violate Constitutional principles. However, even in such cases, it is considered good judicial practice for the court to examine the potential impact of irregularities on the election.

Essentially, the Supreme Court envisaged two scenarios under Section 83. The first involves elections not conducted in line with Constitutional and statutory principles, as outlined in Article 81 of the Constitution. The second scenario arises when non-compliance affects the election outcome. In the present case, the Learned Judge concluded that there were glaring anomalies and incidents of non-compliance, rendering the election neither transparent nor free and fair. He further found substantial non-compliance with Constitutional and electoral laws, attributing some offences to agents of the 1st and 2nd Respondents, compromising the sanctity of the vote. However, it is crucial to note that the only offence found by the Learned Judge was the failure to stamp ballot papers and counterfoils. Nonetheless, it was argued by the 2nd and 3rd Respondents that Regulation 69 of the Election (General) Regulations, which mandates stamping by presiding officers, was amended or repealed by Legal Notice 72 of 2017. Consequently, the Learned Judge's findings on this matter were deemed erroneous.

The Learned Judge proceeded to assert that there had been the use of false or irregular statutory forms and instances of vote stuffing. This finding was rooted in the contention that the results for Majenjeni were utilized instead of those of Mjanaheri, although this allegation was not pleaded and, therefore, should not have been relied upon. Moreover, the Learned Judge identified glaring errors committed by the presiding officers and the returning officer herself, which compromised the verifiability of the election. Consequently, he concluded that given the slim margin of 21 votes, these irregularities and illegalities significantly influenced the election outcome. Essentially, the Learned Judge determined that there was substantial non-compliance with the Constitution and electoral law, and that irregularities and illegalities indeed impacted the results of the election.

The Supreme Court, in ***Raila 2017***, paragraph 371, emphasized that an election is a multifaceted process, encompassing not only numerical outcomes but also the manner in which it is conducted, including factors such as process integrity and adherence to laws. This perspective underscores the fundamental principle that elections must faithfully reflect the will of the people, as dictated by the Constitution's principles of transparency, credibility, and accountability.

However, the Supreme Court recognized, in paragraph 373, that not every irregularity or legal infraction warrants nullification of an election. It articulated the need for a court to assess whether the irregularities were substantial enough to affect the election's outcome or integrity. At paragraph 378, the Supreme Court posed critical questions regarding the election's integrity and whether the irregularities cast doubt on the legitimacy of the outcome, underscoring the importance of both the quality and quantity of votes in upholding democratic processes. In ***Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*** (**Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022**), the Supreme Court emphasized, at paragraph 284 and 285, the burden on Petitioners to demonstrate that irregularities and illegalities were significant enough to affect the election outcome.

In this case, it was determined that the opening of the ballot boxes at the tallying centre and the subsequent recount, conducted without ensuring the presence of all party agents, constituted an irregularity. This failure to meet the Constitutional standards of transparency and accountability was highlighted. Additionally, the 2nd and 3rd Respondents admitted to certain irregularities occurring, although they asserted that these did not impact the election outcome.

Notable irregularities included result interchange at Mapimo Youth Polytechnic Polling Station No.1 and alterations of votes at various polling stations.

It was acknowledged that while these irregularities, when considered individually, may not have influenced the election outcome, a holistic approach was necessary for assessment. As posited in the ***Raila 2017 Case*** at paragraph 377, the perception of the electorate is also significant. Therefore, the occurrence of multiple minor irregularities alongside a major one, such as the unauthorized recount, could constitute grounds for nullification, particularly in cases with a marginal winning margin.

However, it was underscored that not every close margin necessitates nullification, especially in the absence of irregularities. A win, even by a single ballot, stands unless irregularities or illegalities are evident. The conduct of the election must be evaluated comprehensively, considering all factors. In this instance, aligning with the findings of the Learned Judge, it was concluded that the Magarini Constituency elections did not adhere to Constitutional and legal standards, and the irregularities did impact the result.

Regarding the award of costs by the High Court, it was noted that costs fall within the court's discretion. Referring to the precedent set in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** **[2014] eKLR**, along with Section 84 of the Election Act and Rule 30 of the Election Petition Rules, 2017, it was determined that the Learned Judge did not err in exercising discretion. Therefore, there were no grounds for intervention. Consequently, both the appeal and cross-appeal were dismissed, with costs awarded to the 1st Respondent, capped at Kshs 1,500,000.00.

Getuba & another v Kibagendi & 2 others Kisii Election Petition E002 of 2022

In the High Court of Kenya at Kisii

Coram: M Thande J

Ruling dismissing application to strike out petition

Date: 9 November 2022

Admissibility of electronic evidence-locus standi in election petitions-application to strike out affidavits before examination of witnesses

Summary of facts

The 1st Respondent filed an application dated 21 October 2022, invoking Article 50 of the Constitution, Section 80(3) of the Elections Act, 2011, and Rules 4, 12(1), and 15(2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The application sought to strike out the petition on the grounds that it was based on false statements and a perjurious affidavit. In the alternative, the application requested the court to expunge the 2nd Petitioner's supporting affidavit from the court record and remove all related statements, strike out the 2nd Petitioner from the petition, and hold the 2nd Petitioner in contempt of court for perjury. The application also sought costs for the process.

The application was supported by an affidavit from Ratemo Ombui, asserting that the 2nd Petitioner was not a resident or registered voter in Kitutu Chache South Constituency, but instead registered in Nakuru County, Bahati Constituency. The Respondent argued this resulted in a lack of locus standi and claimed the 2nd Petitioner had deliberately made false statements to subvert justice. They cited ***Muktar Bishar Sheikh v Independent Electoral & Boundaries Commission & 2 others*** **[2017] eKLR** to support their position that a petition based on falsehoods must fail in its entirety. They further referenced ***CMC Motors Group Limited v Bengela Arap Korir Trading as Marben School & Another*** **[2013] eKLR**, ***James Mulinge v Freight Wings Ltd & 3 others*** **[2016] eKLR**, and ***Odinga & 16 others v Ruto & 10 others; Laws Society of Kenya & 4 others (Amicus Curiae)*** **(Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions)**, asserting that perjurious acts were intended to subvert justice and abuse court processes.

The Petitioners, in affidavits dated 31 October 2022, opposed the application. The 1st Petitioner claimed residency and voter registration in the Constituency, affirming his legal standing to present the petition. They argued that the 1st Respondent had not provided evidence of perjury or false statements, asserting that these issues required a full hearing and cross-examination. They cited ***Brinks-MAT Ltd v Elcombe*** **(1988) 3 All ER 188** to argue that allegations must be proven beyond a reasonable doubt. The Petitioners also referenced ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others*** **[2018] eKLR**, asserting that removing one Petitioner did not invalidate the petition. The 2nd Petitioner supported the 1st Petitioner's statements, denying residency in Bahati Constituency and attributing voter register errors to unauthorised transfers.Both Petitioners contended the application was premature, with issues needing resolution at the petition's hearing. They argued that the Constitution did not limit who could present a petition, citing Article 3 as allowing any Kenyan to uphold the Constitution.

The 2nd Petitioner insisted on a fair trial for any perjury charge, asserting no grounds existed for contempt. Consequently, they requested the application's dismissal with costs.

Issues for determination

1. Whether the 1st Respondent's electronic evidence is admissible.
2. Whether the 2nd Petitioner has locus standi to file the Petition.
3. Whether the 2nd Petitioner committed perjury in his affidavit in support of the Petition and therefore amounts to contempt of court.
4. Whether the Petition and the 2nd Petitioner's affidavit should be struck out.

Determination of the court

On the issue of admissibility of the evidence, the court had to determine the admissibility of the 1st Respondent/Applicant's electronic evidence, which included a screenshot and a QR Code indicating that the 2nd Petitioner was not registered as a voter in the Constituency but in Nakuru County, Bahati Constituency - Lanet/Umoja Ward and Lanet Secondary School Stream 3 Polling Station. The Petitioners challenged the admissibility of this electronic evidence, arguing that it lacked an electronic certificate as required by Sections 78 and 106B of the Evidence Act. They contended that without such a certificate, the authenticity of the evidence could not be verified. The court noted that the 1st Respondent/Applicant did not address this issue in his submissions. Section 78A of the Evidence Act allows the

admissibility of electronic and digital evidence, even if it is not in its original form. However, the probative value of such evidence depends on the reliability of how it was generated, stored, communicated, and the integrity maintained. Section 106B specifies that electronic evidence printed on paper is admissible if accompanied by a certificate that describes the manner of production and provides details of any device involved. This certificate must be signed by someone responsible for the operation of the relevant device or the management of the activities.

In ***John Lokitare Lodinyo v IEBC & 2 Others*** **[2018] eKLR**, the Court of Appeal emphasised that the requirements under Section 106B of the Evidence Act are mandatory, stating that electronic evidence must be accompanied by a certificate to be admissible. Similarly, in ***County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others*** **[2015] eKLR**, the court reiterated the necessity of the certificate to ensure the authenticity and integrity of electronic evidence.

In ***Richard Nyagaka Tong'i v Independent Electoral & Boundaries Commission & 2 Others*** **Election Petition No 5 of 2013 [2013] eKLR,** the court rejected photographs as evidence because they were not accompanied by a certificate, and the person who printed them did not testify about the printing process. The same principle was applied in ***Idris Abdi Abdullahi v Ahmed Bashane & 2 Others*** **[2018] eKLR**, where the court held that the requirement for a certificate under Section 106B (4) of the Evidence Act is mandatory and cannot be overridden by Article 159(2)(d) of the Constitution of Kenya, which allows for the disregard of procedural technicalities in the interest of justice.

Based on these authorities, the court agreed with the Petitioners that the authenticity of the 1st Respondent/Applicant's electronic evidence could not be ascertained without the required certificate. Consequently, the court found the electronic evidence inadmissible and rejected it for failing to comply with the mandatory provisions of the Evidence Act.

On the question of locus, the 1st Respondent/Applicant argued that the 2nd Petitioner lacked the legal standing to file the petition because he was not a resident or registered voter of Kitutu Chache Constituency. The 1st Respondent/Applicant relied on the decision in ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 others*** **[2018] eKLR**, which highlighted that a Petitioner must be a resident and registered voter in the relevant constituency. The 1st Respondent/Applicant also cited the decision in ***Abdi Khaim Osman Mohamed & Anor v IEBC and 2 Others***

[2014] eKLR to argue that electoral disputes involve not only the parties to the petition but also the electorate, emphasizing the public importance of these matters. Additionally, the case ***Mohammed Ibrahim Abdi v IEBC and 2 Others*** **Election Petition No 7 of 2017** was cited to argue that Petitioners must show they are from the electoral area in question.

The Petitioners countered by asserting that Article 258 of the Constitution allows any person to approach the courts to defend the Constitution. They argued that the Constitution broadens the scope of locus standi, empowering every person to contest any contravention of the Constitution or Bill of Rights. Articles 22 and 258 of the Constitution permit any person to institute court proceedings if they believe the Constitution has been violated or is under threat.

The Petitioners also cited ***Michael Osundwa Sakwa v the Chief Justice and President of the Supreme Court of Kenya*** **[2016] eKLR**, where the court held that the Constitution has relaxed the standing rules in public law litigation. While locus standi remains relevant, it should not prevent a Petitioner with bona fide grounds from seeking redress.

In this case, the court noted that the electronic evidence presented by the 1st Respondent/Applicant to challenge the 2nd Petitioner's voter registration was inadmissible. With no other evidence supporting the claim that the 2nd Petitioner was not registered in the constituency, the application was unfounded. Furthermore, under Article 258, every person has the right to institute proceedings to challenge a constitutional violation. The court found the claim that the 2nd Petitioner lacked locus standi to be without merit.

On the third issue, whether the 2nd Petitioner committed perjury in his Supporting Affidavit in support of the petition and whether this constituted contempt of court, the 1st Respondent/Applicant argued that the 2nd Petitioner falsely asserted he was a registered voter in the Constituency, thereby committing perjury as defined under Section 108 of the Penal Code. This section outlines perjury as knowingly giving false testimony in judicial proceedings about material matters. The 1st Respondent/Applicant relied on the case of ***Muktar Bishar Sheikh v Independent Electoral & Boundaries Commission & 2 others*** **[2017] eKLR** to argue that the petition and the supporting affidavit are inseparable, meaning that falsehoods in the affidavit undermine the entire petition. He further cited ***CMC Motors Group Limited v Bengela Arap Korir Trading as Marben School & Another*** **[2013] eKLR**, ***James Mulinge v Freight Wings Ltd & 3 others*** **[2016] eKLR**, ***Odinga & 16 others v Ruto & 10 others; Laws Society of Kenya & 4 others (Amicus Curiae)*** **[2022]**

KESC 54 (KLR), and ***Joseph Muiruri Mugo v County Government of Nyeri & 3 others*** **[2021] eKLR**, arguing that perjurious actions aim to undermine justice and the electoral will.

The Petitioners countered that the 1st Respondent/Applicant had not provided substantial evidence to demonstrate that the 2nd Petitioner was not a registered voter. They emphasized that perjury, being a criminal offence, requires proof beyond reasonable doubt and is within the jurisdiction of a criminal court. They argued that the inadmissibility of electronic evidence should prevent the court from finding the 2nd Petitioner guilty of perjury, citing ***Brinks – MAT Ltd v Elcombe*** **(1988) 3 All ER188**. The Petitioners accused the 1st Respondent/Applicant of material non-disclosure for not verifying the 2nd Petitioner's voter registration status before filing the application.

The court concurred with the Petitioners, acknowledging that perjury necessitates proof beyond reasonable doubt and is a matter for a criminal court. It emphasized the need for the 2nd Petitioner to be heard, to cross-examine his accusers, and to defend himself against perjury charges to safeguard his constitutional right to a fair hearing. The alleged perjury, based on the unverified claim that the 2nd Petitioner was not a registered voter, could not support a finding of contempt of court as requested by the 1st Respondent/Applicant.

Finally, on the issue of whether the petition and the 2nd Petitioner's affidavit should be struck out, the 1st Respondent/Applicant argued that the 2nd Petitioner lacked locus standi, referring to Rules 8(4)(b) and 12(1) of the Rules, which require a petition to be supported by an affidavit detailing the relied-on facts and grounds. The Petitioners contended that removing one Petitioner should not affect a public interest petition, urging the court to hear the petition on its merits. They referenced ***Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others*** **[2018] eKLR**, advocating for a less drastic measure, such as striking out only the perjured sections without dismissing the entire petition.

The court found the 1st Respondent/Applicant's conclusions premature, given that the allegations could not yet be cross-examined or verified. It decided that a full hearing was necessary to allow for the presentation and examination of evidence from all parties. Consequently, the court found no grounds for striking out the 2nd Petitioner's affidavit and petition as sought by the 1st Respondent/Applicant. The application was dismissed for lack of merit, with costs to be determined in the cause.

Juma v Nyongesa, Budalangi Constituency Returning Officer & 2 others Busia Election Petition E001 of 2022

In the High Court of Kenya at Busia

Coram: WA Okwany J

Ruling striking out petition

Date: 27 October 2022

Effects of affidavits commissioned by unqualified persons on the validity of the petition-failure to join the Independent Electoral and Boundaries Commission as a Respondent to a petition-effect of failure to deposit security for costs within 10 days of filing petition-application to amend petition

Summary of facts

Alfred Maloba Juma contested the results of the August 9, 2022 general elections for the Member of Parliament position, alleging that the elections were not free, fair, or credible as stipulated by the Constitution and the Elections Act. The 1st Respondent, the Returning Officer, had declared the 2nd Respondent as the winner. Juma filed a petition on 7 September 2022 to challenge this declaration.

Several preliminary objections were raised by the Respondents. The 2nd Respondent challenged the petition on multiple grounds, including non-compliance with Rule 9 of the Elections (Parliamentary and County Elections) Petition Rules 2017, which mandates that the Independent Electoral and Boundaries Commission (IEBC) must be a Respondent in every election petition. The 2nd Respondent argued that this omission rendered the petition defective and deprived the court of jurisdiction to hear the matter. Additionally, the 2nd Respondent contended that the petition was filed out of time and that any attempt to amend it to include the IEBC would be improper.

The 1st Respondent also raised objections, focusing on the affidavits supporting the petition. They argued that the affidavits were sworn before an individual without a current practising certificate, rendering them fatally defective. This claim was supported by references to ***David Wamatsi Omusotsi v The Returning Officer Mumias East Constituency & 2 others*** **[2017] eKLR**, ***FL Star Limited v The Delphis Bank Limited (under Statutory Management)*** **[2006] CA 58**, and ***Githui Mwangi and 2 others v Jubilee Party and 11 others*** **[2018] eKLR**, which

highlight that affidavits commissioned by unqualified individuals are legally invalid. Furthermore, the 1st Respondent argued that the failure to include the IEBC violated Rule 9 of the Election Petition Rules, citing ***Mbaki & others v Macharia & another*** **[2005] 2 EA 206**, and ***Nyongesa & 4 others v Egerton University College*** **[1990] KLR 692**, which discuss the importance of including necessary parties to ensure fair proceedings.

The 2nd Respondent added to the objections by highlighting the failure to deposit security for costs within the required time frame, according to Rule 13 of the Election Petition Rules 2017. This late deposit was argued to render the petition defective. The 2nd Respondent also contended that the petition, being fundamentally flawed and lacking necessary parties, left the court without jurisdiction to adjudicate the matter.

In response, the Petitioner acknowledged the procedural defects but argued that they were not fatal. He referred to ***Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others*** **[2016] eKLR**, suggesting that such defects should be remedied rather than leading to outright dismissal. Regarding the affidavits, the Petitioner cited ***National Bank Limited v Anaj Warehousing Limited*** **[2015] eKLR** and ***Henry O Nadimo v IEBC and 2 others*** **[2013] eKLR**, arguing that the issues with the affidavits did not render the petition fatal and that amendments should be allowed to correct procedural errors.

Ultimately, the court decided to address the preliminary objections first, as their resolution would determine whether the court could proceed with the petition and related applications.

Issues for determination

1. Whether the petition is fatally defective on the basis that the affidavits in its support were commissioned by an advocate who did not have a current practicing certificate.
2. Whether the failure to deposit security for costs within the prescribed timelines renders the Petition fatally defective and a nullity.
3. Whether the petition is fatally defective for non-compliance with the provisions of rule 9 of the Elections (Parliamentary and County Elections) Petition Rules 2017, for not citing the IEBC as a Respondent. Depending on the finding on this issue, the court would also consider if the said non-compliance could be corrected through an amendment of the petition so as to include the IEBC as a Respondent as has been proposed by the Petitioner.

Determination of the court

The court addressed the preliminary objections raised by the Respondents, focusing on whether these objections were meritorious. The main issues for consideration included whether the petition was fatally defective due to affidavits commissioned by an advocate without a current practising certificate, the failure to deposit security for costs within the prescribed timeline, and the non-compliance with Rule 9 of the Elections (Parliamentary and County Elections) Petition Rules 2017 regarding the inclusion of the Independent Electoral and Boundaries Commission (IEBC) as a Respondent. The court also considered whether the defects could be corrected by amending the petition.

The Petitioner argued that the issues raised by the Respondents did not qualify as a preliminary objection because they involved facts requiring judicial discretion. The Respondents contended that the issues were pure points of law, going to the court's jurisdiction, and could dispose of the entire petition. The definition of a preliminary objection was discussed with reference to ***Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd*** **(1969) EA 696**, where it was held that a preliminary objection consists of a pure point of law, such as jurisdiction, that could dispose of the suit if argued as a preliminary point. The Respondents argued that the court lacked jurisdiction because the petition was void ab initio due to non-compliance with Rule 9 and was filed outside constitutional timelines, referencing ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*** **(1989)**.

The Respondents argued that the petition was incurably defective as the affidavits were commissioned by an advocate who lacked a current practising certificate. The petitioner conceded that the affidavits were indeed commissioned by an unlicensed advocate but contended that this defect was not fatal and could be cured by replacing the defective affidavits with those commissioned by a qualified advocate. Section 2 of the Oaths and Statutory Declarations Act stipulates that only practising advocates may be appointed as commissioners for oaths, while Section 4(1) grants commissioners the power to administer oaths, provided they are not involved in the matter at hand.

Section 9 of the Advocates Act requires advocates to be admitted to the roll and hold a valid practising certificate to act as advocates. Section 2 of the Act defines an unqualified person as one who fails to meet these requirements. In this case, it was undisputed that the advocate who commissioned the affidavits, Mochama Macrine Boisabi, did not hold a practising certificate for 2022. The court had to determine the effect of this defect on the validity of the petition.

The petitioner argued that affidavits commissioned by unlicensed advocates are not invalid, as Article 159 of the Constitution promotes substantive justice over technicalities. Section 34B of the Advocates Act also provides that the validity of legal documents is not affected by an advocate's lack of a practising certificate. Additionally, Order 19 Rule 7 of the Civil Procedure Rules allows the court to receive affidavits despite technical defects.

The petitioner cited ***National Bank of Kenya Ltd v Wilson Ndolo Ayah*** **[2009] eKLR**, where the Court of Appeal ruled that pleadings could be struck out due to a lack of a practising certificate. However, the Supreme Court held that documents do not become invalid merely because they were prepared by an advocate without a practising certificate, provided the advocate had not been struck off the roll. This principle was affirmed in ***Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company Ltd*** **[2018] eKLR**, and cited by Ngugi J. in ***R v Resident Magistrate Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 others*** **[2016] eKLR**.

The court found no evidence that the advocate had been struck off the roll and noted that the petitioner could not have known about the lack of a practising certificate. Therefore, striking out the affidavits would not be fatal to the petition, and the petitioner was allowed to substitute the defective affidavits with those commissioned by a qualified advocate.

Regarding security for costs, the 2nd Respondent argued the Petitioner was one day late in depositing the security, making the petition defective. Past cases such as ***Henry Okello Nadimo v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR*** and ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** **[2014] eKLR** highlighted the importance of adhering to timelines, but the court determined there was no breach in this instance. The court found the deposit was made on the tenth day, thus within the timeline.

The court then examined the failure to include the IEBC as a Respondent, noting the mandatory nature of Rule 9 of the Election Petition Rules. The Petitioner argued this was a procedural oversight that could be corrected under Article 159(2)(d) of the Constitution. However, the court held that the inclusion and service of the IEBC were mandatory, citing ***Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another*** **[2018] eKLR**, which emphasised the compulsory nature of the word "shall" in statutory provisions. The omission could not be treated as a mere procedural technicality.

The Petitioner urged the court to invoke Article 159(2)(d) of the Constitution, which calls for the administration of substantive justice without undue regard to procedural technicalities. The Petitioner admitted to failing to name the IEBC as a Respondent and argued that this oversight was a procedural issue rather than a substantive one. The court had to decide whether this omission was a mere procedural technicality or a fundamental defect affecting the court's jurisdiction and the validity of the petition.

The court examined the relevant legal framework, particularly Section 76(4) of the Elections Act. This provision, as discussed in ***Amina Hassan Ahmed v Returning Officer Mandera County & 2 others*** **[2013] eKLR**, allows for the amendment of an election petition under strict conditions: the petition must question a return or election result based on an alleged electoral offence; the amendment must be sought within 28 days of the election result declaration; and the election court must exercise its discretion to grant the amendment. The court emphasised that the statutory provision must be interpreted and complied with strictly due to its special legislative nature.

In this case, the court noted that the results of the disputed election were declared on 10 August 2022, and the Petitioner filed the petition on 7 September 2022, exactly 28 days after the declaration. This timing was the last possible day to challenge the election results within the statutory limit. The second Respondent raised a preliminary objection to the petition on 27 September 2022, highlighting the omission of the IEBC as a Respondent. The Petitioner then sought to amend the petition on 29 September 2022, well beyond the 28-day period allowed for amendments under Section 76(4) of the Elections Act.

The court reiterated that the special jurisdiction of election petitions requires strict adherence to the timelines and procedures set out in the Elections Act. Unlike ordinary civil suits, where the Civil Procedure Act might allow for discretion in extending time limits, election law is governed by its own strict statutory framework. This position was supported by the decision in ***Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others*** **[2014] eKLR**, where it was held that electoral law is a special jurisdiction requiring strict interpretation within its statutory confines. The court also cited the Indian Supreme Court case ***Jyoti Basu & others v Debi Ghosal & others*** to underscore the statutory nature of electoral disputes, stating that election petitions are not governed by common law or equity principles but strictly by statutory provisions.

Continuing with the petition without the IEBC would violate the principles of natural justice and render the petition ineffective, as the Commission is crucial for addressing allegations regarding voting, tallying, and declaration processes. The court determined that Article 159(2)(d) could not rescue the Petitioner because the failure to include the IEBC was a fundamental issue affecting the petition's root and the court's jurisdiction. This view was reinforced by the decision in ***Omari Juma Mwakamole v Independent Electoral & Boundaries Commission & 2 others*** **[2017] eKLR**, which dealt with similar defects in election petitions.

The court criticised the Petitioner for not initially naming the IEBC and only realising this mistake after the second Respondent raised a preliminary objection. The Petitioner's lack of attention to electoral law led to multiple errors, including the non-joinder of the IEBC and commissioning affidavits by an unqualified advocate. The court emphasised that the Commission is both a necessary and mandatory party in any election petition. Since the period for amending the petition to include the Commission had long expired, the court found it had no discretion to expand the time except as provided by election laws.

Ultimately, the court concluded that the petition's failure to name the IEBC was a fatal defect, rendering it null and void. The requirement to include the IEBC was a substantive legal requirement, not a procedural technicality that could be excused or remedied by extending time. Consequently, the court struck out the petition, awarding costs capped at Kshs 500,000 to each Respondent.

Njomo v Waithaka & 2 others Kiambu Election Petition E003 of 2022

In the High Court of Kenya at Kiambu

Coram: Ong'eri J

Judgment dismissing petition

Date: 24 February 2023

Summary of facts

Hon. Jude Kangethe Njomo, hereafter referred to as the Petitioner, filed a petition dated 8 September 2022, contesting the results of the National Assembly elections held on 9 August 2022 in Kiambu Constituency. In these elections, Hon. John Machua Waithaka, hereafter referred to as the 1st Respondent, was declared the winner. The petition was brought against the 1st Respondent, Beatrice Saki Muli, hereafter referred to as the 2nd Respondent, who served as the returning officer, and the Independent Electoral & Boundaries Commission (IEBC), hereafter referred to as the 3rd Respondent. The Petitioner sought several orders and reliefs against the Respondents. He requested the court to direct the 2nd and 3rd Respondents to produce certified copies of election documents, including Forms 37 and 38B for the National Assembly election in Kiambu Constituency and all Day Book Diaries from polling stations. He also sought certified copies of Forms 36A from all wards in the constituency, namely Kiambu Township, Ting'ang'a, Riabai, and Ndumberi Wards. Additionally, the Petitioner requested an order for scrutiny and audit of all election returns for the constituency, including Forms 35A, 35B, and 35C, as well as an order for a recount of votes in specific polling stations, including Kiamumbi Primary, Riabai Coffee Factory, Thindigua Primary School, Ndumberi Primary School, Karunga Primary School, Kasarini Primary School, Kiambu Municipal Office, Kiambu Primary School, and Kiambu High School. The Petitioner further sought a declaration that the 2nd Respondent's declaration of the 1st Respondent as the winner was invalid, null, and void ab initio. He also requested an order for scrutiny and recount of all voting materials and votes cast to determine the extent of vote stuffing. The Petitioner argued that irregularities, improprieties, and non-compliance by the 2nd and 3rd Respondents materially affected the election outcome, rendering the declaration of the 1st Respondent as the winner invalid. Lastly, the Petitioner sought costs against the 3rd Respondent and any other relief the court deemed appropriate.

In support of the petition, the Petitioner provided an affidavit in which he outlined his concerns and observations regarding the election process. He stated that he was the outgoing Member of National Assembly for Kiambu Constituency and contested the election as a Jubilee party candidate. The Petitioner alleged that the 2nd Respondent, as the returning officer, and some election officials were not impartial and failed to uphold political neutrality as required by the Constitution and the Elections Act 2011.

The Petitioner highlighted several breaches of the law, including incidents of voter bribery in Riabai Ward, allegedly orchestrated by agents of the United Democratic Alliance (UDA), the party that nominated the 1st Respondent. He claimed that his agents were denied access to polling stations or allowed entry late, compromising the integrity of the voting process. Specifically, the Petitioner mentioned that his agents were blocked from entering or serving at Karigo Primary, Chief Wandie, St. Mary ACK Thindigua, and Kiambu Primary School polling stations. He argued that these actions were intended to facilitate vote stuffing and falsification of election results in favour of the 1st Respondent.

The Petitioner also raised concerns about the conduct of election officials, stating that his chief agents, Moses Macharia Mburu and Kenneth Kongo Mwangi, observed various electoral improprieties. These included the alteration of Forms 35A to disadvantage the Petitioner, breaking of ballot box seals, and unauthorized guidance of voters by polling officers. He argued that such irregularities, misconduct, and illegalities undermined the credibility of the election results in specific polling stations.

Furthermore, the Petitioner questioned the reported voter turnout, alleging that it was fraudulently inflated through vote stuffing. He noted that the turnout in 2022 was visibly lower than in previous elections, and he suspected manipulation of the KIEMS kits to accommodate vote stuffing and other malpractices.

During his oral evidence in court, the Petitioner reiterated these points, emphasizing the denial of access to polling stations for his agents and the potential impact on the election's integrity. He testified about the layout of polling stations that prevented agents from observing the voting process and raised suspicions of vote stuffing due to low voter turnout. The Petitioner requested scrutiny and recount to verify his claims.

The witnesses for the Petitioner supported his allegations. PW.2, Kenneth Kongo Mwangi, the Petitioner's chief election day manager, testified that many of the Petitioner's agents were denied access to polling stations. He reported instances of KIEMS kit failures and voter frustration due to the inability to vote. PW.3, Winnie Njeri Thuo, an agent for the Petitioner, stated that she was denied access to her assigned polling station because her appointment forms were not stamped. She observed more than one UDA agent in a polling station and noted issues with the KIEMS kits.

PW.4, Daniel Mburu Njeri, another agent, testified about being denied entry to his polling station due to COVID-19 protocols, despite other agents being allowed access. He observed that voters were turned away due to the slow process and failure of biometric systems. He argued that these denials allowed for manipulation of election results to the Petitioner's detriment.

The Petitioner and his witnesses argued that these irregularities and improprieties compromised the election's fairness and transparency. The Petitioner concluded that the 1st Respondent was not validly elected and urged the court to declare the election results null and void.

During the cross-examination of PW.5, it was established that she was not an official agent for the Jubilee Party but for the Petitioner himself. She expressed scepticism about the 1st Respondent's victory in the election, suggesting irregularities might have affected the outcome.

PW.6, Aida Melil Kyalo, detailed her experience as an agent for the Jubilee Party in Kiambu Constituency during the 9 August 2022 elections. In her affidavit, she stated that many Jubilee Party agents, including herself, were denied access to polling stations because their appointment forms were not stamped. They were instructed by the chief observer to monitor the voting process from outside the polling stations. She reported several issues, including malfunctioning KIEMS kits, which forced some polling stations to resort to manual voter verification. As a result, many voters were unable to cast their votes. Under cross-examination, PW.6 stated that she arrived at Kiamumbi Primary School at 5:10 a.m. and observed that some voters could not be identified by the KIEMS kit and left the polling station without voting.

PW.7, Moses Kinyua Warui, claimed he was the Petitioner's observer and media liaison agent. In his affidavit, he stated that he witnessed a vehicle, allegedly linked to UDA mobilisers, being used to transport voters to polling centres.

He also reported incidents of voter bribery occurring outside polling stations. During cross-examination, he mentioned that he was working as a journalist accredited by the 3rd Respondent and had taken photographs of the alleged bribery incidents. However, he admitted to being unfamiliar with Section 106B of the Evidence Act, which deals with the certification of electronic evidence.

PW.8, Moses Macharia Mburu, described himself as the Petitioner's chief agent. He testified that he received numerous complaints from agents who were denied access to polling stations. He also reported problems with the KIEMS kits and alleged instances of voter bribery, which he claimed disadvantaged the Petitioner. In cross-examination, he confirmed that he was registered to vote at St. Mary's Thindigua Primary School and that he had relayed the agents' complaints to the Petitioner.

DW.1, Beatrice Saki Muli, the returning officer, denied all allegations of electoral misconduct. She maintained that the election process was conducted transparently and in compliance with legal standards. She asserted that all agents were permitted to enter polling stations and refuted claims of voter bribery or any misconduct that could have influenced the election outcome. Under cross-examination, DW.1 explained how forms 35As and 35B were prepared and authenticated.

DW.2, the 1st Respondent, robustly defended the election process, insisting that it was free and fair. He denied any involvement in illegal activities or collusion. He highlighted that the Petition lacked substantive evidence and questioned the accreditation of some agents. The 1st Respondent reaffirmed the fairness and legality of the elections and dismissed the allegations of misconduct or irregularities.

The parties presented written submissions. The Petitioner cited constitutional provisions and electoral regulations to bolster their claims, emphasising the necessity for transparency and scrutiny in the electoral process. The Petitioner argued for the examination of the Polling Station Diaries, considering them essential for verifying compliance with legal standards and procedures.

The 1st Respondent argued that the offence of voter bribery, as per section 9 of the Elections Offences Act, must be reported to the police, and the person alleging bribery must provide evidence of such a report, like an occurrence book record. In the absence of substantial evidence, the court would disregard such claims. Additionally, the 1st Respondent contended that the Petitioner failed to demonstrate that his political party, Jubilee, notified the Independent Electoral and Boundaries Commission (IEBC) about its decision not to appoint agents. The

Petitioner also did not provide proof of appointing his own agents in accordance with section 30 of the Elections Act. The 1st Respondent further argued that there was no evidence showing that Jubilee did not appoint agents or that this decision was communicated to the 3rd Respondent before the election. According to the 1st Respondent, only political parties have the right to appoint and deploy agents to polling stations unless the party waives this right, which did not occur in this case as Jubilee appointed agents for the elections.

The 1st Respondent claimed that any agents purportedly appointed by the Petitioner had no right to be admitted into polling stations without proper documentation, such as a letter of appointment, an oath of secrecy, and identification. The presiding officers were tasked with ensuring that only duly appointed agents and authorised persons entered polling stations. As such, the polling officers were not obliged to admit agents without valid credentials. Furthermore, the 1st Respondent argued that the Petitioner did not show how any alleged non-compliance with the law impacted the results reported in Forms 35A from the polling stations and by the 2nd Respondent at the tallying centre, which led to the declaration of the 1st Respondent as the duly elected Member of the National Assembly for Kiambu Constituency. The 1st Respondent characterised any alleged irregularities as minor and not affecting the election results, urging the court to uphold his election.

The 1st Respondent also emphasised that the election was conducted in accordance with constitutional and legal requirements, and the 3rd Respondent, being a public body, was presumed to have followed the law. It was the Petitioner's responsibility to prove otherwise. The 1st Respondent asserted that there was no evidence of electoral malpractice or offences committed by him, and the declaration by the 2nd Respondent reflected the true will of the people of Kiambu Constituency. Consequently, the 1st Respondent sought costs for defending the petition, amounting to Kshs. 5,000,000, due to substantial expenses incurred, including two formal interlocutory applications and several oral applications.

On the other hand, the 2nd and 3rd Respondents highlighted that the Petitioner bore the legal burden of proof under section 107 of the Evidence Act. This burden should not be confused with the evidential burden, which may shift based on the Petitioner's evidence. They argued that there is a rebuttable presumption of election validity, meaning that until the Petitioner discharges this initial burden, the election is presumed valid. Issues related to regulation 61(4)(a) of the Elections (General) Regulations, 2012, were dismissed as they were not part of the petition.

Regarding the allegation that the Petitioner's agents were denied entry or admitted late into polling stations, the 2nd and 3rd Respondents contended that the Petitioner needed to provide evidence of having appointed such agents and the relevant documentation.

The 2nd and 3rd Respondents also argued that the Jubilee Party had appointed agents for the election, and Forms 35A were signed by Jubilee agents, aligning with sections 30(1) and (2) of the Elections Act, which permit a political party to appoint agents. The Petitioner's misunderstanding of this provision was noted, asserting that the presence of agents at polling stations is not mandatory to validate the proceedings. The absence of the Petitioner's agents did not invalidate the election results, as per regulations 62(2) and 79(7) of the Elections (General) Regulations, 2012. The Petitioner had also failed to request a recount of votes, suggesting satisfaction with the counting process. Allegations of bribery, a criminal offence under section 9 of the Elections Offences Act, 2016, were not substantiated with evidence beyond reasonable doubt or reported to the police.

The 2nd and 3rd Respondents opposed any court-initiated scrutiny of votes, as it was not sought in the petition or application. They argued that the Petitioner was undeserving of a scrutiny order and that the court's earlier ruling on 9 February 2023, should be upheld. They also submitted that no evidence was provided to show that the election contravened constitutional or electoral laws, and even if irregularities were proven, the Petitioner did not demonstrate how these affected the election results. Consequently, the declaration of the 1st Respondent as the elected Member of Parliament should not be invalidated. Costs, they argued, should follow the cause, meaning the unsuccessful party, in this case, the Petitioner, should bear the costs of the petition.

Issues for determination

1. Whether election malpractices, irregularities, or offences were committed during the election for member of parliament for Kiambu Constituency.
2. Whether the said malpractices, irregularities, or offences affected the outcome of the final results.
3. Whether the said malpractices, irregularities, or offences was orchestrated by UDA agents.
4. Whether the Petitioner's agents were denied entry into polling stations and whether this was prejudicial to the Petitioner.
5. Whether the elections were credible, transparent, accountable and verifiable and whether they were conducted in accordance with the law.

6. Whether the results for Member of Parliament should be nullified due to violations of the law.
7. Whether the declaration of the 1st Respondent as the Member of National Assembly should be declared invalid, null and void ab initio
8. Who pays the costs of this petition.

Determination of the court

In the case regarding allegations of electoral malpractices during the election for the Member of Parliament for Kiambu constituency, the Petitioner asserted that there were instances of vote stuffing, falsification of voter turnout, and voter bribery.

On the issue of vote stuffing, the Petitioner contended that he suspected such activities occurred because his agents were not present at the beginning of the voting process to confirm that the ballot boxes were empty. He argued that his agents were denied access or allowed into many polling stations late, raising suspicions of irregularities. The court, however, found that Jubilee agents, representing the Petitioner's political party, were present at all polling stations. It was undisputed that the Petitioner was a Jubilee candidate. The court emphasised that the Petitioner's evidence was based merely on suspicion and lacked substantive proof. It reiterated that suspicion could not substitute for concrete evidence.

In support of its decision, the court referenced Regulation 62(2) and (3) of the General Elections Regulations 2012. These provisions allow the Presiding Officer to admit only one agent for each candidate or political party into polling stations and specify that the absence of agents does not invalidate the proceedings. The court cited the case ***Harun Meitamei Lempaka v Lemanken Aramat & 2 Others*** **[2013] eKLR**, where it was affirmed that instructions to admit only one agent per political party were legally sound. Similarly, in ***Philip Munge Ndolo v Omar Mwinyi Shimbwa & 2 Others*** **[2013] eKLR**, the court upheld the denial of access to a second agent from the same party to avoid overcrowding as lawful. Justice Jessie Lesiit, in ***M'Nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 Others*** **[2013] eKLR**, stated that the absence of agents does not affect the integrity of an election unless evidence proves otherwise. The court thus concluded that the Petitioner failed to prove the claim of vote stuffing.

Regarding the falsification of voter turnout, the Petitioner argued that the reported voter turnout was implausible based on his observations of the low voter lines, which he contrasted with previous elections. He claimed that during the 2022 election, the turnout was visibly low compared to previous years but was still re

ported at 65% by the 3rd Respondent. The court, however, found that the Petitioner did not provide any figures to substantiate his claims or to dispute the turnout figures provided by the 3rd Respondent. The Petitioner essentially conceded that he was seeking the court's assistance to find evidence in support of his petition. The court ruled that without a proper basis, it was impossible to verify the votes cast in the 144 polling stations of Kiambu constituency merely to assuage the Petitioner's suspicions.

On the issue of voter bribery, the Petitioner's key witness, PW7, alleged that certain individuals were bribing voters. He claimed to have taken pictures of these individuals, whom he identified as UDA agents. However, he did not provide the names of these individuals, nor was there any report made to the police, as required by Section 9 of the Elections Offences Act. The court found no evidence to support the allegations of voter bribery. Concerning the denial of access to polling stations for the Petitioner's agents, the court found no evidence or testimony from witnesses to support these claims. None of the witnesses who purported to be the Petitioner's agents provided any documentation, such as letters of appointment or oaths of secrecy, required for admission into polling stations. The court noted that Jubilee agents were present at every polling station and highlighted that the Petitioner was a Jubilee candidate. The case ***Hezbon Omondi v Independent Electoral and Boundaries Commission & 2 Others*** **[2018] eKLR** was cited to explain the appointment of agents by political parties under Section 30 of the Elections Act. This section outlines that a political party is responsible for appointing agents for its candidates, except where the candidate is independent or the party fails to appoint one. On the broader issue of whether the elections were credible, transparent, accountable, and verifiable, the court found no evidence to the contrary. It concluded that the elections were free, fair, and transparent. As a result, the court found no reason to nullify the elections for the Kiambu National Assembly held on 9 August 2022. The declaration of the 1st Respondent as the elected Member of Parliament for Kiambu Constituency was deemed lawful. The petition was consequently dismissed for lack of merit. Regarding the costs, the court directed that the Petitioner should bear the costs incurred by the 1st, 2nd, and 3rd Respondents, in accordance with Rules 30 and 31 of the Elections (Parliamentary and County Elections) Petition Rules 2017, and Section 84 of the Election Act. These provisions stipulate that costs follow the cause, meaning the unsuccessful party in an election petition is typically responsible for the costs. The costs were capped at Kshs 1,000,000 for each Respondent, to be agreed upon by the parties or assessed by the Deputy Registrar.

Beatrice Saki Muli & Another v Hon. Jude Kang'ethe Njomo & Another Nairobi Civil Application No E021 of 2023

In the Court of Appeal at Nairobi

Coram: H Omondi Dr KI Laibuta, A Ali-Aroni JJA

Ruling striking out Notice of Appeal

Date: 14 April 2023

Notice of appeal on interlocutory matters-filing of notice of appeal in election court-whether Court of Appeal has jurisdiction before notice of appeal against final judgment issued

In the ruling, the 1st applicant, Beatrice Saki Muli, an officer of the 2nd applicant, the Independent Electoral and Boundaries Commission (IEBC), was involved in an election dispute with the 1st Respondent, Hon. Jude Kang'ethe Njomo, and the 2nd Respondent, John Machua Waithaka. The Respondents were candidates in the election for the position of Member of National Assembly for Kiambu Constituency held on 9 August 2023, with results announced on 11 August 2022. Dissatisfied with the outcome, the 1st Respondent filed a petition on 8 September 2022, followed by an interlocutory application on 7 November 2022, seeking various orders, including the production of electoral documents and scrutiny by Information Technology experts. The High Court, presided over by A.N. Ongeri, J., dismissed the 1st Respondent's application on 9 January 2023, citing insufficient evidence and warning against aiding a "fishing expedition." The 1st Respondent, aggrieved by this decision, filed a Notice of Appeal on 20 January 2023, which the applicants sought to strike out on the grounds of procedural non-compliance, specifically that the notice was filed in the High Court instead of the Court of Appeal and was filed out of time, contrary to rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017.The applicants' motion to strike out the notice was supported by the case ***John Munuve Mati v Returning Officer Mwingi North, IEBC & Paul Musyimi Nzengu*** **[2018] eKLR**, which emphasised the importance of timely resolution of election disputes. Additional cases cited included ***Moses Mwicigi & 14 Others v IEBC & 5 Others*** **[2016] eKLR**, where the Supreme Court held that procedural rules in litigation should not amount to vanity, ***Apungu Arthur Kibira v IEBC & 2 Others*** **[2018] eKLR**, which underscored the mandate to comply with rule 6 of the Court of Appeal's Election Petition Rules, and ***Mbaraka Issa Kombo v IEBC & 3 Others*** **[2017] eKLR**, which distinguished between dismissal and striking out of suits.

The 2nd Respondent supported the application to strike out the notice, citing ***Abdikadir Farah Mohammed & Another v IEBC & 3 Others*** **[2018] eKLR**. In response, the 1st Respondent raised a preliminary objection, arguing that the court lacked jurisdiction until a Notice of Appeal was filed against the final judgment of the High Court in Kiambu HCEP No. E003 of 2022. The 1st Respondent cited ***Jared Odoyo Okello v IEBC & 6 Others*** **[2014] eKLR**, and referred to section 85A of the Elections Act, 2011, the Elections (General) Regulations, 2017, and the Court of Appeal (Election Petition) Rules, 2017.

The court agreed with the 1st Respondent, referencing the mandatory provisions of section 80(3) of the Elections Act, 2011, which require that interlocutory matters in election petitions be determined by the election court and only appealed after the final judgment. The court reiterated its position from ***Jared Odoyo Okello & Another v IEBC & 6 Others*** **[2014] eKLR**, and ***Peter Gichuki King'ara v IEBC & 2 Others*** CA No 23 of 2013, stressing that interlocutory issues must be addressed in the final appeal to prevent clogging the judicial process. The court also referenced ***Mae Properties Limited v Joseph Kibe & Another*** **[2017] eKLR**, emphasising the importance of adhering to procedural rules and timelines.

The court, after considering the applicants' Motion, the 1st Respondent's preliminary objection, and the submissions from both sides, concluded that the Notice of Appeal was incompetent and effectively non-existent. This conclusion was based on several factors: the notice had been incorrectly filed in the election court, it did not comply with rule 6(1) of the Court of Appeal (Election Petition) Rules, it related to an interlocutory application rather than a final decision of the election court, and thus, it did not meet the requirements of the statute and case law.

The court further noted that since the Notice of Appeal was not properly before it, the question arose whether it had jurisdiction to entertain the applicants' Motion. The 1st Respondent argued that the court lacked jurisdiction until a Notice of Appeal against the final judgment of the High Court in Kiambu HCEP No. E003 of 2022 was filed. The court agreed with the 1st Respondent, ruling that the Motion was premature as the court's jurisdiction under section 85A of the Elections Act had not yet been triggered. Consequently, the 1st Respondent's preliminary objection was upheld, and the applicants' Notice of Motion was struck out, with no order as to costs.

Njomo v Waithaka & 2 Others Nairobi Election Petition Appeal (Application) E002 of 2023

In the Court of Appeal at Nairobi

Coram: HA Omondi, KI Laibuta & JM Mativo JJA

Ruling striking out appeal

Date: 22 June 2023

Failure to deposit security for following court order-whether the Court of Appeal can extend time for deposit of security-grounds for the grant of an extension of time under Rule 17 of the Court of Appeal (Election Petition) Rules 2017

Summary of facts

In this case, two applications were presented to the Court, each seeking opposing orders. The first application, dated 5 June 2023, was filed by Beatrice Saki Muli and the Independent Electoral & Boundaries Commission (IEBC), who were the 2nd and 3rd Respondents. This application sought to strike out the appeal for non-compliance with rule 27 of the Court of Appeal (Election Petition) Rules, 2017 (the Rules). The main issue was the Appellants' failure to deposit security for costs, which was a prerequisite for the appeal's hearing. The applicants also requested costs for this application. On 14 April 2023, the Court (Omondi, JA.) had directed the Appellant to deposit security for costs as a condition for the appeal's hearing. On 2 May 2023, it was established that the Appellant had not complied with this order, leading the court to grant the applicants the liberty to apply for orders to strike out the appeal. The Court also ordered that if no application was filed within 10 days, the appeal would be deemed invalid and dismissed. The applicants interpreted this order as self-executing.

On 5 June 2023, the matter was mentioned again, and the Appellant's counsel informed the Court that compliance would occur only after filing a supplementary record of appeal. The Court directed that the Respondents file and serve their application and written submissions by the end of that day, with the Appellant to file and serve responses and submissions by 6 June 2023. The application was to be listed for hearing within three days.

The core argument of the applicants was that rule 27 is mandatory and does not allow discretion on when to comply. They contended that the Appellant had not

deposited the security 52 days after the last court mention, despite being given reasonable time. They argued that granting the orders sought was in the interest of justice.

On 7 June 2023, the Appellant filed an application seeking an extension of time to deposit the security for costs until after filing the supplementary record of appeal. The Appellant also requested that this application be heard alongside the intended application for leave to file the supplementary record. On 8 June 2023, both parties appeared ready to prosecute their applications. Although the application dated 5 June 2023 was the only one scheduled for hearing, it was decided to hear both applications together due to the time-bound nature of election petitions.

The Appellant attributed the delay in depositing security to difficulties in obtaining certified court documents from the High Court in Kiambu, financial hardship from election campaigns, and a protracted trial. The Appellant argued that constitutional rights under articles 27(1), 38(3)(c), 47(1), 48, and 50(1) should not be infringed due to the delay caused by the High Court. The Appellant also claimed that rule 8(5), which allows filing a supplementary record within seven days, was not helpful due to the delays in obtaining necessary documents.

The 1st Respondent supported the 2nd and 3rd Respondents' application to strike out the appeal, arguing that rule 27(1) and (2) required immediate deposit of security upon filing or as directed by the Court. They cited ***Esposito Franco v Amason Jeffah Kingi & 2 Others*** **[2008] eKLR**, where non-compliance with set timelines in election petitions resulted in dismissal. They argued that there was no provision for extending time under rule 27 or any other legislation and that the Court had no jurisdiction to extend the time for security deposit.

The Appellant's counsel, Mr. Mungai, addressed two main issues: whether the Court had jurisdiction to extend time for depositing security for costs and whether sufficient reasons had been provided to justify the extension. He referred to rules 5, 17(1), and 17(2) to argue that the Court had the jurisdiction to extend time and dismissed ***Esposito Franco v Amason Jeffah Kingi & 2 Others*** as pre-2010 case law. Mr. Mungai contended that the Appellant had provided compelling reasons for the delay, citing the High Court's decision in ***Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others*** **[2013] eKLR**, which affirmed that an applicant could seek leave for default in depositing security.

Determination of the court

The Court first addressed whether it had jurisdiction to extend time for depositing security for costs in election petition appeals. Rule 4(1) states that the Rules apply to appeals from decisions of the High Court in election petitions. Rule 27 provides for the deposit of security for costs and the consequences of non-compliance. Rule 5 highlights that failure to comply with the rules is subject to the Court's discretion, considering the provisions of article 159(2)(d) of the Constitution and the need to observe constitutional timelines.

The Court found that while rule 17(1) allows for the extension of timelines for sufficient reasons, it is constrained by constitutional and statutory timelines. Therefore, the Court has discretion to extend time for depositing security, provided the reasons are substantial and do not infringe upon constitutional or electoral timelines.

The Court then examined whether the Appellant provided sufficient reasons to merit the extension. The principles from ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*** **[2014] eKLR** were considered, including the necessity of a reasonable explanation for the delay and the absence of prejudice to the Respondents.

In determining whether it should exercise discretion to extend time, the court asserted that the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, and the nature of the case only to mention but some. Ordinarily, these facts are inter-related; they are not individually decisive. An unsatisfactory explanation for any period of delay will normally be fatal to an application.

The Court noted that the Appellant's failure to comply with the Court's directions and the arguments presented by Mr. Mungai were insufficient. The Appellant's claim that the delay was due to financial hardship and the need for a complete record was deemed unconvincing. The Appellant had ignored previous directions and had not demonstrated that the delay was justified. Ultimately, the Court concluded that the Appellant's non-compliance and lack of a satisfactory explanation disentitled him to the Court's discretion. The application for an extension of time was dismissed, the appeal was struck out, and costs were awarded to the Respondents.

VI. PARTY LIST DECISIONS

Amos Liyayi Munasya v Geoffrey Muhongo Mitalo & Another Kakamega Election Petition Appeal No E001 of 2023

In the High Court of Kenya at Kakamega

Coram P.J.O. Otieno J.

Date: 7 July 2023

Judgment allowing appeal

Substitution of party list-

Summary of the Facts

The applicant/Appellant (Amos Liyayi Munasya) appealed the decision of the Trial Court at the High Court at Kakamega. ODM party (Interested Party) submitted a list of 8 persons to IEBC (2nd Respondent) as nominees for the marginalized group for nomination into the Kakamega County Assembly. The list was published on the IEBC website indicating that 1st Respondent was listed as number two and the preferred nominee for the marginalized community while the Applicant/Appellant was listed as number six and a nominee for the youth. The Applicant/Appellant was nominated into the County Assembly while the 1st Respondent was left out. 1st Respondent challenged the decision in the Lower court. The Lower court nullified the Appellant's election to the County Assembly. The Applicant/Appellant appealed against the decision of the Lower court. In his appeal, the Applicant/Appellant argued that he was ranked number one to represent youth in the amended ODM party list following the general election and the performance of the party which earned it two slots in the County Assembly for nomination. The 1st Respondent was ranked number three to represent ethnicity.

The 2nd Respondent submitted that the 1st Respondent was not qualified to represent marginalized groups in the County Assembly because he does not belong to the marginalized community in the county. Further, it stated that the ODM party submitted an amended party list which ranked the Appellant first to represent the youth while the 1st Respondent was ranked number 3 to represent ethnicity. It further argued that it published the amended list because it plays no role in the Constitution of the party list. That is the role of the political party.

Issues for Determination

The Court determined whether the Applicant/Appellant was validly and properly nominated as a member of the County Assembly of Kakamega County.

Decision of the court

The Court stated that the political party has the liberty to review the party list until the nominated members are declared elected. The declaration of election for special seats is published in the gazette after the seats have been allocated by IEBC and not the publication done before the general elections is conducted. However, the publication of the party list in the Kenya Gazette after the general elections cannot be reviewed during the term of the County Assembly unless by an order of the Court.

The Court allowed the appeal and set aside the decision of the lower court. It held that the Applicant/Appellant was validly and properly nominated as a member of the County Assembly of Kakamega County in line with the amended party list that was published in the gazette.

Anne Khakasa Situma & 2 Others v Lydia Chelimo Kiboi Kitale High Court Election Petition Appeal E002 of 2023

In the High Court of Kenya at Kitale

Coram: AC Mrima J

Judgment allowing appeals

Date: 1 August 2023

Inclusion in the wrong party list-whether pre-election dispute can form basis of an election petition after elections

Summary of facts

The dispute arises from Article 177 of the Constitution, which pertains to County Assembly membership. The central issue involves the processes of political parties in publishing and gazetting party lists for nominations to Parliament and County Assemblies by the Independent Electoral and Boundaries Commission (IEBC).

In the August 2022 General Election cycle, Lydia Chelimo Kiboi (the Respondent) applied to her party, FORD-K, for inclusion in the Trans-Nzoia County Assembly Gender Top-Up List. However, the IEBC mistakenly included her in the Bungoma County Gender Top-Up List. Responding to this error, the Respondent requested FORD-K to correct the mistake, but the party declined, citing reasons such as prior submission of nominees and the lack of a formal application from her.

The Respondent then brought her complaint before the Political Parties Dispute Tribunal (PPDT). She argued that despite paying application fees and coming from a marginalized community, only nominees from other communities were listed. The Tribunal, on 8 August 2022, upheld her complaint, directing FORD-K to amend its list by transferring her name from Bungoma to Trans-Nzoia and prioritising it. When FORD-K and IEBC failed to comply with the Tribunal's orders, the Respondent filed Election Petition No. 1 of 2022. She contended that FORD-K's and IEBC's non-compliance with the Tribunal's decision breached constitutional and statutory provisions regarding the nomination process. She sought a declaration that the nomination of Ann Khakasa Situma (the 1st Appellant) under the Gender List was invalid.

FORD-K argued that by the time of the Respondent's complaint, it had already submitted its nominees to the IEBC. It later included the Respondent's name upon opportunity for amendment. IEBC claimed it did not receive an amended list from FORD-K and thus could not act on it.

The Election Court, on 20 March 2023, found that the 1st Appellant's nomination could only be challenged via an Election Petition. It determined that FORD-K failed to comply with the applicable laws and its own rules, as the list was generated by an Ad-Hoc Committee rather than the mandated Ward Executive Committee. The Court found the process lacked transparency and due process.

Consequently, the Court declared FORD-K's party list as non-compliant with the Constitution and Election Act, nullified the allocation of the special seat to the 1st Appellant, and directed that a fresh nomination process be conducted within 60 days.

The decision prompted the current appeal.

In the appeal process, three appeals were filed against the judgment of the Election Court, identified as Election Appeal No. E001 of 2023, Election Appeal No. E002 of 2023, and Election Appeal No. E003 of 2023. These appeals were consolidated, with Election Appeal No. E002 of 2023 serving as the lead appeal.

The 1st Appellant, Ann Khakasa Situma, challenged the Election Court's decision on several grounds. In her Memorandum of Appeal dated 15 April 2023, she argued that the learned magistrate had erred in law by handling Election Petition No. E001 of 2022, claiming it lacked jurisdiction. Situma contended that the petition was statute-barred, that the magistrate misinterpreted the facts and evidence, and failed to meet the required standard of proof. She also asserted that the magistrate had not provided a proper analysis of the law and facts and had wrongfully shifted the burden of proof to the Respondents. Situma sought the setting aside of the judgment and decree of the Chief Magistrate's Court Election Petition No. E001 of 2022 and requested costs to be awarded to her.

The 2nd Appellant, Ford-Kenya, similarly disputed the Election Court's decision in its memorandum of appeal dated 22 March 2023. Ford-Kenya argued that the petition was res judicata and an abuse of court process, and that the trial magistrate had erred by finding that the 3rd Respondent was not lawfully nominated. They also contended that the magistrate had incorrectly judged the compliance of the party list and that the decision was contrary to the evidence and the law,

which constituted a miscarriage of justice. Ford-Kenya requested the judgment of 20 March 2023 to be set aside, the proceedings in the lower court to be dismissed with costs, and that the costs of the appeal be borne by the 1st Respondent.

The 3rd Appellant, the IEBC, challenged the trial court's decision on several grounds in its Memorandum of Appeal dated 17 April 2023. The IEBC argued that the magistrate had overstepped by addressing pre-election disputes that should have been handled by the Political Parties Dispute Tribunal (PPDT). They claimed that the magistrate had disregarded evidence showing compliance with the PPDT's decision and that the trial court had failed to consider the submissions and evidence provided by the IEBC. Additionally, the IEBC contended that the magistrate's decision to nullify the nomination was erroneous. They sought to have the judgment of the lower court set aside, the petition against the IEBC dismissed, and costs of the appeal and the lower court borne by the Respondent.

In their submissions, the 1st Appellant argued that the trial court had wrongly entertained issues that should have been resolved by the PPDT and that the Respondent failed to appeal the PPDT's decisions. The 1st Appellant criticised the trial court for not adhering to procedural requirements and not evaluating factual issues correctly. They relied on precedents to argue that the Respondent had not discharged the burden of proof.

The 2nd Appellant contended that the dispute was pre-election and thus outside the jurisdiction of the Election Court. They argued that the matter should have been resolved by the PPDT or IEBC before it was brought to the court. The 2nd Appellant also argued that the trial court had wrongly assumed jurisdiction, and that the Election Court had created confusion by conflicting with the PPDT's orders.

The 3rd Appellant's submissions focused on the Respondent's failure to challenge her prioritisation before the PPDT and the lack of compliance with the nomination rules. The IEBC faulted the Respondent for not addressing issues related to Regulation 15 of the nomination rules before the Tribunal.

The appeals therefore related to jurisdiction, procedural errors, and adherence to legal standards. They sought the setting aside of the judgment and the dismissal of the petitions, along with costs.

In response to the appeals, Lydia Chelimo Kiboi challenged the proceedings through written submissions dated 30 June 2023. The Respondent argued that the

Election Court's jurisdiction over normative seats begins once the IEBC gazettes the nominees, as they are then deemed duly elected. The Respondent contended that the issues raised in the Petition before the trial Court differed from those in the complaint filed before the PPDT, and thus the doctrine of res judicata did not apply.

The Respondent emphasised that the core issue was whether the Trans-Nzoia Gender Top-up List was created and submitted in accordance with the Constitution, the Elections Act, the Elections (General) Regulations 2012, the Elections (Party Primaries and Party Lists) Regulations 2017, and FORD-K's nomination and election rules. It was submitted that the Lists were prepared by an Ad Hoc Committee rather than the Ward Executive Committee.

The Respondent agreed with the trial Court's decision that the 1st Appellant's nomination could only be challenged through an Election Petition, as the challenge was made post-gazettement and assumption of office. The Respondent noted that the 2nd Appellant's jurisdictional contest before the PPDT and the trial Court was unsuccessful, and the appeal challenging the PPDT outcome was dismissed by the High Court in Nairobi Civil Appeal No. E634 of 2022.

The Respondent also indicated that she became aware of the purported compliance with the PPDT judgment only when the 2nd Appellant filed pleadings in the trial Court. She highlighted that communications from the IEBC Chairman regarding compliance with PPDT orders and FORD-K's responses were not shared with her or her legal representatives. Furthermore, she was not informed about the amendment that placed her last on the list.

The Respondent argued that following the gazettement of the 1st Petitioner, and having litigated her case before the PPDT, her recourse was solely through the Election Court. She relied on ***National Gender and Equality Commission v IEBC & Another*** **[2013] eKLR**, cited with approval by the Supreme Court in ***Moses Mwicigi & 14 Others -vs- Independent Electoral and Boundaries Commission & 5 Others*** **[2016] eKLR**.

She disputed the propriety of the 1st Appellant's nomination, asserting that the 1st Appellant failed to produce her application or explain the criteria used. Additionally, the Respondent argued that she was not afforded the opportunity to exhaust internal dispute resolution mechanisms due to the 2nd Appellant's lack of transparency.

It was also contended that IEBC should not have engaged directly with the 2nd Appellant about compliance with the PPDT judgment while excluding her. The Respondent maintained that it was improper for her to be excluded from communications involving the 2nd and 3rd Appellants.

Relying again on ***National Gender and Equality Commission v IEBC & Another*** **[2013] eKLR**, the Respondent argued that the failure to adhere to the law rendered the list null and void. The Respondent criticised IEBC for not ensuring that the amended list complied with Section 27(1) of the Elections Act, which mandates that political parties submit their nomination rules at least three months before candidate nomination.

The Respondent urged the Court to uphold the trial Court's judgment and dismiss the three appeals for lack of merit.

Issues for determination

1. Whether the trial Court had jurisdiction over the dispute.

2. If the answer in (i) above is in the affirmative, whether the 2nd Appellant's nomination process was in consonance with the Constitution and the law.

Determination of the court

The appellate Court's duty, as outlined in Section 75(4) of the Elections Act, is to revisit the record but to focus solely on matters of law. This principle is established in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 7 Others Petition No. 2B of 2014*** **[2014] eKLR**, where the Supreme Court delineated that legal questions involve applying legal principles to facts, while factual questions involve assessing evidence and witness credibility. Appellate courts do not re-evaluate evidence or witness testimony, which is the domain of trial judges.

The Supreme Court also emphasised in ***Mary Wambui Munene v Peter Gichuki Kingara & Six Others*** **Petition No. 7 of 2013 [2014] eKLR** that jurisdiction is a crucial legal issue that must be determined at the outset of a case. This was reiterated in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others*** **[2010] eKLR**, which affirmed that jurisdiction must be established before proceeding with a case and cannot be conferred by consent or procedural technicalities.

Further, in ***Nornael Okello G'Oganyo v Independent Electoral Commission Selection Panel & 2 Others; Independent Electoral and Boundaries Commission & 6 Others (Interested Parties)*** **Petition E345 of 2021 [2022] eKLR**, the Court reinforced that jurisdiction is a prerequisite and must be established before a case can be entertained. This principle was supported by ***Jamal Salim v Yusuf Abdulahi Abdi & Another*** **Civil Appeal No. 103 of 2016 [2018] eKLR** and ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others*** **[2013] eKLR**, which underscored that jurisdiction is fundamental and cannot be conferred by consent or procedural means.

In ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others*** **[2012] eKLR**, it was confirmed that a Court's jurisdiction must be explicitly provided by the Constitution or legislation. The Court of Appeal in ***Orange Democratic Movement v Yusuf Ali Mohamed & 5 Others*** **[2018] eKLR** clarified that jurisdiction must be grounded in law and cannot be determined solely through pleadings.

The Court determined that the Respondent's challenge to the constitutionality and legality of the party list had not been extinguished. Following guidance from the Supreme Court, the Respondent is permitted to pursue such a challenge in the High Court, exercising its judicial review or supervisory jurisdiction under Article 165(3) and (6) of the Constitution, even after the determination of an election petition. This remains true regardless of whether the Respondent initially acted against the party list.

The dispute involved the Respondent's placement on a party list, initially reviewed by the Political Parties Dispute Tribunal (PPDT). The PPDT had ordered amendments to the list but did not place the Respondent at the top. The Respondent filed an election petition, which the Appellants argued was outside the Election Court's jurisdiction as it concerned a pre-election matter.

The Court found that the Respondent's issue was a pre-election dispute about the party list, which fell outside the Election Court's jurisdiction. The Court ruled that the Respondent should have addressed the matter with the PPDT and could appeal to the High Court on points of law if dissatisfied. Thus, the Court concluded that the Election Court lacked jurisdiction to adjudicate the dispute, reaffirming that pre-election matters should be resolved through the appropriate pre-election dispute resolution mechanisms.

The Court concluded that the first issue was resolved in the negative, rendering the second issue moot.

As a result, the Court issued the following orders: All appeals, namely **Election Appeal No. 1 of 2023**, **Election Appeal No. 2 of 2023**, and **Election Appeal No. 3 of 2023**, were found to be meritorious and were allowed. The judgment of the Election Court in ***Lydia Chelimo Kiboi v FORD-K & Others*** **Kitale Chief Magistrates Court Election Petition No. E001 of 2022,** rendered on 20 March 2023 was set aside in its entirety due to lack of jurisdiction. Consequently, the Election Petition was dismissed. Anne Khakasa Situma was affirmed as duly elected as a Member of the County Assembly of Trans Nzoia by nomination through the Ford-Kenya's Gender Top Up Party List.

Given the nature of the dispute and the potential for further challenges, each party was ordered to bear its own costs. Any security for costs made in the matter was to be returned to the depositor. A Certificate of the determination of the Election Petition and this Appeal was to be issued to the Independent Electoral and Boundaries Commission and the Speaker of the County Assembly of Trans Nzoia County.

Dennis Matundura Mogeni v IEBC & 2 Others Nyamira High Court Election Petition Appeal E004 of 2023

In the High Court of Kenya at Nyamira

Coram: H Chemitei J.

Date: 6 July 2023

Judgment allowing appeal

Party list nominations-eligibility for nomination in the marginalised (youth) category-requisite document for proof of eligibility for nomination in the Youth category

Summary of facts

The appeal stemmed from the judgment delivered by Hon. B.M. Kimtai (PM) on 26 January 2023. The trial magistrate had dismissed the petition, ruling that the Petitioner failed to prove his case and awarded costs to the 1st and 3rd Respondents, capped at Kshs. 300,000.

The Appellant challenged this decision on several grounds. Firstly, it was argued that the magistrate erred in dismissing an application for the Directorate of Criminal Investigation (DCI) to investigate the 3rd Respondent's two identity cards. The Appellant claimed the magistrate incorrectly found that the 3rd Respondent was 34 years old rather than 35, as shown in the 2nd Respondent's party list and Gazette Notice No. 10712 dated 9 September 2022. The Appellant contended that documents, including a birth certificate, presented later to prove the 3rd Respondent's age were not available during the nomination process and thus should not have been considered.

Additionally, the Appellant argued that the trial magistrate relied on a document belatedly produced by the 3rd Respondent, which was not part of the initial evidence and thus did not correct an otherwise voidable election. The appeal further claimed that the nomination and gazettement of the 3rd Respondent as a youth representative were unlawful due to the 3rd Respondent's actual age of 35, which made him ineligible under Article 177(c) of the Constitution. The Appellant also disputed the costs awarded, arguing they should have followed the event.

In response, the 3rd Respondent contended that the trial magistrate had correctly dismissed the application based on a detailed ruling and had addressed the age

dispute adequately. The 3rd Respondent argued that the applicable law only required proof that a nominee was over 18 and under 35 at the time of nomination, citing ***Lydia Nyaguthi Githendu v IEBC & 17 Others*** **[2015] eKLR**, and other cases such as ***Losikany James v Independent Electoral and Boundaries Commission*** **Constitutional Petition No. E313 of 2022** and ***Linet Kemunto Nyakeriga & Another v Ben Njoroge & 2 Others*** **C.A 266/2013**. He also maintained that the costs awarded were appropriate under section 85 of the Election Act, which mandates that costs follow the event.

The court was tasked with re-evaluating the evidence and legal interpretations to determine whether the trial court had acted correctly and applied the law judicially.

Issue for determination

1. Whether the 3rd Respondent was eligible to be nominated as a youth in line with Article 177 of the Constitution as well as Regulations 15 (3) of the Elec tions (Party Primaries and Party Lists 2017).

Determination of the court

The court examined the eligibility of the 3rd Respondent for nomination as a youth representative, focusing on whether he met the criteria set out in Article 177 of the Constitution and Regulation 15(3) of the Elections (Party Primaries and Party Lists) 2017.

Article 260 of the Constitution defines the composition of a county assembly, which includes members from marginalised groups such as youth. This provision was integral in determining whether the 3rd Respondent fulfilled the constitutional requirements for youth representation. Regulation 15(3) of the Elections (Party Primaries and Party Lists) 2017 stipulates that a person nominated to represent the youth must be between 18 and 34 years old, and must provide documentary proof of their age. This regulation was crucial in evaluating the 3rd Respondent's eligibility. The 3rd Respondent had presented two conflicting documents during the nomination process. His national identity card, dated 1 January 1987, indicated he was 35 years old at the time of the nominations, while his certificate of birth, dated 12 December 1987, suggested he was 34 years old. The 1st Respondent relied on the birth certificate to validate the nomination, which the Appellant challenged, arguing that the birth certificate was not an acceptable document for nomination.

The court considered several cases and legal provisions in its determination. In ***Lydia Nyaguthi Githendu v IEBC & 17 Others*** **[2015] eKLR**, the court supported the argument that documents presented during nominations must adhere to legal requirements. Additionally, the court referred to the case of ***Losikany James v IEBC*** **High Court Constitutional Petition No. E313 of 2022** to assess whether the corrected identity card, obtained after the nomination process, could validate the nomination. The court found that the effort to sanitise the 3rd Respondent's identification documents whether procedural or not, came after the nomination and was not consequential. The court further ruled that the 3rd Respondent ought not benefit from the decision in the ***Losikany*** case and the interim orders therefrom as he would be benefiting from an illegality. It was also noteworthy that the petition was later dismissed.

The court also analysed Regulation 15(3) of the Elections (Party Primaries and Party Lists) 2017, confirming that a nominee must be within the age bracket of 18 to 34 years, and noted that the birth certificate presented was not an acceptable substitute for the national identity card. Moreover, Gazette Notice No. 6378 required copies of national identity cards or valid passports for voter registration, further invalidating the 3rd Respondent's nomination, as the birth certificate was not listed among the acceptable documents.

The court concluded that the 3rd Respondent's nomination was irregular because the primary document used for eligibility verification did not comply with legal requirements. The reliance on the birth certificate, presented after the nominations, did not rectify the initial procedural deficiencies. As a result, the court invalidated the nomination and the trial court's judgment. It directed the 1st Respondent to issue a gazette notice revoking the 3rd Respondent's nomination and ordered fresh nominations for the youth position in Nyamira County Assembly. The Appellant was awarded costs totalling Kshs 500,000, to be paid equally by the 1st and 3rd Respondents.

Mohammed Bashir Ismail v Independent Electoral & Boundaries Commission (IEBC) & 2 Others Clerk, County Assembly of Kajiado (Interested Party) Kajiado Election Petition Appeal E002 of 2023

In the High Court of Kenya at Kajiado

Coram: FR Olel J

Judgment allowing the petition

Date: 31 July 2023

Summary of facts

In a petition dated 20 September 2022 and filed on the same day, the Appellant challenged the exclusion of his name from the list of nominated members for Kajiado County Assembly by the 1st Respondent. The Appellant had initially applied for nomination under the marginalized category, and his name was forwarded as the party's first preference. However, when the 1st Respondent published the gazette notice on 9 September 2022, the Appellant's name was replaced by that of the 3rd Respondent, who was placed in the gender top-up category. The Appellant argued that this replacement was unlawful and failed to comply with the Constitution and the Elections Act, as the 3rd Respondent did not reside in Kajiado and thus could not represent its marginalized communities.

The Appellant sought several declarations, including nullification of the 3rd Respondent's nomination, a declaration of his rightful nomination, and an order for the Independent Electoral and Boundaries Commission to gazette him as a member representing the marginalized communities. Additionally, he requested that the court award costs to him.

In response, the 1st Respondent provided a replying affidavit stating that the party lists were reviewed for compliance with relevant laws and regulations. The 1st Respondent noted that the 2nd Respondent's list was amended and published according to legal requirements. They asserted that the petitioner had opportunities to contest the nominations but failed to do so within the designated period.

The 2nd Respondent filed a replying affidavit indicating that their party list was submitted and amended in compliance with the 1st Respondent's guidelines. They claimed that the process was fair and that the nomination list complied with legal provisions.

The 3rd Respondent also provided a replying affidavit, asserting that he was qualified for nomination and that the petition was frivolous. He noted that the petitioner had not utilized the internal dispute mechanisms before filing the petition and that the petitioner's claims were based on a false narrative.

The Interested Party, the county assembly clerk, confirmed that his role was limited to swearing in members and not determining nomination disputes.

In further response, the petitioner challenged the 1st Respondent's handling of the nomination process, alleging breaches in procedure and failure to follow legal requirements. He argued that the final party list was not subjected to public participation and that the certificate of compliance was invalid.

When the matter came before the Election Court, the parties agreed to submit written submissions. The trial magistrate, Hon. V. Kachuodho, found that the dispute was a pre-election issue that should have been addressed by the IEBC or PPDT. The court held that the petitioner had failed to present his case to these bodies and concluded that it lacked jurisdiction over the matter. Consequently, the petition was dismissed, and each party was ordered to bear its own costs.

The Appellant filed a Memorandum of Appeal dated 3 March 2023, raising nine grounds. He argued that the trial magistrate erred in various ways, including declining jurisdiction, misapplying the principles in ***Sammy Ndung'u Waity v IEBC & 3 others*** **[2019] eKLR**, misapprehending the evidence, and failing to consider crucial evidence such as the resubmission of an amended party list by the 2nd Respondent. The Appellant also challenged the trial court's finding that the Appellant failed to exercise diligence in lodging a pre-election complaint. He further contended that the court erred in holding that nothing barred the Appellant from challenging the 3rd Respondent's nomination before gazettement.

The Appellant prayed for the judgment of the Senior Resident Magistrate, dated 9 February 2023, to be set aside and sought a declaration that the nomination of the 3rd Respondent was invalid due to non-compliance with election laws and regulations. He also sought orders to nullify the nomination and gazettement of the 3rd Respondent and requested that he be declared the duly nominated member of the County Assembly of Kajiado, or in the alternative, that fresh nominations be conducted.

In his submissions dated 26 July 2023, the Appellant argued that the trial court erred in dismissing his petition, which alleged non-compliance with the

Constitution of Kenya 2010 and electoral laws. He relied on ***Mohamed Abdi Mohammed v Ahmed Abdullahi Mohammed & 3 others*** **[2019] eKLR**, where the Supreme Court held that an election court might look into a pre-election dispute if it goes to the root of the election. The Appellant also cited ***Micah Kigen & 2 others v Attorney General & 2 others*** **Nairobi Petition No 268 of 2012 [2012] eKLR**, ***Kabetsi v Anifa Kawooy & another*** **Election Petition No 25 of 2005**, and ***Commission for the Implementation of the Constitution v Attorney General & 2 others*** **Civil Appeal No 351 of 2012** in support of his argument that the trial court had jurisdiction to determine the petition.

The Appellant argued that the amended party list submitted by the 2nd Respondent on 6 August 2022, just before the election, was done without public participation, breaching the constitutional and legal requirements. He contended that the trial court wrongly found that the amended list was made available to the Appellant, asserting that he was not aware of the changes. He further submitted that the 2nd Respondent failed to comply with the nomination rules, leading to a flawed process.

The Appellant also cited ***Victoria Cheruto Limo & another v IEBC & another*** **[2018] eKLR**, arguing that the 3rd Respondent's nomination was invalid as he was registered as a voter in Mandera County, while only those registered within a county should qualify for nomination to its county assembly. The Appellant submitted that the 1st and 2nd Respondents did not tender evidence of compliance with nomination rules, rendering the nomination and election of the 3rd Respondent invalid.

The Appellant concluded by urging the court to find non-compliance with electoral laws and regulations in the nomination process and revoke the 3rd Respondent's membership to the County Assembly of Kajiado.

The 1st Respondent filed their submissions on 4 July 2023, addressing three primary issues. The first issue was whether the 1st Respondent had executed its mandate as required by the Constitution of Kenya, the Elections Act, and the relevant regulations. The 1st Respondent contended that they had adhered to the legal framework by reviewing and confirming party lists submitted by political parties, including the 2nd Respondent, in accordance with ***Section 34 of the Elections Act*** and various regulations. They asserted that the 2nd Respondent's list was initially non-compliant but was corrected and published without altering the priority list, refuting any claims of collusion or tampering.

The second issue was whether the trial court in ***Kajiado CMCC Election Petition No E003 of 2022*** was correct in determining that it lacked jurisdiction to hear the matter. The 1st Respondent argued that the trial magistrate's decision was proper, as jurisdiction for pre-election disputes was vested in the IEBC and not the court. They cited various precedents, including ***Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd*** **[1989] eKLR** and ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others*** **[2012] eKLR** to support their position that the court could not entertain pre-election disputes and that the Appellant had failed to follow the appropriate dispute resolution mechanisms.

The third issue concerned the costs of the appeal. The 1st Respondent requested that costs be awarded in their favour, as stipulated by ***Section 84 of the Elections Act***, which provides that costs follow the cause in election petitions.

The 2nd Respondent, in their submissions filed on 6 July 2023, supported the trial court's finding that it did not have jurisdiction to address the dispute, which was fundamentally a pre-election issue. They argued that such disputes should be resolved first through the IEBC or the Political Parties Dispute Tribunal (PPDT), as established by ***Article 88(4)(e) of the Constitution*** and ***Section 74(1) of the Elections Act***. The 2nd Respondent referred to the Supreme Court case ***Mohammed Abdi Mohammed v Ahmed Abdullahi Mohammed & 3 Others [2022] eKLR*** to emphasise that pre-election disputes must be resolved through the proper channels before being brought to court.

Additionally, the 2nd Respondent contended that the Appellant had waived their right to contest the nomination list by failing to use the available dispute resolution mechanisms. They cited cases such as ***Fredrick Odhiambo Oyugi v Orange Democratic Movement & 2 Others*** **[2020] eKLR** and ***Geoffrey Muthira & Another v Samuel Muguna Henry & 1756 Others*** **[2018] eKLR** to illustrate that the Appellant's inaction rendered them ineligible to challenge the list in court. They also noted that the process of preparing the party list was compliant with the law, and the Appellant's claims of irregularities were unsubstantiated.

The 3rd Respondent, who also submitted their arguments on 6 July 2023, proposed three issues for determination: whether the court had jurisdiction to address issues not previously considered by the subordinate court, whether the subordinate court correctly held it lacked jurisdiction over pre-election disputes, and who should bear the costs of the appeal. They argued that the subordinate court had only addressed the issue of jurisdiction and did not deal with other grounds raised in the petition. They referred to the Supreme Court case ***Basil***

Criticos v Independent Electoral and Boundaries Commission & 2 Others **[2016] eKLR** to argue that an appeal cannot be properly based on issues not determined by the lower court.

The 3rd Respondent supported the submissions of the 1st and 2nd Respondents regarding the lack of jurisdiction for pre-election disputes. They asserted that the Appellant had failed to use the proper dispute resolution channels, such as the IEBC or PPDT, and thus could not validly challenge the nomination process in court. They cited cases like ***Republic v The National Alliance Party of Kenya & Another*** **[2014] eKLR** and ***Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others*** **[2015] eKLR** to reinforce that pre-election disputes should be resolved through appropriate mechanisms before court intervention. They urged the court to uphold the principle of stare decisis and deny the appeal, while also requesting costs.

The interested parties did not file written submissions but supported the submissions made by the 1st to 3rd Respondents during oral arguments. Their counsel asserted that the role of the assembly was limited to receiving the names of nominated candidates and organising their swearing-in. They claimed that the assembly had no legal role in the pre-election nomination process and, therefore, could not be held responsible for any issues arising from it. Additionally, they noted that there was no court order preventing the swearing-in of the 3rd Respondent, who was duly sworn in. The interested parties also requested that the appeal be dismissed with costs.

Issues for determination

1. Whether this court has jurisdiction to make a determination on issues which were not addressed in the determination of the election court.
2. Whether the election court had/ or did not have jurisdiction to determine a prelection dispute especially one relating to the nomination of candidates by political parties to the county Assembly.
3. Who should bear costs of this suit.

Determination of the court

The court addressed several issues in this appeal. It first noted that a first appeal involves a complete rehearing of the case, both in terms of fact and law, unless otherwise restricted. The court is required to independently evaluate the facts and law, as well as provide reasoned judgments when overturning any findings

from the trial court. The court referred to ***Santosh Hazari v Purushottam Tiwari*** **(2001) 3 SCC 179** to support this position.

It was further established that a first appellate court is the final court for matters of fact, and parties are entitled to a thorough consideration of evidence and issues raised. The court has the authority to reconsider evidence and arrive at different conclusions, as outlined in ***Kurian Chacko v Varkey Joseph*** **AIR 1969 Kerala 316**. However, the court emphasised that its jurisdiction in this case was limited to matters of law and not facts.

The court examined whether it had jurisdiction over issues not addressed by the election court. Citing various provisions of the Elections Act and the Constitution, it concluded that the appeal to the High Court could only be based on matters of law, not fact, under Section 75(1A) and 75(4) of the Elections Act. The Appellant sought a reconsideration of the entire record of the appeal, but the third Respondent argued that the trial magistrate had only ruled on jurisdiction and, therefore, no other issues could be entertained on appeal. The court agreed, citing ***Basil Criticos v IEBC & 2 Others*** **[2015] eKLR** and ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited*** **[2019] eKLR** to affirm that the appellate court can only review matters determined by the lower court.

The court also evaluated the trial court's decision on jurisdiction regarding pre-election disputes. The trial court had ruled that it lacked jurisdiction to hear a dispute involving the nomination of a candidate to the County Assembly, as it was a pre-election matter that should have been resolved by the IEBC or PPDT. This position was affirmed by the appellate court, which held that pre-election disputes concerning party nominations fall under the jurisdiction of these bodies, not the courts.

The Appellant contended that the trial court had erred in dismissing the petition, citing ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohammed & 3 Others*** **[2019] eKLR**, arguing that in exceptional cases, election courts could consider pre-election disputes that go to the root of the election. However, the court upheld the trial magistrate's finding that the dispute was a pre-election matter and therefore beyond the trial court's jurisdiction.

The Appellant further argued that the nomination process was flawed, alleging alterations to the nomination list on the eve of the election, failure to follow procedures outlined in the Elections Act, and that the third Respondent was ineligible due to being registered in a different county. The Respondents countered that the

nomination process was transparent and that the Appellant had opportunities to challenge it through the party's dispute resolution mechanisms but failed to do so.

The court concluded that the trial magistrate had properly addressed the issue of jurisdiction and had correctly dismissed the petition. The petition was misconceived and thus was rightly dismissed.

In considering the general election principles, the Constitution of Kenya, particularly Article 10, provides the national values and principles of governance, which bind all state organs, state officers, public officers, and all persons whenever they apply or interpret the Constitution, enact or apply any law, or make or implement public policy decisions. Article 38 establishes the right to vote as a core aspect of the constitutional structure of elections, with Articles 81 and 86 amplifying the principles under Article 10 as general principles of the electoral system in Kenya. Article 81(1)(e) outlines that elections must be free and fair, transparent, and administered impartially, neutrally, efficiently, accurately, and accountably.

The court, therefore, had to determine whether the nomination of the 3rd Respondent to the County Assembly of Kajiado complied with these principles and whether it was conducted in a manner that was simple, accurate, verifiable, secure, accountable, and transparent. The Supreme Court in Presidential Petition No. 1 of 2017 observed that these terms reflect the constitutional principles under Articles 10, 38, 81, and 86. The Court emphasised that elections, including nominations, are not single events but processes, meaning that all stages must adhere to constitutional principles.

In ***Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others*** **[2013] eKLR**, Justice Emukule reiterated that the election process includes the registration of voters, nomination of candidates, voting, tallying of votes, and the declaration of results. The Learned Judge noted that all related provisions of the law must be read and applied harmoniously. Similarly, in ***Republic v Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & another***, Justice Odunga emphasised that general elections are processes, and failure to adhere to legal requirements at any stage may justify the nullification of the election.

The court in ***Kabatsi v Anifa Kawooya & Another*** **Election Petition No. 25 of 2005** also held that non-compliance with the law at any stage of the election process could affect the quality of the election results. The appellate court found that while the Appellant had a window to object to the 3rd Respondent's nomination

between 27 July 2022 and 6 August 2022, he failed to take advantage of this opportunity.

However, the Appellant raised issues of non-compliance with various constitutional provisions, including Articles 50(1), 81, 86, 90, 177, 171(1)(b)(c), (2), as well as the County Government Act, the Elections Act, and several regulations. The trial magistrate did not address these legal issues. The Supreme Court, in ***Mohammed Abdi Mohamud v Ahmed Abdullahi Mohamad & 4 others*** **[2019] eKLR**, laid down principles concerning pre-election disputes, stating that these should first be addressed by the IEBC or PPDT and that such disputes, if resolved, should not be grounds in an election petition.

In the present case, although the dispute involved pre-election issues, the Appellant was prevented from raising his concerns before the IEBC or PPDT due to time constraints. As a result, the court held that the legal issues raised by the Appellant should have been considered by the trial court.

The court recognised that the time limits for hearing and determining election petitions cannot be extended, as confirmed in ***Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others*** **[2019] eKLR**, ***Hassan Ali Joho & Another v Suleiman Said Shahbal & Another*** **[2013] eKLR**, and ***Evens Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*** **[2014] eKLR**. The appellate court, therefore, could not remit the matter back to the magistrate's court as the case was time-barred.

In the end, the court dismissed the appeal but ordered each party to bear their own costs, as neither could claim complete success. The decision to not award costs followed the reasoning in ***Paul Chen-Young v Ajax Investments Ltd & others Jamaica Supreme Court*** **Civil Appeal No. 39 of 2006**.

Hon Clare Moraa Obino v IEBC & 3 others Kisii Election Petition Appeal E002 of 2023

In the High Court of Kenya at Kisii

Coram: Kamau J

Judgment dismissing appeal

Date: 30 June 2023

Party list-eligibility for nomination under Article 177 of the Constitution

Summary of facts:

This case involves an appeal against a decision made by the Senior Principal Magistrate, Hon C. A. Ocharo, on 16 December 2022. The Learned Trial Magistrate had ruled in favour of the 3rd Respondent, declaring that the gazettement of the Appellant as a nominated member of the Kisii County Assembly was invalid. The trial court further directed the 2nd Respondent to submit a fresh list in compliance with an earlier order by the Political Parties Disputes Tribunal in Complaint No E035 of 2022, and the 1st Respondent was to publish the revised list accordingly.

The Appellant, dissatisfied with the decision, filed an appeal on 12 January 2023, raising sixteen grounds of appeal. The appeal was argued through written submissions.

Issues for determination

1. Whether or not the Appellant was a member of the 2nd Respondent.
2. Whether or not the nomination of the Appellant was lawful.
3. Who is to bear the cost of this Appeal.

Determination of the court

The court's jurisdiction to hear the appeal is derived from Section 75 of the Elections Act, 2011, which allows for appeals on matters of law only. The court relied on the decision in ***Zacharia Obado v Edward Akongo Oyugi & 2 Others*** **[2014] eKLR**, which allows for an appeal on a mixed point of law and fact if the trial court's findings were unsupported by evidence or were unreasonable.

Regarding the issue of the Appellant's membership in the 2nd Respondent, the court examined the evidence provided, including the Appellant's claim that she had resigned from the Orange Democratic Movement (ODM) and joined the 2nd Respondent in accordance with Section 14 of the Political Parties Act, 2011, and Article 38 of the Constitution of Kenya, 2010. The Appellant argued that her membership number with the 2nd Respondent was prima facie evidence of her membership. However, the 3rd Respondent disputed this, asserting that the Appellant was still a member of ODM during the relevant period.

The trial court had found that while the Appellant resigned from ODM, she had not completed the formal process of joining the 2nd Respondent as required by Section 14 of the Political Parties Act, 2011. The 2nd Respondent's lack of participation in the trial meant that it did not provide any evidence to confirm or refute the Appellant's membership claims.

The court noted that the burden of proof in election petitions lies with the Petitioner, as established in ***Raila Odinga & 5 Others v IEBC & 3 Others*** **[2013] eKLR**. The 3rd Respondent bore this burden and provided evidence to suggest that the Appellant had not fully formalised her membership with the 2nd Respondent. This evidence was not effectively countered by the Appellant, leading the court to conclude that the Appellant was not a member of the 2nd Respondent and, therefore, her nomination was unlawful.

The Appellant contended that following the orders issued by the Political Parties Disputes Tribunal (PPDT) on 8 August 2022, the 2nd Respondent forwarded a list to the 1st Respondent which included the name of the 3rd Respondent in the position of number 3, as directed by the PPDT. Invoking Section 34 of the Election Act 2011, the Appellant argued that the 1st Respondent was obligated to accept the list from the 2nd Respondent without any changes, as it adhered to the PPDT's directives. The Appellant emphasized that this should have been implemented according to the legal order of priority since the 2nd Respondent had been allocated two seats. The Appellant further pointed out that the 1st Respondent had gazetted her nomination to the Kisii County Assembly in Gazette Notice dated 9 September 2022, Volume CXXIV No 186, which aligned with the names and order submitted by the 2nd Respondent. The Appellant asserted that claims about the list being amended were misleading, and the Trial Court had erred by not recognising this compliance evidence. She claimed that the PPDT's orders did not mandate the removal of her name from the list and that the 2nd Respondent had indeed reconstituted its gender top-up list as required.

The Appellant cited ***Aden Noor Ali v IEBC & 2 Others*** **[2018] eKLR** to argue that the PPDT's order did not specify that the reconstituted list should exclude the 3rd Respondent. She maintained that the 2nd Respondent had reconstituted and amended the list according to the PPDT's verdict.

The Appellant also requested the court to consider the evidence from the 3rd Respondent as equivalent to hers and argued there was no basis for admitting the 3rd Respondent's evidence over hers. She referred to ***Aden Noor Ali v IEBC & 2 Others*** (Supra) where similar evidence was accepted to establish compliance with PPDT orders.

Additionally, the Appellant invoked Regulations 21(1) and (2) of the Election Act, arguing that the list forwarded by the 2nd Respondent through the letter dated 8 September 2022 was compliant with the law and procedure. She noted that only a political party could forward the list, and the 1st Respondent's role was limited to ensuring compliance with legal requirements, citing ***Lydia Mathia v Nasula Lesuuda & Another*** **[2013] eKLR**, which held that the authority to determine who gets reserved seats resided with the parties, not other authorities.

The Appellant further contended that the Trial Court misdirected itself and failed to consider her evidence. She urged the court to overturn the Trial Court's judgment and decree dated 16 December 2022, and affirm her nomination as a member of the Kisii County Assembly.

The 1st Respondent argued that the Trial Court erred by finding it had a statutory duty to ensure compliance with orders it was not a party to. The 1st Respondent maintained that it adhered to its constitutional and statutory obligations, including issuing Gazette Notice dated 9 September 2022, Volume CXXIV No 186. Invoking Article 90(2) of the Constitution and Sections 34 and 35 of the Elections Act No 24 of 2011, the 1st Respondent asserted that it did not play an active role in the nomination process, which was the responsibility of the political parties.

The 1st Respondent cited ***Peninah Nandako Kiliswa v IEBC & 2 Others*** **[2014] eKLR** to emphasize that the responsibility for determining party list members and order of priority lay with the parties, not the 1st Respondent. It argued that the Trial Court's finding that it should follow up on PPDT orders was incorrect as it was not a party to those orders.

The 1st Respondent contended that it reviewed and gazetted the 2nd Respondent's list as presented, as long as it was duly certified by the Registrar. It asserted that

any issues regarding party membership validity should be addressed by the Registrar of Political Parties or PPDT, not the 1st Respondent.

On the other hand, the 3rd Respondent argued that the 1st Respondent failed to comply with PPDT's orders, which she claimed were served on 7 September 2022. She contended that the 1st Respondent's actions were invalid under Article 2(4) of the Constitution. She pointed out that the 2nd Respondent did not defend the Petition in the Trial Court and challenged the Appellant's claim that PPDT's orders were complied with. She argued that the 3rd Respondent was unfairly removed from number 3 to number 27 on the list, and the Appellant's nomination was invalid.

The 3rd Respondent cited ***Alice Wahito Mwangi Ndegwa & Others v IEBC & Another*** **[2013] eKLR** and maintained that the 2nd Respondent failed to reconstitute the list and submit it within the 48-hour deadline set by the PPDT, making its actions a nullity. She asserted that her rights under Articles 10, 38, 47 of the Constitution were violated, and the nomination process was flawed with irregularities.

The court noted that Article 177 of the Constitution provides for the nomination of County Assembly members to ensure no more than two-thirds of the membership are of the same gender, and includes provisions for marginalized groups. Article 90 details the party list system and IEBC's role in ensuring compliance with constitutional and statutory requirements, including Sections 34, 35, and 36 of the Elections Act 2011.

The PPDT had previously ordered the 2nd Respondent to submit a revised list including the 3rd Respondent in the position of number 3. However, evidence showed that the 3rd Respondent's name was moved to number 27 on the gazetted list, which did not align with the PPDT's directive. The court found that the 2nd Respondent did not participate in the trial to explain this change.

Given that the Appellant did not prove her membership with the 2nd Respondent and the PPDT's decision had not been overturned, the court concluded that the Trial Court's declaration of the Appellant's nomination as invalid was correct. The court cited ***The National Gender and Equality Commission v The Independent Electoral and Boundaries Commission & Another*** **[2013] eKLR**, which upheld that while IEBC's role was to ensure lists met constitutional and statutory standards, it did not dictate how lists should be prepared. Ultimately, the court found the Appellant's appeal lacked merit and dismissed it, awarding the 3rd Respondent costs of the appeal.

Clara Moraa Obino v IEBC & 2 Others Kisumu Election Petition Appeal No E015 of 2023

In the Court of Appeal at Kisumu

Coram: Okwengu, Omondi & Joel Ngugi JJA

Ruling striking out appeal

Date: 24 October 2023

Jurisdiction over second tier appeals-whether the jurisdictional door has been left 'slightly ajar' by the Political Parties Act-party list petitions

Summary of facts

In the case before the Court, the Notice of Appeal, dated 30 June 2023, was filed under Rule 6 of the Court of Appeal (Election Petitions) Rules, 2017. It sought to challenge the judgment of the High Court in **Election Petition No E002 of 2023**, delivered by Justice J. Kamau on 30 June 2023. The Appellant contended that the High Court erred in two principal respects.

Firstly, the Appellant argued that the High Court incorrectly concluded that she was not a member of the 2nd Respondent, as required by section 3(2A) of the Political Parties Act, No. 12 of 2011. The Appellant claimed that her membership was in compliance with Articles 4(9) and 4(10)(e) of the Constitution. Secondly, the Appellant contended that the High Court erred by finding that the nomination of the Appellant did not comply with Article 90 of the Constitution and Sections 34 and 35 of the Elections Act, No. 24 of 2011, whereas she believed that the nomination was indeed compliant.

The Appellant sought the following orders: the setting aside of the judgment delivered on 30 June 2023 by Justice J. Kamau; the allowance of the appeal; the upholding of the Appellant's election by nomination and gazettement as a member of the County Assembly of Kisii, as compliant with all applicable laws; and that the costs of the appeal be borne by the Respondents.

The High Court had dismissed an appeal against the decision of Honourable C.A. Ocharo, Senior Principal Magistrate, dated 16 December 2022 in Election Petition No E005 of 2022. In the Magistrate's Court, the 3rd Respondent, Redempta Vera Onkundi, was the Petitioner, while the Appellant, Clare Moraa Obino, was the 3rd

Respondent. The Independent Electoral and Boundaries Commission (IEBC) was the 1st Respondent, and the Jubilee Party of Kenya was the 2nd Respondent.

The dispute arose from the 3rd Respondent's challenge to the gazettement of the Appellant by the IEBC as a nominated candidate under the gender top-up list for the 2nd Respondent. The 3rd Respondent claimed that she was a life member of the 2nd Respondent and had participated in a public exercise to determine the party list for nomination. She alleged that she had been initially listed at position 3 but found herself demoted to position 27 after the Appellant's name was substituted, which led to her missing out on nomination due to insufficient slots.

In the Magistrate's Court, the 3rd Respondent argued that the Appellant's nomination was irregular because the Appellant was not a member of the 2nd Respondent. The court found that the Appellant had resigned from the Orange Democratic Movement (ODM) Party but had not met the requirements for joining the 2nd Respondent. Consequently, the court declared the gazettement of the Appellant as invalid and ordered the preparation of a fresh list in accordance with a previous order of the Political Parties Dispute Tribunal (PPDT).

Dissatisfied with the High Court's dismissal of her appeal, the Appellant filed the current appeal. The core issue at the Court of Appeal was whether it had jurisdiction to hear and determine the appeal from the High Court, given the specific nature of the election petition.

The 1st and 3rd Respondents raised jurisdictional concerns, arguing that under Sections 75(4) and 85A of the Elections Act, appeals concerning County Assembly elections should terminate at the High Court. They cited ***Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission*** **[2019] eKLR** and other cases to support their position that no second appeal lies in the Court of Appeal in such matters.

The Appellant countered that despite the established position, the Supreme Court decision in ***Hamdia Yaroi Shek Nuri Case*** **[2019] eKLR** and similar decisions did not close the door entirely for appeals to the Court of Appeal. She argued that Section 41(2) of the Political Parties Act No. 11 of 2011 provides for appeals to the Court of Appeal on points of law and referred to ***Kennedy Moki v Rachel Kaki Nyamai & 2 Others*** **[2018] eKLR** and ***Fredrick Otieno Outa v Jared Odoyo Okello & 4 Others*** **[2014] eKLR**. The Appellant posited that the dispute at hand involved questions of law regarding the validity of the nomination process, which should be within the jurisdiction of the Court of Appeal.

However, the Court found that the appeal did not present a valid claim for jurisdiction. The issues raised by the Appellant were not new and had been definitively addressed by previous decisions, including ***Kipkalya Kiprono Kones v The Republic & Another ex parte Kimani Wanyoike & 4 Others*** **[2006] eKLR**, ***Mwihia & Another v Ayah & Another*** **[2008] 1 KLR (EP) 450**, and ***Wamboko v Kibunguchi & Another*** **[2008] 2 KLR 477**. These cases had consistently upheld the view that the Court of Appeal lacks jurisdiction to entertain second appeals from High Court decisions on County Assembly elections.

In line with the Supreme Court's decision in ***Hamdia Yaroi Shek Nuri Case*** **[2019] eKLR**, which held that sections 75(4) and 85A of the Elections Act limit appeals on County Assembly elections to the High Court, the Court of Appeal ruled that it had no jurisdiction to hear the appeal. Consequently, the appeal was struck out, and the Appellant was ordered to pay the costs to the 1st and 3rd Respondents. No costs were awarded to the 2nd Respondent, as it had not actively participated in the appeal.

Losikany James v Independent Electoral and Boundaries Commission Nairobi High Court Constitutional Petition E313 of 2022

In the High Court of Kenya at Nairobi

Coram: AC Mrima J

Ruling allowing preliminary objection

Date: 19 July 2022

Nomination on the party list-jurisdiction of the IEBC DRC & PPDT to interpret the Constitution

Summary of facts:

The petitioner, a youth, sought nomination to the County Assembly of Narok to represent the youth as a special interest group, as provided under Article 177(1)(c) of the Constitution. The challenge was directed at the Respondent's policy, which excluded any youth who would be older than 34 years by the time the next Parliament convened from such nominations. The Respondent raised a Preliminary Objection, arguing that the High Court lacked jurisdiction to hear the case based on constitutional and statutory grounds.

Issues for determination

1. Whether the Preliminary Objection was sustainable in law.

2. Whether the Court had jurisdiction over the dispute.

Determination of the court

The Court held that the dispute involved the interpretation of constitutional provisions, a responsibility exclusively assigned to the High Court under Article 165(3)(d) of the Constitution. The matter was significant as it related to the political rights of Kenyan youths who would exceed the age limit during the next Parliament term. The Court emphasized that this was a relevant issue requiring constitutional interpretation. The Court concluded that the Political Parties Dispute Tribunal (PPDT) and the Dispute Resolution Committee (DRC) did not possess the authority to interpret the Constitution but could only apply it as quasi-judicial bodies. The Preliminary Objection was dismissed with costs awarded to the petitioner.

Richard Masese Makori v IEBC & 3 Others Kisii Election Petition Appeal No. E006 of 2023

In the High Court of Kenya at Kisii

Coram: LN Mutende J

Judgment dismissing appeal

Date: 4 August 2023

Summary of the Facts

The election petition appeal arose from the judgment of the Lower court. The Appellant (Richard Masese Makori) challenged the nomination of the 2nd and 3rd Respondents to the Kisii County Assembly under the special interest gender top-up category representing the 4th Respondent (Kenya Social Congress). He argued that IEBC erred in nominating the 2nd Respondent who comes from Mandera County and is a registered voter at Dololo Primary School while the 3rd Respondent comes from Nyamira County and is a registered voter at Manga ward. The Trial Court held that the 2nd and 3rd Respondents were properly nominated because they were qualified as per the party list of 4th Respondents that was submitted to IEBC. The Appellant appealed against the decision of the Trial Court at the High Court. He argued that the Trial Court erred in law in failing to appreciate the provisions of Article 90 of the Constitution in the allocation of party lists for county seats which do not require regional and ethnic diversity. The Respondents argued that Article 177(1)(b) and (c) of the Constitution and Section 36(7)(8) of the Elections Act envisage nomination of a gender top-up category that represents the number of special seat members necessary to ensure that there are no more than the two-thirds of the membership of the county assembly who are of the same gender. They also stated that Article 193 of the Constitution and Section 36 of the Elections Act do not require that nominated members to a county assembly come from a specific county.

Issues for Determination

The Court determined the following issues:

1. Who qualifies to be nominated for the gender top-up list?
2. Who is a registered voter and/or was there a multiple registration in respect of the 2nd and 3rd Respondents?

3. Was the appellant obligated to file the complaint with the Political Parties Dispute Tribunal?

Decision of the Court

The Court held that the 2nd and 3rd Respondents were properly nominated to the County Assembly of Kisii in line with articles 193 and 177 of the Constitution and section 36 of the Elections Act. They were Kenyan citizens, registered voters in Kenya, and members of the 4th Respondent. Article 90 (1) of the Constitution requires every political party to have a national character. Nominating only residents and locals to the County Assembly may be discriminatory. It stated that a voter to be nominated to a county assembly does not have to come from a specific county.

The Court also stated that the issue of double registration was not captured in the pleadings and evidence produced at the Trial Court. It only came up at the appellate stage. It was not a matter of law to be considered by an appellate court. Section 75(4) of the Election Act provides that the appeal from the Trial Court shall lie to the High Court on matters of law only.

The Court also stated that the Appellant was not obliged to file the complaint with PPDT because he moved to court after the gazettement of the nominated members of the County Assembly under the special category. IEBC used its discretion to identify female nominees to achieve the two-third gender rule in the county assembly.

In the end, the Court dismissed the appeal for lack of merit with costs to Respondents.

Michael v Orange Democratic Movement Party & 3 Others Nairobi Election Petition Appeal E001 of 2023

Court of Appeal at Nairobi

Coram: A Ali-Aroni, JM Mativo & PM Gachoka, JJA

Date: 12 May 2023

Ruling striking out appeal

Party list petitions-res judicata-enlargement of time for filing Notice and Record of Appeal

Summary of facts

The Appellant, a member of the Orange Democratic Movement Party (ODM), was initially included in the party list submitted to the Independent Electoral and Boundaries Commission (IEBC) for nomination to the Senate for special interests before the 2022 general elections. However, the IEBC returned the list to ODM for constitutional non-compliance, and the Appellant's name was omitted from the revised list. The Appellant filed a Complaint No. E130 of 2022 with the Political Parties Disputes Tribunal (PPDT), which was dismissed for not exhausting the party's internal dispute resolution mechanisms (IDRM).

The Appellant then filed an election petition, Nairobi High Court Election Petition No. E002 of 2022, seeking various declarations and orders regarding the omission. However, the High Court dismissed the petition, upholding a preliminary objection by the 3rd Respondent that the matter was res judicata and within the jurisdiction of the PPDT, and the Appellant should have appealed the PPDT decision. The Appellant was also ordered to pay costs of Kshs. 100,000 to the 3rd Respondent. The application supporting the appeal was based on several points. The Appellant's counsel had formally applied for typed proceedings, an order, and a certified copy of the ruling, and had paid for them. Uncertified copies were provided on 22 December 2022. The Appellant's counsel uploaded a Notice of Appeal into the e-filing system of the High Court of Kenya on 26 December 2022. This notice had lacked the Deputy Registrar's signature, necessitating a fresh filing on 29 December 2022, which was lodged at the Court of Appeal registry on 31 December 2022, with advice to forward it via email. The Appellant argued that the delay had been neither deliberate nor due to ignorance.

The court, aware of the strict timelines for election petition appeals as prescribed in Rule 23 of the Election Petition Rules, decided to hear the application alongside the main appeal, with written submissions highlighted on 14 March 2023. The application was opposed by the 3rd and 4th Respondents, who filed affidavits and a preliminary objection. The 1st and 2nd Respondents did not respond but relied on the 4th Respondent's submissions. The Appellant's counsel, Mr. Manyara, argued that the delay had been minor, attributed to the High Court registry staff, and justified by efforts to obtain the necessary documents, eventually secured on 26 January 2023. He stated that the Respondents had been served with the Notice of Appeal on 28 January 2023, with objections due by 4 February 2023, in accordance with Rule 19(2) of the Election Petition Rules. He requested that the security for costs deposited in the High Court be used for the appeal, citing the Appellant's financial and personal circumstances.

Opposing counsel, Mr. Asige, argued that required documents could have been filed even before receiving certified versions and noted the Appellant's failure to serve documents on Respondents or provide certified records, as mandated by Rule 8(5) of the Election Petition Rules. He contended that no sufficient reasons had been shown to extend time limits and that any extension would have prejudiced the 3rd Respondent. He also highlighted that Rule 27(1) and (2) required a separate security deposit for this appeal and that the High Court's award of Kshs.100,000 to the 3rd Respondent remained undistributed.

Ms. Chamia, counsel for the 4th Respondent, reiterated objections regarding the court's jurisdiction due to untimely filing and failure to deposit security for costs. She asserted that the appeal was defective, lacked merit, and did not present reasonable legal grounds.

Issues for determination

1. Whether the court had jurisdiction.
2. Whether the court could grant Appellant's plea for enlargement of time to file her Notice of Appeal and Record of Appeal and that the filed documents be deemed as properly filed.

Determination of the court

The Court first addressed the jurisdictional objection raised by the 4th Respondent, who contended that the Notice of Appeal and the Record of Appeal had been filed out of time. In response, the Appellant argued that this preliminary

objection was belated and contravened Rule 19(2) of the Court of Appeal (Election Petition) Rules, 2017. This rule stipulates that a person affected by an election petition appeal must apply to the Court to strike out the notice or record of appeal within seven days from the date of service if no appeal lies or if essential steps were not taken within the prescribed time. If no such application is made within this period, the issue cannot be raised later.

The Court elaborated on the concept of jurisdiction, emphasising that it refers to a court's authority or power to adjudicate a dispute. For a court to have jurisdiction, it must be properly constituted regarding the bench's composition, the subject matter must be within its jurisdiction, and the case must come before the court initiated by due process and after fulfilling any conditions precedent. If jurisdiction is lacking, proceedings become null and void. This principle was reinforced by the Court's decision in ***National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others*** **[2022] eKLR**. The Court further referenced ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others*** **[2013] eKLR**, which underscored the fundamental nature of jurisdiction as a threshold issue that must be addressed before considering the merits of a case.

The Court also highlighted that a Notice of Appeal is a critical document for initiating an appeal. If it is defective or incompetent, the Court has the authority to strike it out, as established in ***Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 Others*** **[2014] eKLR**. In ***Silverbrand v County of Los Angeles*** **[2009] 46 Cal. 4th 106 (Cal. Sup. Ct.)**, the California Supreme Court similarly held that a timely Notice of Appeal is a jurisdictional prerequisite. The Court of Appeal in ***Boy Juma Boy & 2 Others v Mwamlole Tchappu Mbwana & Another*** **[2014] eKLR** affirmed that the jurisdiction of the Court of Appeal is contingent upon the filing of a proper Notice of Appeal.

Regarding the 4th Respondent's objection, the Court noted that it was filed 26 days after service of the Notice of Appeal and Record of Appeal, well beyond the 7-day period prescribed by Rule 19(1) of the Election Petition Rules. Thus, the preliminary objection was deemed incompetent and was dismissed, as supported by ***William Mwangi Nguruki v Barclays Bank of Kenya Ltd*** **[2014] eKLR**.

Next, the Court considered the Appellant's request for an extension of time to file her Notice of Appeal and Record of Appeal, seeking to have the documents deemed properly filed. Rule 6 of the Election Petition Rules provides that a Notice of Appeal must be filed within seven days of the decision being appealed. The Court reviewed previous cases, including ***Andrew Tobaso Anyanga v Mwale***

Nicholas Scott Tindi & 3 Others **[2017] eKLR** and ***Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission and Paul Musyimi Nzengu*** **[2018] eKLR**, which had allowed applications for extension of time.

The Court also considered ***Charles Kamuren v Grace Jelegat Kipchoim & 2 Others*** **[2015] eKLR**, which underscored the importance of strict adherence to timelines in electoral disputes. However, it acknowledged that the 2017 Rules confer discretion to determine the effect of non-compliance, provided that justice is not unduly impeded by procedural technicalities.

The Supreme Court in ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*** **[2014] eKLR** affirmed that non-compliance with service rules does not necessarily warrant striking out an appeal, especially where there is no demonstrated prejudice to the other party. Similarly, in ***John Munuve Mati v Returning Officer of Mwingi North Constituency & Others*** **Nairobi Election Petition Appeal No. 5 of 2018**, the Court exercised discretion to admit a Notice of Appeal which was filed late.

Despite these considerations, the Court found that the delay in filing the Record of Appeal was not sufficiently explained. The Appellant's delay was attributed to the delay in obtaining certified copies of the proceedings, although Rule 8(5) allows the use of uncertified documents to file a Record of Appeal within 30 days. The Court noted that the Appellant failed to make use of this provision and therefore found the delay unjustified.

The Court further referenced ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*** **[2014] eKLR**, which underscored that strict adherence to statutory timelines is mandatory. The Court also considered the principles outlined in ***Wavinya Ndeti v IEBC & 4 Others*** **[2015] eKLR**, emphasising that statutory timelines for filing appeals are mandatory and cannot be extended.

In conclusion, the Court ruled that the delay in filing the Record of Appeal was not excusable and struck out the appeal. As a result, the appeal was dismissed with costs awarded to the 3rd and 4th Respondents, capped at Kshs.200,000 each.

Josephine Wairimu Kinyanjui & 4 Others v Mary Charles Kalunga & 6 Others Mombasa Election Petition Appeal No E002 of 2023

In the Court of Appeal at Mombasa

Coram: 22 March 2024

Judgment striking out appeal

Date: 22 March 2024

Second tier appeals-jurisdiction of the Court of Appeal in relation to second tier party list appeals

Summary of facts

The appeal arose from a High Court judgment dated 14 September 2023, where the appellants sought to challenge a decision allowing the 1st Respondent, Mary Charles Kalunga's appeal, which had been previously decided by the trial Magistrates' Court. During the proceedings, the 1st Respondent filed a motion seeking to strike out the appellants' appeal on the grounds that the Court of Appeal lacked jurisdiction over matters concerning the election of Members of the County Assembly. The court noted that resolving this jurisdictional issue was paramount before addressing the substance of the appeal.

The case originated from an election petition filed by the 1st appellant in the Chief Magistrates' Court at Kwale, seeking a declaration that the nomination of County Assembly representatives for persons with disabilities was unconstitutional. The Respondents, including the Independent Electoral and Boundaries Commission (IEBC), opposed the petition. The trial court dismissed the petition, ruling that the election of the appellants was in compliance with constitutional and electoral laws. The 1st Respondent appealed to the High Court, arguing that the nominations did not meet constitutional requirements, including the failure to nominate persons with disabilities and the lack of local representation among some nominees. The High Court agreed with the 1st Respondent, declaring the failure to nominate persons with disabilities unconstitutional, invalidating the nominations of certain members, and ordering the IEBC to fill the vacancies.

The appellants were dissatisfied with the High Court's ruling and filed an appeal, arguing that the judge exceeded his jurisdiction by invalidating the nominations based on the lack of residency or voter registration in Kwale County.

They also claimed that the court misapplied the law, particularly by relying on a section of the Elections Act that had already been declared unconstitutional. Additionally, they contended that the Political Parties Dispute Tribunal, not the High Court, had jurisdiction to address issues regarding political party nominations.

During the appeal proceedings, the 1st Respondent argued that the Court of Appeal did not have jurisdiction to hear the matter, as the High Court's decision was final in County Assembly election disputes. The appellants, however, maintained that Article 164(3) of the Constitution granted the Court of Appeal the authority to hear their appeal. They relied on case law, including ***Judicial Service Commission & Secretary Judicial Service Commissions v Kalpana H. Rawal*** **[2015] eKLR** and ***Equity Bank Limited v West Link Mbo Limited*** **[2013] eKLR**, to argue that the interpretation of the relevant sections of the Elections Act had been misconstrued.

The outcome of the appeal depended on the court's determination of the jurisdictional issue, which was yet to be resolved.

The court considered the grounds of appeal, the Notice of Motion, and the rival submissions. A key issue raised was whether the court had jurisdiction to hear the appeal. It was emphasised that jurisdictional matters must be resolved promptly, and where a court lacks jurisdiction, it must not proceed. This principle was supported by the cases of ***The Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited*** **[1989] KLR 1** and ***The Owners & Masters of the Motor Vessel "Joey" v Owners & Masters of the Motor Tugs "Barbra" and "Steve B"*** **[2008] 1 EA 367**. In ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others*** **[2013] eKLR**, the court reiterated that jurisdiction is a fundamental issue that should be addressed immediately.

The court acknowledged that under Article 164(3)(a) of the Constitution and section 3 of the Appellate Jurisdiction Act, appeals from the High Court lie with the Court of Appeal. However, the case of ***Twaher Abdulkarim Mohammed v Mwathethe Adamson Kadenge & 2 others*** **[2015] eKLR** clarified that not all High Court appeals automatically go to the Court of Appeal. In election disputes, section 85A of the Elections Act limits appeals concerning National Assembly, Senate, or gubernatorial elections to matters of law only. The court noted that section 75(1A) of the Elections Act confers jurisdiction over county assembly election petitions to the Magistrate's Court, with an appeal on matters of law lying to the High Court.

The appellants argued that Article 163(4)(c) allows the Court of Appeal to hear second appeals from the High Court. However, the court referenced previous decisions where it had declined jurisdiction in such cases, including ***Hassan Jimal Abdi v Ibrahim Nor Hussein & 2 Others*** **[2018] eKLR** and ***Hamdia Yaroi Sheikh Nuri v Faith Tumaini Kombe & 2 others*** **[2018] eKLR**, which held that there was no provision for a second appeal to the Court of Appeal concerning county assembly elections. The court also cited the decision in ***United Democratic Movement & another v IEBC & 2 others*** **Election Petition Appeal E017 of 2023 [2023] KECA 1338 (KLR)**, which affirmed that the Court of Appeal lacked jurisdiction in these cases.

The Supreme Court also affirmed this position in ***Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & IEBC [2019] eKLR***, holding that without express statutory provision, no second appeal lies to the Court of Appeal in county assembly election petitions. Despite the appellants' attempts to persuade the court to depart from these rulings, the court reaffirmed the doctrine of stare decisis as articulated in ***Mohamed Abushiri Mukullu v Minister for Lands and Settlement & 6 others*** **[2015] eKLR** and ***Ferdinand Ndung'u Waititu v IEBC & 8 others*** **[2014] eKLR**, which requires courts to follow established precedents unless clearly wrong.

The court further cited ***Jasbir Singh Rai & 3 Others v Tarlochan Singh & 4 Others*** **[2013] eKLR**, which emphasised that precedents promote fairness and predictability. Given the binding nature of Supreme Court decisions under Article 163(7) of the Constitution, the court found no reason to deviate from its previous rulings. Consequently, it concluded that it lacked jurisdiction to hear the appeal.

Josephine Wairimu Kinyanjui & 4 others v Mary Kalinga & 6 others Supreme Court Petition (Application) No. E014 of 2024

In the Supreme Court of Kenya

Coram: Coram: MK Koome, CJ & P, PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu, I Lenaola & W Ouko, SCJJ

Ruling striking out appeal

Date: 28 June 2024

Nomination of party list members-jurisdiction in relation to second tier party list appeals

Summary of the facts

In this ruling, the court considered a Notice of Motion dated 28 March 2024 and filed on 2 April 2024. The application, made under Sections 23A and 24 of the Supreme Court Act and Rule 31 of the Supreme Court Rules, 2020, sought conservatory orders to stay the execution of a Court of Appeal judgment delivered on 22 March 2024 in ***Josephine Wairimu Kinyanjui & 4 others vs. Mary Charles Kalinga & Others*** **Election Petition Appeal No. E002 of 2023 (Mombasa)**, pending the hearing and determination of the intended appeal.

The applicants, through an affidavit by Rachael Katumbi Mutisya, contended that the Court of Appeal's decision striking out the appeal for lack of jurisdiction violated Article 164(3)(a) of the Constitution. They argued that the appeal was arguable, raised constitutional issues, and met the test for conservatory orders as established in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*** **Application No. 5 of 2014 [2014] eKLR**. The applicants raised concerns about constitutional rights under Articles 38(3) and 193(1) of the Constitution and Section 25 of the Elections Act. They also cited ***George Mike Wanjohi vs. Stephen Kariuki & 2 others*** **SC Application No. 6 of 2014; [2014] eKLR,** urging that public interest warranted the court's intervention.

The 1st Respondent opposed the application, arguing that the matter had been settled by the Supreme Court in ***Hamdia Yaroi Tumaini Kombe & 2 others vs. Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission*** **SC Petition No. 38 of 2018; [2019] eKLR**, which concluded that no second appeals lie to the Court of Appeal concerning the election of County Assembly members. The 1st Respondent contended that the Court of

Appeal's decision to strike out the appeal for want of jurisdiction was final, and no new legal circumstances existed to warrant revisiting the issue.

Upon reviewing submissions, the court considered the principles for granting conservatory orders outlined in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others*** [supra] and ***Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell*** **Petition Nos 6 & 7 of 2013; [2013] eKLR**. The court found that the appeal related to the nomination of County Assembly members and determined that ***Hamdia Yaroi Tumaini Kombe*** [supra] applied to disputes involving both elected and nominated County Assembly members. As such, the Supreme Court and Court of Appeal lacked jurisdiction in the matter.

Additionally, the Court of Appeal's decision to strike out the appeal on jurisdictional grounds did not issue a positive order capable of execution, rendering the application for conservatory orders unsustainable. The court cited ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai Estate of & 4 Others*** **SC Petition No. 4 of 2012; [2013] eKLR**, noting that costs follow the event but exercised discretion to make no order as to costs.

The court struck out Petition of Appeal No. E014 of 2024 and the related Notice of Motion, ordered the refund of Kshs. 6,000/= deposited as security, and made no order as to costs.

VII. ANALYSIS

Presidential election petitions

i Standard of proof

In ***Raila Amolo Odinga & another v IEBC & 2 others*** **[2017] eKLR (Raila 1, 2017)**, the Supreme Court declined to accept the Petitioners' request to overturn its decision in the ***2013 Raila Odinga case,*** which established that the applicable standard of proof is above a balance of probabilities. The Court was similarly unconvinced by the Attorney-General's argument that the standard should fluctuate between balance of probabilities and beyond reasonable doubt depending on the nature of the alleged irregularity or non-compliance with electoral laws. After reviewing decisions from various jurisdictions, the Court identified three categories of standard of proof: a criminal standard of proof beyond reasonable doubt, used when criminal or quasi-criminal acts are alleged in a petition; a civil standard of balance of probabilities, applied in jurisdictions such as England regardless of the nature of the allegations; and an intermediate standard, higher than the balance of probabilities but not as high as beyond reasonable doubt, as applied in the 2013 Raila Odinga case.

Although the Court acknowledged that it had the authority to overrule its previous decision in the 2013 case, it was convinced that, due to the significant public interest involved in election petitions, the standard of proof should remain higher than the balance of probabilities but lower than beyond reasonable doubt. In cases where criminal or quasi-criminal allegations are made, the Court maintained that these must be proven beyond reasonable doubt

In ***Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*** **Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated),** one of the issues that the amicus curiae admitted to the Supreme Court asked the Supreme Court to determine was whether amendments to the Elections Act introduced in 2016 altered the standard of proof where election offences are alleged in an election petition. How did the removal of jurisdiction to determine whether an election offence had been committed (to making an assessment that an election offence may have occurred) alter the level of proof required for such a finding to be made?

A fuller discussion on this is undertaken below in the section on jurisdiction of an election court in respect of election offences.

ii Threshold of validity

One of the issues raised in ***Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*** **Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)** was whether the President-elect had met the threshold under Article 138 (4) of the Constitution. The LSK as amicus and the 4th Petitioner urged the court to revisit its finding in 2013, which was upheld in 2017, that the term 'all the votes' cast as used in Article 138 (4) of the Constitution meant 'valid votes cast'.

The Supreme Court, referring to its 2013 jurisprudence, asserted that rejected ballot papers do not constitute a valid vote cast as to be included in calculating the final tally in favour of a Presidential candidate.

The 2013 jurisprudence may be considered problematic for several reasons. First, the 2013 jurisprudence conflated 'spoilt' votes and 'rejected' ones. In para 277 where the court adopted the jurisprudence of the Seychellois Court of Appeal in ***Popular Democratic Movement v Electoral Commission*** **(2011) SLR 354**, the court stated:

> *277 The comparative experience shows that different countries refer to votes cast by different terms, and assign differing consequences to the contrasting categories of votes. In countries such as Ghana, Cyprus and Portugal, the winner in an election is determined only by the valid votes cast. Under the Constitution of Seychelles, the broad term "votes cast", just as in Kenya, has been adopted; and it became necessary for the Constitutional Court, in Popular Democratic Movement v Electoral Commission (supra) to hold upon a literal interpretation, that "votes cast" included both spoilt votes and valid votes. Objections were raised, and this matter came before the Court of Appeal, which overturned the decision, and held that the term "votes cast" must be construed to mean only valid votes cast. The Court of Appeal remarked that, to count spoilt votes and ascribe to them the quality of valid votes, is improper as it entails converting the "latent vote" of the elector into a "patent vote" – and such an approach would render meaningless the distinction between spoilt votes and valid votes.*

Secondly, the standard as established in 2013 was founded on the jurisprudence of the Seychellois Court of Appeal, the only country that has interpreted the Constitutional threshold 'votes cast' to mean 'valid votes cast'. It is not clear why the Supreme Court ignored the trend in all the countries cited, which is to give effect to the words as they are contained in the Constitution (Ghana, Cyprus and

Portugal, which were cited with approval, all used the term 'valid votes cast' in determining the threshold).

Thirdly, the term 'votes cast' is used in both Article 138 and Article 86 of the Constitution. The latter provision requires counting, tabulation and announcement of the votes cast in an election. Was it the intention of the drafters of the Constitution that the term as used in the drafters of the Constitution in Article 86 and 138 have two meanings? LSK as amicus urged the court to revisit the jurisprudence and give judicial interpretation of the term, but the court opted to retain its 2013 position.

Fourthly, in 2017, the court asserted that:

> *[w]e can find nothing in the Constitutional Review Commission's Report or in the Parliamentary Hansard Report giving the basis for the change from —valid votes cast in Section 5(3)(f) of the old Constitution to —votes cast in Article 138(4) of the current Constitution.*

It is curious that the Supreme Court did not refer to its 2017 jurisprudence in re-asserting that rejected votes are not included. This is especially because the LSK amicus brief proffered a detailed analysis of the evolution of the threshold from the CKRC draft all the way to the Revised Harmonised Draft of the Constitution, all of which consistently referred to 'all the votes cast' as the standard. Further, the Report of the Committee of Experts captured the rationale for the provision in the Final Report of the Committee of Experts on Constitutional Review at page 121 as follows:

> *It is in the electoral process in a presidential system that the popularity and legitimacy of presidential candidates should be tested and demonstrated. For this reason, the CoE supported the PSC's proposal that a candidate should receive more than half of all the votes cast in the election and at least twenty-five per cent of the votes cast in at least half of the counties to be elected*

While extensive submissions were made on this issue in 2022, this material was not evaluated by the apex court before taking the decision to retain the 2013 position.

iii Pre-election issues touching on presidential election petitions/ Scope of Supreme Court jurisdiction in election disputes touching on the election of the President

The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the election of the President of the Republic of Kenya (Articles 163(3)(a) and 140 of the Constitution. However, the Supreme Court's jurisdiction in presidential election disputes has evolved significantly, leading to ambiguity regarding the precise scope of the Court's authority in such matters.

In its advisory opinion in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court Advisory Opinion No. 2 of 2012**, the Supreme Court took the position that elections are a process, and that a purposive interpretation of the Constitution required that the Supreme Court have jurisdiction over every part of the process of electing the President.

> *[100] It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for "qualifications and disqualifications for election as President" – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election.*
>
> *[101] Does the entire question concerning Presidential elections belong to the Supreme Court's jurisdiction? Or is the Supreme Court's power limited by the express language of Article 140 of the Constitution? An analogy may be drawn with other categories of elections…*
>
> *On a literal construction, it may be stated that the foregoing reference to "the elections to the office of President" suggests the draftspersons contemplated that several rounds of election may be involved, before the emergence of a duly elected President.*
>
> *[102] Besides, a reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate*

> *upon **all** such disputes as would arise from the Presidential election. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising after the election – while excluding those disputes which might arise during the conduct of election.*

While the apex court touched on various aspects of the election of the President, the focus of the court appeared to have been on dealing with possible disputes arising out of the first round of a presidential election. Little guidance was given on the exercise of the Supreme Court's jurisdiction in disputes arising before declaration of the result of the election.

n a petition challenging the eligibility of certain presidential and parliamentary candidates based on non-compliance with Chapter Six of the Constitution, the High Court reaffirmed the Supreme Court's position in ***International Centre for Policy and Conflict & 5 others v Attorney General & 5 Others*, Nairobi High Court Constitutional Petition No. 552 of 2012**. In doing so, the five-judge bench declined jurisdiction over the qualifications for nomination in a presidential election:

> *89. It is therefore clear from the foregoing that any question relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya can only be determined by the Supreme Court. This includes the determination of the question whether such a person meets the test of integrity under Chapter Six of the Constitution in relation to Presidential elections. These two questions cannot be determined or considered by this Court outside the context of the elections that are due to be held on 4th March, 2013.*

Following the conduct of the 2013 elections, the High Court restated this jurisdiction in relation to the entire presidential election process in ***The Africa Centre for Open Governance (AfriCOG) v Ahmed Issack Hassan & Another*, Petition 152 of 2013).** It clarified that the Supreme Court was clothed with this jurisdiction even where the results of the presidential election had not yet been declared.

However, in ***Isaac Aluoch Polo Aluochier v IEBC & 19 Others*, Supreme Court Petition 2 of 2013,** As such, the Court cannot entertain an election petition filed before the results of a presidential election have been declared. This ruling indicated that any matters related to the presidential election process, including issues such as nominations or eligibility, could only be addressed after the results had been announced. A concern with this approach, however, is that it leaves

pre-election issues unresolved before the results are declared. If there is an eligibility issue, e.g. a non-citizen is nominated for the presidential election, or some other disqualification under Article 99 of the Constitution attaches, it is better to resolve it before the election rather than after.[59]

In addressing the constitutionality of certain provisions of the Elections Act in 2017, the High Court was also invited to address the Supreme Court's jurisdiction as against its own interpretation jurisdiction under Article 165 of the Constitution. In ***Maina Kiai and Others v IEBC and Others*** **High Court, Petition 207 Of 2016, [2017] eKLR,** the High Court, while acknowledging the jurisprudence from the ***International Centre for Policy and Conflict Case*** as well as ***Advisory Opinion No 2 of 2012***, asserted that it had jurisdiction to interpret the constitutionality of *inter alia*, section 39 of the Elections Act which relates to the presidential election, where the question for determination did not relate to whether a person was qualified to run for the office of the president. If the issue for determination was the constitutionality or otherwise of legislation, the court could not avoid its constitutional mandate to 'to hear and determine any question respecting the interpretation of the Constitution, including the determination of the question whether any law is inconsistent with or in contravention of the Constitution'. In the relevant portions of the judgment of the High Court, which was upheld on appeal in ***IEBC v Maina Kiai & 5 others*** **Civil Appeal 105 of 2017,** the High Court asserted:

> *[18] The issue of jurisdiction was raised in the 1st Respondent's response and supported by the 2nd Respondent. According to them the proper judicial forum for the adjudication of any dispute relating to the election to the office of the president is the Supreme Court, and not the High Court. In the submissions by Mr. Kilonzo for the 1st Respondent, the Constitution had outlined the functions and jurisdiction of each court. Article 163(3)(a) had dictated that the Supreme Court shall have exclusive original jurisdiction to hear and determine disputes relating to the election of the president arising under* ***Article 140****. In limiting the jurisdiction to hear and determine disputes relating to presidential election, it was argued, the Constitution under Article 165(5)(a) had expressly provided that the High Court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court. Informed by Article 163(9), the Supreme Court Act (Cap.9A) was enacted to make further pro*

59 See for example Section 285 (9) of the Constitution of the Federal Republic of Nigeria, which provides for all pre-election matters are to be brought within 14 days of the complained action or decision. See also section 46 (2) Constitution of Sierra Leone which allows one to lodge an objection to the nomination of a candidate within 7 days of the publication of the notification of the nomination. Section 46(3) requires that the objection be heard and determined within 30 days.

visions with respect to the operation of the Supreme Court as a court of final judicial authority. Section 12 of the Act provides that the Court has jurisdiction to determine disputes arising out of presidential elections, that is disputes to which Article 163(3)(a) applies. As provided for under Article 163(8) as read with section 31 of the Supreme Court Act, the Supreme Court made the Supreme Court (Presidential Election Petition) Rules, 2013 which provided for the exercise of its jurisdiction. Rule 3 provided that the object and purpose of the Rules was to enable the court exercise its exclusive original jurisdiction under Article 163(3)(a).

This court takes the view that the instant petition does not relate to any of the grounds in Rule 12(2) of the Supreme Court (Presidential Election Petition) Rules. More specifically, the pleadings in the petition do not raise a question as to the validity of the presidential election, a declaration by the Commission under Article 138(5), the validity of the qualification of a president-elect, the commission of an election offence as provided under Part VI of the Elections Act, or the validity of the nomination of a presidential candidate. The court is alive to the High Court decision in In the Matter of the International Centre for Policy and Conflict & 5 Others –v- A.G & 4 Others [2013]eKLR in which the question was whether the 3rd and 4th Respondents in the case were qualified to offer their candidature for the office of the President and Deputy President. The court observed as follows:-

"We were urged to make a declaration whose ultimate aim would result in the determination of the question, whether the 3rd and 4th Respondents are qualified to offer their candidature for the office of the President and Deputy President respectively. This is an issue which is within the exclusive jurisdiction of the Supreme Court. In the premises therefore, this court lacks jurisdiction to deal with a question relating to the election of a President and Deputy President"

Again, this court is not dealing with the question whether or not any person is qualified to run for the office of the president.

[25] In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (above), the Supreme Court expressed itself with regard to how it interpreted its exclusive jurisdiction to deal with disputes arising out of a presidential election. In its Advisory Opinion, it observed as follows:-

"It is clear to us, in unanimity, that there are potential disputes from presidential elections other than those expressly mentioned in Article 140 of the Constitution. A presidential election, much like other elected – assembly elections, is not lodged in a single event; it is, in effect, a process set in plurality of stages. Article 137 of the Constitution provides for "Qualifications and disqualifica

tions for election as President" – and this touches on the tasks of agencies such as political parties which deal with early stages of nominations; it also touches on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the presidential election …

A reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon all such disputes as would arise from the presidential election. We find no reason to presume that the framers of the Constitution intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely disputes after the election – while excluding those disputes which might arise during the conduct of election."

This court fully agrees with the Supreme Court. Where a question arises under Article 137 of the Constitution as to whether one is qualified or not qualified to be elected as president, that is a matter within the exclusive original jurisdiction of the Supreme Court. Where, either the Commission or the political parties are involved in the nomination of presidential candidates and there is a dispute, that is a matter within the exclusive jurisdiction of the Supreme Court. All these are in, our view, disputes that arise during the early stages of the conduct of a presidential election. In other words, these are critical stages of the presidential electoral process. In the instant case, the process of electing the president has not commenced. To our mind, a presidential election is activated when, under section 14 of the Elections Act, the Commission publishes a notice of holding of the elections in a Gazette and in electronic and print media. The Supreme Court was alive to this when it stated in In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (above) as follows:-

"It is our unanimous opinion that the validity of the Presidential election is not for determination only after the administrative pronouncement of the final result; at any stage in the critical steps of the electoral process, the Supreme Court should entertain a dispute as to validity."

[27] Once again, the Petitioners have through this petition challenged the constitutionality of section 39(2) and (3) of the Elections Act and regulations 83(2), 84(1) and 87(2)(c) of the Elections (General) Regulations 2012. They have invoked this court's powers under Article 165(3)(d) which gives the court jurisdiction to hear and determine any question respecting the interpretation of the Constitution, including the determination of the question whether any law

> *is inconsistent with or in contravention of the Constitution. The court cannot run away from this challenge to test the constitutionality of the impugned provisions. We, therefore, hold and find that this court has jurisdiction to hear and determine the petition.*

In ***Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & Others*** **Supreme Court Petition No. 18 of 2017, [2020] eKLR,** the court considered its jurisdiction in relation to presidential elections settled with finality. It asserted that when it comes to the validity of the election, a party had to wait until the election had been held before the apex court could pronounce itself on that election. Affirming the position taken in ***Maina Kiai*** above, the Supreme Court asserted that constitutional or legal questions requiring interpretation that touching on presidential election were the preserve of the High Court:

> *[51] We hasten to restate the position that, the Constitution confers upon the Supreme Court, exclusive original jurisdiction, to determine disputes relating to the election of the President arising under Article 140 only. Though exclusive and original, this jurisdiction is limited to the circumstances contemplated in Article 140 (1). It is not a blanket jurisdiction that empowers the Supreme Court, to extend its judicial authority over any and all interpretational questions, touching upon the election of the President. It must be further emphasized that, Article 163 (3) of the Constitution does not oust the High Court's original jurisdiction to interpret the Constitution under Article 165 (3) (d). The Supreme Court's exclusive and original jurisdiction to determine the validity of a presidential election, only kicks in after the declaration of results, following a petition challenging the election. … (emphasis added)*
>
> *[52] The Supreme Court cannot determine the validity or otherwise of a presidential election, before the same is held and the results thereof declared. It is one thing for the Court to pronounce itself on a Constitutional or legal question, but it is another thing to determine the validity of an election. In other words, the Supreme Court cannot anticipate the validity of a presidential election, within the meaning of Article 140 (1) of the Constitution"*

The determination of the Supreme Court in this matter appears to reverse its position in ***Advisory Opinion 2 of 2012,*** which had clarified that all issues touching on the presidential election were within the province of the apex court's jurisdiction. Where there are eligibility issues, the Supreme Court now appears to say that the High Court has jurisdiction to exercise its Constitutional interpretation mandate under Article 165 (3) (d) of the Constitution, thereby splitting again the jurisdiction in relation to the presidential election between two courts. It is unclear where the distinction lies between a Constitutional or legal question and the validity of

a presidential election issue. The ruling in ***Okiya Omtata*** does not proffer this guidance. Before the 2022 general election, a challenge as to the validity of the nomination of a deputy presidential candidate for want of compliance with Chapter Six of the Constitution was presented before the Supreme Court in ***Njiru & 10 others v Ruto & 5 others; Azimio la Umoja One-Kenya Coalition & 3 others (Interested Parties)*** **(Petition 22 (E25) of 2022).** The petitions sought to suspend the swearing of the 1st and 2nd Respondents (William Ruto and Rigathi Gachagua) in the event that they won the general election.

In declining to exercise jurisdiction over the petition, which was filed too close to the general election, the apex court asserted that the Supreme Court cannot determine the validity or otherwise of a presidential election, before the same is held and the results thereof declared. In a ruling delivered after the elections striking out the petition, the court set out its jurisdictional province as follows:

> *[11] It is general knowledge that the Presidential Elections were held on 9 August 2022 and the declaration of results of the Presidential Election made on the 15th August 2022. On the other hand, the petition and motion before us were filed on 8 August 2022, a day before the General Elections and seven days before the declaration of the results of the Presidential Election. Therefore, the applicants are inviting the Court to assume jurisdiction outside the confines of Article 163 (3) as read with Article 140 (1) of the Constitution. They are inviting the Court to unconstitutionally expand its jurisdiction. To wait until a day to the General Elections, before seeking the Orders of such magnitude, casts the Petitioners/applicants in a cynical scheme of abuse of the processes of this Court. [12] Consequently, applying the settled principles, we find that this Court lacks jurisdiction to hear and determine the petition and also the present application. We reiterate that this Court's jurisdiction under Article 163 (3) (a) of the Constitution only kicks in after the declaration of the presidential election results and subsequent to a competent petition challenging the election.*

The position taken by the Supreme Court appears to be inconsistent with the spirit of Article 99 of the Constitution, whose aim was to preclude unqualified persons from holding office.

After the conduct of the 2022 elections, the Supreme Court had occasion again to pronounce itself on its jurisdiction regarding a nomination dispute touching on the presidential election. In ***Reuben Lichete Kigame v Independent Electoral Boundaries & Another*** **Supreme Court Presidential Election Petition 9 of 2022** the court appeared to prevaricate on whether it has jurisdiction over a pre-election issue after the results have been declared, thus obfuscating its jurisdiction on

issues touching on the electoral process rather that the declaration of the result. In a ruling striking out the ***Kigame*** petition, the court, citing lack of jurisdiction asserted:

> *The petition as filed does not seek to challenge the declaration of the 2nd interested party as the president-elect, but as rightly submitted by the applicants, seeks to address issues arising before the presidential election and is essentially a pre-election dispute. Article 140 of the Constitution is also instructive in that a presidential petition filed before this Court must be one that seeks to challenge the election of a president-elect.*

While this ruling also turned on the fact that there was a pending appeal at the Court of Appeal on the exclusion of Mr Kigame from the ballot,[60] the court, in asserting that a presidential election petition can only be a post-election dispute that challenges the election of a president-elect claws back on its jurisprudence in ***Advisory Opinion 2 of 2012, Aluochier*** and ***AfriCOG.*** While in ***Omtata*** the court stated that it had jurisdiction over the validity of the election, in ***Kigame*** the court asserted that it can only entertain challenges to the election of a president-elect. This appears to indicate that if you are not contesting the declaration of a person as president-elect, the apex court has no jurisdiction in respect of the matter.

For example, what would happen if a person who was ineligible to be nominated as a presidential candidate was cleared to run for office? Can that issue be addressed in the post-election of adjudication where it was a clear violation of the Constitution? From a reading of the ruling in ***Kigame***, it would appear not, so long as the person has not been declared *president-elect*. Even where such a person is not declared the president-elect and therefore there would be no need to contest their declaration as president-elect, it would be an illegality that ought to have been addressed before the pre-election stage.

60 The IEBC in the Court of Appeal decision in in *Independent Electoral & Boundaries Commission & Wafula Wanyonyi Chebukati v Reuben Kigame Lichete & Attorney General* Civil Application No. E253 of 2022 obtained a stay of execution of the judgment of the High Court in *Reuben Kigame Lichete v Independent Electoral and Boundaries Commission & Wafula Chebukati* Constitutional Petition No. E275 of 2022. The High Court # had ordered inclusion of Mr Kigame on the ballot, but the Court of Appeal ruled that the orders were issued too close to the election and a balance had to be struck between the political rights of one candidate and the public interest in the conduct of the elections within the timelines stipulated by law. The substantive appeal was still pending at the Court of Appeal at the time of the election in *Independent Electoral and Boundaries Commission & Wafula Wanyonyi Chebukati v Reuben Kigame Lichete & Hon Attorney General;* Nairobi Civil Appeal No. E2456 of 2022.

In addition, there could be instances, like the ***Reuben Kigame*** case where a person is improperly locked out of candidature by the IEBC. The ruling of the court appears to suggest that unless the issue relates to the person who has been declared president-elect, such an issue would not be open for adjudication at the Supreme Court.

What does that mean for the fairness of the presidential election?

From a reading of the ruling in the ***Kigame*** petition, it is now unclear whether one can bring an election process issue to the Supreme Court after declaration of results.

iv Reliefs

In ***Odinga & 16 others v Ruto & 10 others; Laws Society of Kenya & 4 others (Amicus Curiae)*** **Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated) [2022] KESC 54 (KLR) (Election Petitions),** the court assessed its powers to issue reliefs and asserted that the powers were limited by Articles 140 and 163. While the reliefs available were in the view of the court limited, nothing stopped the court from making recommendations to address certain structural issues:

> *[84]In the strict sense therefore, these are the only orders that the court may make under the Constitution. The court cannot assume jurisdiction that goes beyond the purview of articles 163(3) and 140 of the Constitution. However, nothing stops the court from issuing "orders" or reliefs by way of recommendations. Indeed, since 2013, this court has issued many recommendations arising from the determination of three petitions challenging the election of the President-elect. The recommendations are meant to improve our electoral landscape and hence aid in the development of our democracy. In this regard, the court has been greatly aided by the contributions of amici curiae. The court places a heavy premium on the amici-briefs that are filed by those it admits in such capacity.*

While the Court cited Rule 22 on the orders that it can give when sitting as an election court, in its analysis, it ruled that:

> *[302] In exercising its jurisdiction pursuant to these provisions, the Court sits as an election court, with the mandate to determine the validity or otherwise of the election of the President-elect. It is clear to us that the jurisdiction of the Court is quite circumscribed in terms of the Orders or reliefs it can grant following the hearing and determination of a Presidential Election Petition under Article 140 of the Constitution.*
>
> *[303] A determination by the Court that the election of the President-elect is invalid leads to an Order of nullification of that election. Consequently, by operation of the Constitution and law it follows that a fresh election must be held within sixty days after that determination.*
>
> *[304] Should the Court determine that the election of the President-elect is valid, it shall issue a declaration to that effect. The Court has, as a matter of course, to make an Order dismissing the Petition, with or without costs as the case may be.*
>
> *[305] In the strict sense therefore, these are the only Orders that the Court may make under the Constitution.*

By restricting itself to the binary determination of whether an election is valid or invalid, the court did not make reference to the possibility, emanating from Article 138 (5) of the Constitution, of the IEBC declaring that no candidate has met the threshold for election. One may only challenge such a declaration in the Supreme Court as the body with the exclusive jurisdiction to handle all challenges to the presidential election. A dispute may also arise as to the candidature for such an election, where one contests their exclusion from the run-off election under Article 138 (6). Rule 22 anticipates a challenge to the declaration by the IEBC under Article 138 (5) that no candidate has met the threshold. As such, the court would be called upon to make a determination on the numbers. Such a situation does not fall within the binary categorisation of the court's jurisdiction as an election court which it restricted to the declaration of validity or invalidity of the election of the president-elect.

Further, the court did not address itself to section 80 (4) of the Elections Act, which had been cited by the 1st Petitioners, and its suitability to a presidential election dispute. The section provides as follows:

> *(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if— (a) upon recount of the ballots cast, the winner is apparent; and (b) that winner is found not to have committed an election offence.*

There are several reasons why such a remedy may be inappropriate for a presidential election dispute. Firstly, elections are concerned with establishing the sovereign will of the people, and it is the role of the court to not substitute its own will for that of the people. This means that an order of nullification should be preferred to the order of declaring an apparent winner where there is a serious doubt as to whether the apparent winner was the candidate elected by the voters. Moreover, this remedy is discretionary. Where the prayer was made in other elections, the question turned on the meaning of the word 'apparent'. In ***John Oroo Oyioka v IEBC & Others*** **[2014] eKLR**, the Court of Appeal asserted that the term should be taken to mean 'visible; manifest; [and] obvious'. Therefore, a section 80 (4) remedy should only be granted in the clearest of circumstances that leave no doubt as to what the will of the voters on the material polling day was. Without caution and restraint, the election court would run the risk of disenfranchising voters by substituting the will of the electorate with that of itself and imposing a leader on the electorate. The remedy ought also not be granted if the election was generally flawed by multiple errors or irregularities.[61] Secondly, due to the strict timelines set by the Constitution for the hearing and determination of a presidential election petition, the court has limited time for actual hearing determination of the case. Since this remedy is predicated on the conduct of a recount, which is only appropriate in three instances:[62] *(i) where it is the only plea in the petition; (ii) whereupon recount of the ballots cast, the winner is apparent; and (iii) where the margin of victory is narrow,* this remedy may not be suited for presidential disputes. Such a remedy would require a certain degree of certainty and the insufficiency of time for resolving such disputes, as admitted by the court in 2017 and 2022, militates against the efficaciousness of this remedy in a presidential election dispute.

v. Adoption of structural interdicts

While the court interpreted narrowly the remedies available to it when sitting as an election court, it nevertheless made recommendations or structural interdicts for the IEBC, on constitutional reform of the timeline for resolving presidential disputes and on the conduct of proceedings before the Supreme Court. While these recommendations are not binding as remedies, it is noteworthy that when in 2013, the court recommended, at para 293 of its decision, investigation of IEBC

61 For a more recent High Court finding on the efficaciousness of this section 80 (4) remedy, see *Mochumbe Jackson Mogusu v Nyaribo Dennis Kebaso and 4 Others* Nyamira Election Petition Appeal No. E006 of 2023 (as consolidated with Petition Appeal No. E007 of 2023).

62 DK Maraga 'Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective' in C Odote & L Musumba (eds) Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence (2016) 243 265.

officials in relation to the failed technology deployed during the first general elections under the 2010 Constitution, such was undertaken after the recommendation was taken up by Parliament. Unfortunately, it appears that the court has taken a narrow view of the appropriate remedies in an electoral dispute. In instances where there is need for a remedial response to a systemic problem, structural interdicts are an effective remedy, and while they have previously been used to address systemic socio-economic problems, the jurisprudence is evolving to allow them to be used to address systemic violations of civil and political rights.[63]

Electoral process issues

i Party nomination process

Internal Dispute Resolution Mechanism (IDRM)

The law mandates that litigants must make an effort to exhaust internal dispute resolution mechanisms (IDRMs) in the circumstances outlined in section 40(2) of the Political Parties Act. This requirement ensures that political parties are given the initial opportunity to address and resolve internal conflicts in good faith. The rationale behind this is to foster and strengthen intra-party democracy. Additionally, where the Constitution or relevant statutes have established an IDRM, it is necessary for that mechanism to be fully utilised. Party IDRMs also serve as a means to incorporate alternative dispute resolution (ADR), in line with the principles set out in Article 159 of the Constitution.

During the 2017 elections, there was ambiguity from High Court decisions regarding whether Internal Dispute Resolution Mechanisms (IDRM) were mandatory in party nominations. In ***Magero Gumo v Political Parties Dispute Tribunal & 2 others*** **Election Petition Appeal No 11 of 2017**, para 24, where the High Court found that any irregularity arising out of party primaries *'is a dispute which should be addressed by the party dispute resolution mechanism or PPDT and not the court directly.'* In ***Joseph Mboya Nyamuthe v Orange Democratic Movement & Another*** **EPA 5 of 2017 [2017] eKLR,** the High Court ruled that party primaries were not included in the categories of dispute in respect of which IDRM was required to be exhausted. The Court of Appeal ***Lilian Gogo v Joseph Mboya Nyamuthe & 4 others*** **[2017] eKLR** set out the primacy of IDRM in party nomination disputes in the following terms**:**

63 See for example *Molina Thiessen v Guatemala* 5 Order of the Inter-American Court of Human Rights, 16 November 2009, *Case of Molina-Theissen v Guatemala* (Monitoring Compliance with Judgment) available at https://www.corteidh.or.cr/docs/supervisiones/molina_16_11_09_ing.pdf

> *27… That dispute is between members of the same political party. Although it is a dispute arising from the party primaries, it is nonetheless a dispute that falls under paragraphs a, b, c, and e of Section 40(1) of the Act that is required to be heard by the party's internal dispute resolution mechanism before the PPDT can take cognizance of it…*
>
> *28. We are therefore satisfied that the learned Judge of the High Court fell into error in holding, without qualification, that the PPDT has jurisdiction to hear disputes arising out of party primaries and that in all cases involving disputes arising out of party primaries, an aggrieved party "is not necessarily bound by the party nomination rules and regulations which require that such aggrieved party do appeal to the party national appeals tribunal."*

The amendments introduced by the Political Parties Act 2022 have clarified that IDRM is now compulsory in such cases, as stipulated in section 40(2) of the amended Political Parties Act (PPA). The obligation to exhaust IDRM applies to disputes not only between party members and their political parties but also between coalition partners within a coalition, as outlined in section 40(1)(e) PPA. This has been illustrated in cases such as ***Kenya Council of Employment and Migration Agencies & Another v Hon. Hussein Dado & 3 Others*** **Mombasa Miscellaneous No E001 of 2022,** ***Republic v Registrar of Political Parties & 3 Others; Hassan (Ex parte)*** **Miscellaneous Application E048 of 2022 [2022] KEHC 572,** ***and Namunyu & 3 Others v Ndonji & 3 Others; Namunyu & 2 Others (Interested Parties)*** **Civil (Election) Appeal E413, E414, E430 & E433 of 2022 (Consolidated) [2022]**. Additionally, coalition political parties are required by section 40(3) to incorporate IDRM provisions in their coalition agreements.

Place of IDRM in the dispute resolution process

While political parties have autonomy in the choice of nomination methods, they are to conduct themselves democratically and promote constitutional values, including good governance, separation of power and the right to a fair trial. As such, it is not open to political parties to put in place a dispute resolution mechanism as is required by the Political Parties Act and then allow other organs within the political party to circumvent the decisions of the IDRM.

In ***Hon. Elisha Ochieng Odhiambo v Dr. George Jalango Midiwo & 3 Others*** **Complaint Number 003 of 2022**, the PPDT, which seeks to enforce democratic culture within political parties, observed as follows on the centrality of the IDRM:

> *57… there is no doubt that the 3rd Respondent is the sole judicial organ of the party established under Rule 19 of the ODM Party Primaries and Nomination Rules, and charged with the responsibility of resolving disputes that arise out of the party's primaries and nominations. It is an organ specifically recognised under section 40 (2) of the Political Parties Act, 2011. Disputants are required to first settle their grievances with respect to party primaries through the 3rd Respondent. If dissatisfied, a disputant, including the political party, can escalate the dispute to this Tribunal and, thereafter to the High Court, and Court of Appeal, if need be.*
>
> *58. There is no role for any other organ of the party to exercise the judicial function of the 3rd Respondent. If a party organ is aggrieved with the decision of the 3rd Respondent, an Appeal mechanism is provided. No party organ can usurp, countermand or even supplant the decisions of lawfully established judicial organs. To entertain the alternative argument would be a recipe for chaos and undermine the judicial authority of tribunals and courts. Court decisions would amount to nothing as executive organs would willy-nilly set them aside and replace them with their own findings. We dare add that the rule of law would also be under acute threat…*
>
> *62. We also find that the central committee's usurpation of the 3rd Respondent's duties and those of the party's disciplinary committee is an act that violates at least two principles of good governance of political parties: separation of powers; and fair trial.*
>
> *63.Political party organs mimic or approximate state organs in the fashion of Montesquieu's hallowed doctrine of separation of powers. The party constitution creates, allocates, disperses powers, while creating checks and balances to the powers allocated. Judicial organs play a critical role in this framework of checks and balances. It is the vanguard and bulwark of the rights of members against potential excesses of the executive's organs.*

In concurring with this finding, the High Court in ***Midiwo v Odhiambo & 2 others*** **Civil Appeal 26 of 2022 [2022] KEHC 10679)** stated:

> *110. I am therefore in agreement with the PPDT findings that if the party was aggrieved by the decision of the Appeals Tribunal, it had the opportunity to move to the PPDT to challenge that decision and not to sit on appeal of the Appeals Tribunal's decision through the Central Committee. I find that the Central Committee acted ultra vires and in excess of jurisdiction when 15 it purported to review the decision of the Appeals Tribunal and made a decision that suited the interests of the appellant and the Party. I further find that the Central Committee acted in vain and therefore its resolutions if any are all in vain and void ab initio.*

The goal of IDRM is to enhance a democratic culture within political parties. Therefore, as the Court of Appeal established in ***Samuel Kalii Kiminza v Jubilee Party & another*** **(2017) eKLR,** it is essential that technicalities do not take precedence when determining whether IDRM has been fully exhausted. In instances where a party has not followed the established procedure to initiate IDRM, it is incumbent upon the party to inform the member of the correct procedure and invite them to adhere to it in order to resolve their dispute. However, in 2022, the High Court in ***National Elections Board, ODM v Kepher Ojil Odongo & Another*** **Civil Appeal E317 of 2022** asserted that IDRM is not demonstrated to be exhausted where the party's laid down procedures are not followed.

Meaning of direct and indirect nomination

The term "direct nomination" previously referred to the issuance of a direct ticket to a party candidate, but its meaning has been redefined under section 38F of the PPA to involve the exercise of universal suffrage by registered party members. Section 38F stipulates that a political party conducting direct nominations must post the list of eligible party members at each nomination venue and provide essential election materials such as ballot papers, ballot boxes, the party member register, pens, and nomination results slips. Additionally, political parties must submit to the Registrar of Political Parties and publish on their official website the particulars of the body responsible for conducting the nominations and the procedure to be followed in direct nominations.

This change indicates that the issuance of a direct party ticket is not recognised by the PPA. However, owing to the late amendments to the PPA, the practice of issuing direct tickets, which differs from direct nomination as defined in the PPA, remains an option within party constitutions for selecting candidates. The

confusion resulting from these amendments has been reflected in both party nominations and the decisions of the Tribunal, as illustrated in ***Kilonzo v Wiper Democratic Movement & 3 others*** **Nairobi A PPDT Complaint E026 of 2022** and ***Nicholas Ouma Ounda & 3 Others v ODM & 2 Others*** **Nairobi A Complaint E053 of 2022**.

In ***Ntabo v Maranga & 2 others*** **Kisii High Court Civil Appeal 26 of 2022**, the High Court observed:

> *At the onset, I note that the parties including the tribunal could not differentiate the methods of nomination available to a political party. The Political Parties Act provides for two methods of conducting nominations, i.e. direct party nominations and indirect party nominations (see section 38A of the Political Parties Act). Section 2 of the Act defines direct party nomination as the process by which a political party, through its registered members, elects its candidates for an election, while indirect party nomination is the process by which a political party, through the use of delegates selected from registered members of the political party and interviews, selects its candidates for an election.*

Issuance of direct ticket versus direct nomination

While acknowledging the inconsistency between many party constitutions and the PPA caused by the late amendments, the Political Parties Disputes Tribunal (PPDT) has upheld the position that political parties retain the right to issue a direct ticket to a candidate for elections as per their constitution or where justifiable reasons exist. However, the issuance of a direct ticket cannot be done where two or more aspirants anticipate competitive nominations or where a political party collects nomination fees from aspirants in anticipation of a direct nomination. This would be a breach of legitimate expectations.

Indirect nomination

It is worth noting that due to the divergence of nomination methods contained in many PNRs as compared to the PPA, some indirect nomination methods used were not consistent with the PPA. These include opinion polls and consensus building among candidates. As indicated above and in the recommendations section below, it is necessary to review the PPA in light of this incongruence to provide an opportunity for parties to harmonise their PNRs with the legislative provisions. In the context of the 2022 elections, where an indirect nomination method was used that was not in the PPA (which only recognises the use of delegates as an indirect nomination method), the PPDT and courts did not nullify the nomination.

However, the courts took the position that where there was non-compliance with the PPA and the party nomination rules and democratic values, an indirect nomination method could not be upheld.

In ***Kilonzo v Wiper Democratic Movement & 3 Others*** **(Civil Appeal E132 of 2022) [2022] KEHC 11332**, the High Court declined to find that the nominations were properly conducted where the party changed from a direct to an indirect nomination method. In overruling the Tribunal's finding, the High Court asserted:

> *63. Despite finding the 1st Respondent's manner of carrying out its mandate to be greatly wanting in light of the principles in article 35, 10 and 91 of the Constitution, and dismissing the notion that non-compliance with section 38G was of no consequence, emphasising that the provision existed to regulate the conduct of indirect party nominations, the Tribunal found that there was "substantial compliance by the respondent to the party rules and Act so far as the indirect nomination by poll and interview was conducted". With respect, these findings are against the weight of evidence.*
>
> *64. The 1st Respondent's conduct of the so-called indirect party nomination was grossly marred by substantial non-compliance with its own rules and the PPA as outlined herein and appeared a poor reflection of democratic practice in the party affairs.*

Legitimate expectations of party members in the nomination process

The concept of legitimate expectation extends to political party nominations. When a political party collects nomination fees from a candidate, it establishes an expectation that the nomination process will take place. Likewise, if there is no unresolved dispute, a candidate who secures victory in the party nominations has a valid expectation that the party will provide them with a nomination certificate and submit their name to the IEBC. The High Court confirmed this in the case of ***Kilonzo v Wiper Democratic Movement & 3 Others*** **Civil Appeal E132 of 2022 [2022] KEHC 11332**, where it found equivocation between nomination methods inconsistent with the Party Nomination Rules (PNR) and PPA:

> *36. This court agrees with the appellant's contention that the IEBC form 11, revised nomination dates notice and attached schedule (pp 025 -37 ROA) suggest in the absence of a contrary notice that the direct method of nomination would be applied for the seat of governor Kitui County, in the event that the consensus building process failed. The two letters by the aspirants to the party earlier adverted to in this judgement in my view appear to confirm this view. The angst exhibited in the two aspirants' letters is primarily due to the conduct of the party, as the tribunal properly observed, that despite the notices issued for direct nominations, by its conduct but without any formal notifica*

tion, the party continued to lean towards indirect nominations. Further, it is apparent that this continued until April 17, 2022. It is the court's view that until the decision for indirect nomination was made on April 18, 2022, merely 3 days to the actual primaries, the candidates did not know what direction the matter would eventually take.

37. I accept that the court ought to defer to the political party on the manner in which it runs its affairs and especially in furthering the objects of rule 2.1.8. I do not however accept that the party ought by its mixed signals and conduct to engender such uncertainty not only among the candidates but also among its members on an important matter such as the precise method of nomination concerning the equally important position of governor.

In ***ODM National Elections Board & another v Gare & 2 others*** **Civil Appeal 44 & 45 of 2022 (Consolidated)**, Ochieng J (as he then was) asserted:

> *43. The party and its Elections Board had chosen universal suffrage, in the first instance. Therefore, when the PPDT told them to conduct a repeat of the process, that could only be done using the process which they had initially chosen and utilised.*
>
> *44. By giving the order for a repeat of the process and making it clear that it be done through universal suffrage, the PPDT did not usurp the mandate of either the party or the party's elections board.*

Effect of an order for fresh party nominations

When a political party's nomination process is nullified by the PPDT and a new nomination is ordered, the question arises whether the party can adopt a different method for the new exercise. A question arose as to whether 'fresh nomination' was synonymous with 'repeat nomination'. On one side, political parties have argued that a fresh nomination does not equate to a repeat of the previous one. They claim that their discretion in selecting a nomination method allows them to change the method if the initial exercise is nullified. This position was supported by the Tribunal in ***David Ayoi v ODM & 2 Others*** **Nairobi A Complaint E047 of 2022**, where the Tribunal, in ruling on a contempt application, found that issuing a direct ticket after the nullification was consistent with party nomination rules. The Tribunal reasoned that the nullified nomination no longer existed in law, permitting a fresh nomination through the issuance of a direct ticket. This decision was later upheld by the High Court in ***David Ayoi v Orange Democratic Movement & 4 Others*** **Nairobi High Court Civil Appeal E014 of 2022**, ***Jacob Ochieng Ogutu v Orange Democratic Movement & 2 Others*** **Nairobi High Court Election Petition Appeal E274 of 2022**, and ***Oscar Oluoch Ouma v Independent Electoral & Boundaries Commission & 3 Others*** **Homa Bay High Court Constitutional Petition 1 of 2022**.

In contrast, the Tribunal in other rulings disapproved of issuing a direct ticket after IDRM directed a fresh nomination. This view was held in cases such as ***Abrari Mohamed Omar v Kelvin Ondieki & 2 Others*** **Mombasa Misc. Application No. E002 of 2022**, ***Allan Ojuki Gordon v Moses J. Odhiambo Ochele & 2 Others*** **Kisumu Complaint No. E021 of 2022**, ***John Andiwo Mwai v The National Election Board (ODM) & 2 Others*** **Nairobi A Complaint Number E019 of 2022 (Ruling)**, and ***Nicholas Ouma Ounda & 3 Others v ODM & 2 Others*** **Nairobi A Complaint E053 of 2022**. Similarly, in ***Geoffrey Otieno Opiyo & Orange Democratic Move***

ment Party v IEBC **Nairobi Complaint No. E012 of 2022**, the Tribunal stressed that issuing a direct ticket following the nullification of the first exercise required consultation with candidates and an opportunity for them to be heard.

Reinforcing this latter position, both the High Court and the Court of Appeal emphasised a strict interpretation of section 38E of the PPA. This section mandates that when the initial nomination is nullified and a fresh one is ordered, the party must use the same method that was initially employed. The High Court, in ***Edwin Otieno Odhiambo v ODM National Elections Board & 3 Others*** **Kisumu High Court Civil Appeal E043 of 2022**, held that if the PPDT or the Court directed a repeat nomination process, members had a legitimate expectation to again participate in selecting the candidate. Popularity or time constraints were deemed insufficient justification for issuing a direct ticket instead of repeating the original method of universal suffrage. This position was similarly taken in ***Moses Odhiambo Ochele v Achan Ojuki Gordon & 2 Others*** **Kisumu Civil Appeal No. E037 of 2022** and ***Zakayo Ongondo Oguma v Geoffrey Otieno Opiyo & 3 Others*** **Kisumu High Court Civil Appeal E034 of 2022**. In ***ODM National Election Board & Another v Gare & 2 Others*** **Civil (Election) Appeal E003 of 2022**, the Court of Appeal, affirming the High Court's decision in ***Moses Odhiambo Ochele v Achan Ojuki Gordon & 2 Others*** **Kisumu Civil Appeal No. E037 of 2022**, ruled:

> *39. In the end, it [PPDT] made an order directing the Elections Board of the party to conduct fresh nominations. Learned Senior Counsel Ojienda passionately urged us to find that there is a distinction between a repeat nomination and a fresh nomination and that the party would have only been obliged to conduct another nomination through universal suffrage had the Party Tribunal ordered for a repeat nomination.*
>
> *40. We, however, think, with respect, that this is a distinction without a difference. The nomination exercise held on 13th April, 2022 for the Party's candidate for the position of member of county assembly for West Sakwa Ward was in regard to the forthcoming August 2022 election. Once it was found to have been botched, another nomination needed to be undertaken. As this would be a second exercise then it would at the same time be a fresh nomination because the nomination of 13th April, 2022 had been nullified by the Appeals Tribunal. …*
>
> *41. We reach the conclusion that the exercise contemplated by the Party Tribunal was a repeat of the nomination exercise and we are unable to fault the learned Judge's holding that when the PPDT ordered for a fresh nomination by way of universal suffrage, it was in effect ordering a repeat election...*

> *44. ... The party had chosen that it would conduct party primaries in respect to the position for MCA for Sakwa West by way of universal suffrage. It was a promise to the Party members that it was the chosen method in respect to that position for the 2022 cycle of elections and the Party needed to keep the promise. The first exercise having been nullified, then it would be expected that the repeat exercise would be by the same method unless the Party demonstrated that it was impossible to do a repeat in the same manner because of some intervening circumstances and the notification required by section 38E had been made, something the appellants did not succeed in demonstrating even in the application for review...*
>
> *46. ... Rule 6(m) in the Code of Conduct for Political Parties made pursuant to section 6(2)(e) of the Act commands political parties to respect, uphold and promote democratic practices through free, fair and credible party nominations. To change the rules of the game in a repeat nomination without good reason and without roping in or even notifying the membership is inimical to this commandment...*

This interpretation was similarly upheld in ***Loice Akoth Kawaka & Another v Oscar Oluoch & 3 Others*** **Kisumu Court of Appeal Election Petition Appeal 168 of 2022**. However, if a candidate, initially selected by universal suffrage, resigns from the party to run as an independent, the party may select its candidate by any method consistent with its rules, as held in ***National Elections Board, ODM v Kepher Ojil Odongo & Another*** **Civil Appeal E317 of 2022**.

Additionally, where the Tribunal nullifies a nomination and orders a fresh or repeat process, a party cannot challenge the new nomination process through contempt proceedings in the same case. Instead, the correct approach is to file a new dispute through the party's IDRM, as seen in ***Agnes Nailentei Shonko Wachira v John Njoroge Chege & Another*** **Nairobi A Complaint No. E020 of 2022** and ***Peter Migwi Gichohi & 3 Others v UDA & 3 Others*** **Nairobi A Complaint No. E022 of 2022**.

When does the mandate of the PPDT in relation to party nomination and party list nomination disputes come to an end?

While the PPDT has the mandate to resolve disputes related to party nominations and party list nominations, its jurisdiction ends once the IEBC has cleared a political party nominee. However, there is conflicting interpretation regarding whether the timeframes set out in Section 13 of the Elections Act remove the PPDT's jurisdiction. To understand how the jurisprudence has evolved, a review of decisions from the 2017 cycle to the present is instructive.

In ***Gabriel Bukachi Chapia v Orange Democratic Movement & another*** **Election Petition Appeal No 64 of 2017** and ***Eric Kyalo Mutua v Wiper Democratic Movement Kenya & another*** **Election Petition Appeal No 93 of 2017**, the High Court clarified that once the IEBC clears a nominee,

> *…there can be no change to that candidature. The only way there can be change is if there is death, resignation or incapacity of the nominated candidate, or if the nominated candidate has violated the electoral code of conduct.*

Similarly, in ***Robert Oruko Otege v Orange Democratic Movement & 2 others*** **Complaint No 203 of 2017**, the court noted that:

> *It is clear that once the Interested Party was cleared by the IEBC, jurisdiction over the present dispute passed over to the IEBC as stipulated under Article 88(4)(e) of the Constitution. It is therefore the view of this Tribunal that it is devoid of jurisdiction in the application before it.*

The Court of Appeal affirmed this position in ***Joseph Ibrahim Musyoki v Wiper Democratic Movement-Kenya & Another, Civil Appeal 203 of 2017***, where it held that once a candidate's nomination is accepted, the dispute moves from being a party dispute to a nomination dispute, thus falling under the IEBC's jurisdiction. However, a different position was taken by a bench of the Court of Appeal in ***Eric Kyalo Mutua v Wiper Democratic Movement-Kenya & another Civil Appeal No.173 of 2017***, where it was stated:

> *Section 13 of the Elections Act on which the learned Judge relied provides for timelines within which a political party should nominate its candidates and the circumstances under which a political party may change the candidate nominated after the nomination of that person has been received by the IEBC. It does not, with respect, oust the jurisdiction of the PPDT or the court under Sections 40 and 41 respectively of the Political Parties Act to adjudicate over a dispute arising from nominations provided such jurisdiction is properly invoked.*

Further, the court observed:

> *The decisions of the High Court in Billy Elias Nyonje vs. National Alliance Party of Kenya and another (above) and John Pesa Dache vs. IEBC & another [2013] eKLR to which we were referred do not, in our view, support the proposition advanced that the jurisdiction of the PPDT and the High Court to hear and determine disputes arising from nominations is ousted by Section 13 of*

> *the Elections Act. To that extent, the learned Judge of the High Court erred in concluding that the PPDT did not have jurisdiction over the matter by dint of Section 13 of the Elections Act.*

By 2022, the PPDT upheld this interpretation in ***Kenya Council of Employment and Migration Agencies & Another v Hon. Hussein Dado & 3 Others*** **Mombasa Complaint No. E001 of 2022** and ***Edwin Odhiambo v ODM National Elections Board & 2 Others*** **Kisumu Complaint No E016 of 2022**. However, in some instances, the PPDT's interpretation of its jurisdiction extended until the persons whose nominations were challenged had been cleared and gazetted to contest. In ***Peter Kipkorir Lang'at v Zadock Kibet Kulel & 2 Others*** **Nairobi B Complaint E012 of 2022**, the Tribunal held that its jurisdiction was not ousted by the submission of a candidate's name to the IEBC. It found that:

> *Section 13(2) of the Elections Act bars a political party from changing the names of candidates once they have been submitted to the IEBC, but does not bar the Tribunal from directing a political party to change a name after hearing a dispute and arriving at a determination requiring such orders.*

Similarly, in ***Samuel Kagwanja Muchunga v Nevil Chemuku Napwori & Tijubebe Wakenya Party*** **Nairobi A Complaint E061 of 2022**, the PPDT emphasised that:

> *Regulation 8(1) (supra) provides in part that a complaint against the decision of an internal political party dispute resolution mechanism arising out of party primaries shall be filed with the Tribunal not more than fourteen days from the date of the decision, and in any case, at least one day before the day set aside by the Commission, for the submission of names of the party candidates who have been selected to participate in the general election pursuant to section 31 (2A) of the Elections Act.*

The Tribunal noted that "the filing of a dispute puts the challenged party's name in abeyance until the dispute is determined by the Tribunal," suggesting that its jurisdiction continues after the submission of the name.

In ***Khala v National Elections Board Orange Democratic Movement Party (ODM) & 2 others; Independent Electoral & Boundaries Commission (Interested Party) (Civil Appeal E314 of 2022)***, the High Court found that there was an inconsistency between the Political Parties Disputes Tribunal (Procedure) Regulations 2017 and the Elections Act. Rule 8 of the Procedure Regulations requires disputes to be resolved a day before the IEBC's submission of party candidates' names, while Section 31(2A) of the Elections Act allows dispute resolution to extend to 60 days before the election. Consequently, the Tribunal could not lose jurisdiction under Rule 8.

However, in ***Ochola v Odhiambo & 2 Others; IEBC (Interested Party) Civil Appeal E389 of 2022*** and ***Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & 3 Others, Civil Appeal No E326 of 2022***, the Court of Appeal supported the earlier jurisprudence, confirming that the PPDT's jurisdiction ends when the IEBC accepts a candidate's nomination papers.

Nevertheless, the PPDT retains the ability to hear contempt applications concerning its orders after submission of party candidates' names to the IEBC, as seen in ***John Andiwo v The National Elections Board of the ODM and Others*** **Nairobi A PPDTC E019 of 2022** and ***John Ombawa Gare v ODM National Elections Board & 2 Others*** **Kisumu Complaint E017 of 2022**.

ii Eligibility and suitability for elective office

Eligibility and suitability for public office are distinct yet interconnected concepts governed by specific constitutional and legal provisions. Eligibility refers to whether a person meets the minimum legal, educational, technical, or professional qualifications required by the Constitution or any applicable law. For instance, under Article 99(1)(b) of the Constitution, a candidate for parliamentary office must satisfy the educational qualifications prescribed by the Elections Act. Additionally, Section 24(3) of the Election Offences Act disqualifies a person convicted of an election offence from election or nomination for five years following the conviction. Eligibility thus ensures that a candidate has the necessary credentials or professional experience to hold a particular office.

Suitability, on the other hand, is assessed based on a person's integrity, character, and commitment to the national values enshrined in the Constitution. Article 75(3) of the Constitution disqualifies any person who has been dismissed or otherwise removed from office for contravening the provisions of Chapter Six from holding any other state office. Suitability involves evaluating whether there

are unresolved questions regarding a person's honesty, financial probity, scrupulousness, fairness, reputation, soundness of moral judgment, and adherence to the national values outlined in Article 10 of the Constitution.

Therefore, while a person may be eligible for public office by meeting the necessary qualifications, they may still be deemed unsuitable if they do not meet the ethical and moral standards required by the law. The mere fact that a candidate is eligible does not automatically imply they are suitable to hold public office.

Eligibility

The legislative framework for educational qualifications in Kenya's elective offices has undergone substantial judicial review. Initially, section 22(1)(b) of the Elections Act, 2011, required candidates for elective office to possess a post-secondary school qualification recognised in Kenya, though the statute did not define 'post-secondary qualification'. For presidential and gubernatorial candidates, this requirement specified a degree from a university recognised in Kenya.

In ***Johnson Muthama v Minister for Justice & Constitutional Affairs & Another*** **Petition Nos 198, 166 & 172 of 2011 (Consolidated)**, the Court critiqued this legislative approach, noting it failed to address Kenya's governance issues and violated constitutional provisions by excluding many potential candidates who had not achieved post-secondary education through no fault of their own.

This position was upheld in ***John Harun Mwau v IEBC & Another*** **Constitutional Petition 26 of 2013**, where the Court affirmed the constitutionality of educational qualifications but justified the requirements under section 22 as necessary and attainable. This was reinforced by the Court of Appeal in ***John Harun Mwau v IEBC & Another*** **Civil Appeal 112 of 2014**, which asserted that the educational standards, although stringent, were not discriminatory.

In ***Wilfred Manthi Musyoka v Returning Officer, IEBC, Machakos County & 4 Others*** **Constitutional Petition E004 of 2021**, the High Court confirmed that the educational requirements for the President, Deputy President, Governor, and Deputy Governor applied only to the 2017 general elections and not to any by-elections held before the 2022 general elections.

As to who has the role of authenticating qualifications, in ***Republic v Wavinya Ndeti & 4 others; Gideon Ngewa & another (Exparte); Wiper Democratic Movement Kenya (Interested Party)*** **(Judicial Review 3 of 2022)**, the Court clarified that the IEBC does not have the power to recognise or equate university degrees;

that obligation rests with the Commission for University Education (CUE). The Court ruled that certified copies of degrees, along with any necessary authentication for foreign degrees, were sufficient for candidate qualification. Where the degree is foreign, it ought to be accompanied by a certificate of authentication of the issuing body by the Commission for University Education (Regulation 47, Elections (General) Regulations, 2012). In the words of the court:

> *[116] It is therefore clear that the powers to recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions rests with the 3rd* Respondent. In undertaking its mandate, it is required to undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities. In this case the 3rd Respondent confirmed that the institutions from which the 1st Respondent obtained her degrees and certifications are recognized...
>
> *[118] With due respect I cannot read into the said regulation any power conferred upon the 2nd Respondent to recognise or equate university degrees. I therefore associate myself with the decision of Mrima, J in Petition E321 of 2022 – Dennis Gakuu Wahome v The Independent Electoral and Boundaries Commission and others and find that the 2nd Respondent has no power to recognise or equate university degrees and therefore cannot be compelled to investigate the authenticity of a university degree that is already recognised by the 3rd Respondent…*
>
> *[134] In my view, the mere fact that the system adopted by foreign universities is different from our own system does not necessarily mean that such foreign degrees ought not to be recognized locally. As long as the 3rd* and 5th Respondents are satisfied as regards the standards applied in awarding the same, this court cannot interfere with such a decision simply because the degrees were awarded in an "unusual" manner. While their decision may be challenged on the grounds of irrationality, that is not the same thing as impeaching their decision merely because of differentiation or variation in the educational systems.

Several challenges were lodged against educational qualifications in the run up to the 2022 elections. In ***County Assembly Forum & 6 Others v Attorney General & 2 Others*** **Constitutional Petition Nos E229, E226, E249, and 14 of 2021**, the Court

found the degree requirements for County Assembly candidates unconstitutional due to inadequate public participation. This decision highlighted that while general educational qualifications had been settled, the specific implementation for County Assembly positions was flawed.

Similarly, in ***Paul Macharia Wambui & 10 Others v Speaker of the National Assembly & 6 Others*** **Constitutional Petition 28 of 2021** and **Petition Nos E037, E065 & E549 of 2021**, the Court declared the degree requirements for parliamentary candidates unconstitutional. The Court found these provisions failed to meet the Constitution's limitation of rights test under Article 24, were discriminatory under Article 27, placed unreasonable restrictions on political rights under Article 38(3), and ignored the rights of minorities and marginalised groups under Article 56. The provision also lacked adequate public participation.

In ***Buoga v Attorney General & Another*** **Constitutional Petition E290 of 2022**, the Court ruled the educational requirements for gubernatorial candidates unconstitutional. The Court held that imposing academic qualifications for County Governor positions created discriminatory barriers that were inconsistent with the Constitution, particularly Articles 180(2) and 193(1)(b). The ruling emphasised that the qualifications should align with those for a Member of County Assembly, ensuring no discrimination in the qualifications for persons contesting county elections. The Court also found that section 22(2) was unconstitutional following the declaration of section 22(1)(b)(ii) as unconstitutional due to inadequate public participation.

These cases reflect an evolving legal landscape where educational qualifications for elective offices, which had previously been upheld as necessary by the courts, have not survived judicial scrutiny on account of discrimination and want of public participation. It is noteworthy that should these qualifications remain on the statute books upon compliance with constitutional dictates, the burden of proving that a person does not possess the requisite qualifications or is in possession of a forged degree certificate remains on the one who alleges.[64]

64 This is an onerous burden on the part of the petitioner. Moreover, an attempt to discharge this burden in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* Supreme Court Petition 7 & 9 of 2018 (consolidated) was hampered by the apex court's decision to decline jurisdiction, after allowing admission of further evidence of academic qualifications at a second-tier appeal. To date, no petitioner has been able to demonstrate lack of educational qualifications or forgery of a degree certificate. The timelines for the conduct of these cases also militate in favour of success in demonstrating a lack of educational qualifications, since one can only challenge eligibility on this basis when a person presents themselves for nomination. The level of investigative capacity required to demonstrate forgery cannot be achieved during the nomination phase. See also the case of Granton Samboja where despite two cases being brought on this issue, no substantive determination was ever made as the election petition and consti-

In ***Dennis Gakuu Wahome v IEBC & Others*, Nairobi High Court Petition No. E321 of 2022,** the court stated:

> *[247] Given that the Petitioner's case was based on criminal allegations on the part of the 4th Respondent relating to the degree certificate which was in the possession of the Petitioner, the evidential burden of proof called upon the Petitioner to prove that indeed the degree certificate was not genuine and that the 4th Respondent had committed various criminal acts.*
>
> *[248] It was upon the tendering of such evidence by the Petitioner that the evidential burden of proof would then shift to the 4th Respondent…*
>
> *[282] As I come to the end of this issue, I must express concern in the manner in which serious matters regarding allegations of forged academic documents are generally handled in this country. I say so noting that this is not the first case in which the High Court has declined to find a party accused of forging academic certificates culpable in non-criminal proceedings. The High Court has repeatedly stated that matters of such gravity must be handled carefully: investigations be thoroughly carried out and those culpable to be brought to book. Once that happens, then the criminal convictions can be used to mount challenges like the one before this Court.*

Moreover, previous court decisions had established that if a candidate had completed the necessary process to meet the qualifications required under the Constitution and Elections Act, and this process had been recognised by the Commission for University Education, the IEBC was required to accept the candidate's nomination (see ***Mable Muruli v IEBC*, Petition No. 93 of 2013**; and ***Janet Ndago Ekumbo Mbete v IEBC & 2 Others*, Constitutional Petition 116 of 2013**).

However, in 2017, an amendment to Regulation 47(1) of the Elections (General) Regulations through Legal Notice No 72 of 2017 introduced a new requirement. This amendment stipulated that candidates must now provide 'certified copies of certificates of the educational qualification' as proof of their qualifications. Consequently, it is no longer sufficient to merely show that a degree process was com

tutional petition were struck out on the basis of want of jurisdiction *Ethics and Anti-Corruption Commission v Granton Graham Samboja & Another; Kenyatta University & Another (Interested Parties)*, Constitutional Petition 382 of 2017. In a curious turn of events, the election petition in *Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others* Voi Election Petition 1 of *2017* was struck out on the basis that the constitutional petition was the better avenue for the resolution of the matter, for among other reasons, the limited time granted for the hearing of an election petition and the presence of investigative agencies as parties in the constitutional petition. However, during the hearing of the constitutional petition, the High Court struck out the constitutional petition on the basis that the issue of educational qualifications ought to have been raised in an election petition, not a constitutional one. That left unresolved the question of whether the Respondent had forged a degree certificate from Kenyatta University as was alleged.

pleted; candidates must now submit certified copies of their degree certificates. Additionally, for degrees obtained abroad, a certificate of authentication from the issuing institution is also required (see ***Republic v Chebukati & 2 others***; ***Wanjigi (Exparte)***, **Miscellaneous Application E083 of 2022**; ***Walter Onchonga Mongare v Wafula Chebukati & 2 Others***, **Constitutional Petition No. E318 of 2022**; and ***Jimi Richard Wanjigi v Wafula Chebukati & 2 Others***, **Civil Appeal No E404 of 2022**).

Suitability

There remains a lack of clarity on the interpretation and application of Chapter Six of the Constitution in relation to persons seeking elective positions. While under Article 75(3) of the Constitution, a person who is removed from office for violating Articles 76, 77 and 78(2) of the Constitution is ineligible from holding any other state office, Articles 99(2)(h) and 193(2)(g) of the same Constitution provide for disqualifications of those found to have misused or abused any state or public office. However, Articles 99(3) and 199(3) provide that the disqualification does not attach until all possibility of appeal or review is exhausted (***Commission on Administrative Justice v John Ndirangu Kariuki & IEBC, Constitutional Petition No. 408 of 2013***).

In ***Kenya National Commission on Human Rights v Attorney General; IEBC & 16 Others (Interested Parties)*** **Supreme Court Advisory Opinion Reference No. 1 of 2017**, KNCHR sought a purposive interpretation of Articles 38, 50, 99, 137, 180 and 193 of the Constitution – specifically in the context of the affairs of political parties – citing the apparent contradiction, lack of clarity and/or guidance in High Court and Court of Appeal decisions on the place of Chapter Six of the Constitution. However, the Supreme Court referred the matter to High Court as the court with mandate to interpret the Constitution.

In the 2022 cycle, the High Court in ***Okiya Omtatah Okoiti & 15 Others v Attorney General & 7 Others***, **Nairobi Petition E090 of 2022 (consolidated)**, was urged to harmonise decisions across several significant cases. These cases included ***International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others*** **Nairobi High Court Constitutional Petition No. 552 of 2012**; ***Luka Angaiya Lubwayo & Another v Gerald Otieno Kajwang & Another*** **Nairobi High Court Election Petition No. 120 of 2013**; ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*** **Nairobi Civil Appeal No. 290 of 2012;** ***Marson Integrated Ltd v Minister for Public Works & Another*** **High Court Petition No. 252 of 2012;** ***Benson Riitho Mureithi v J. W. Wakhungu & 2 Others*** **Nairobi**

High Court Petition No. 19 of 2014; ***Commission on Administrative Justice v John Ndirangu Kariuki & IEBC*** **Constitutional Petition No. 408 of 2013;** and ***Ethics and Anti-Corruption Commission v Granton Graham Samboja & Another; Kenyatta University & Another (Interested Parties)*****, Constitutional Petition 382 of 2017.** However, the Court declined to hear the case, citing lack of jurisdiction, and instead directed the parties to first exhaust the IEBC's mechanisms before pursuing judicial review in the High Court.

In ***Mike Gideon Sonko v Swalha Ibrahim Yusuf & Others, Mombasa High Court*** **Petition No. E027 of 2022,** the court asserted as follows in relation to the apparently conflicting provisions:

> *[119] A holistic approach of interpretation in essence means that the Constitution speaks as one harmonious document; and that it is not self-contradictory. Thus, Article 75, being part of Chapter 6 of the Constitution cannot be read in isolation from Article 193; granted that Article 193 (2) (g) does provide for disqualification on the basis of contravention of any of the Chapter 6 provisions. In the premises, we are persuaded that Article 193 (3) was deliberately put in place by the framers of the Constitution and by extension, Kenyans, to afford protection to any citizen who has a pending appeal or review during the pendency of such appeal or review.*

Following the determination of his pending appeal at the Supreme Court in ***Mike Mbuvi Sonko v Clerk County Assembly of Nairobi*, Supreme Court Petition 11(E008) of 2022 (unreported)**, the IEBC revoked the certificate of clearance issued pursuant to the decision of the High Court in Petition E027 above. In dismissing the appeal, the Supreme Court stated as follows in relation to the intendment of Chapter Six:

> *[25] It bears mentioning in conclusion that Chapter Six of the Constitution was not enacted in vain or for cosmetic reasons. The authority assigned to a state officer is a public trust to be exercised in a manner that demonstrates respect for the people, brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. It vests in the State officer the responsibility to serve the people, rather than the power to rule them"*

The position therefore appears to be that disqualification does not attach until all possibility of appeal or review is exhausted, as established in ***Commission on Administrative Justice v John Ndirangu Kariuki & IEBC Constitutional Petition No. 408 of 2013*** and reiterated in ***Republic v IEBC & Another Ex Parte Paul Karungo Thang'wa*, Judicial Review No 2 of 2022.** In the latter decision, the court asserted as follows:

> *[73] I agree with the counsel for that the Exparte Applicant that he is entitled to benefit from Article 99 of the Constitution which gives a party opportunity to exhaust appeal process if appeal has been filed challenging decision that disqualify the party from vying for a political position.*

Similarly, the Supreme Court decline to exercise jurisdiction in relation to a suitability question relating to deputy presidential candidate Rigathi Gachagua before the election in ***Njiru & 10 others v Ruto & 5 others; Azimio la Umoja One-Kenya Coalition & 3 others (Interested Parties)* (Petition 22 (E25) of 2022).** The apex court found, firstly, that it could not determine the validity or otherwise of a presidential election, before the same is held and the results thereof declared. As such, the applicants were inviting the court to unconstitutionally expand its jurisdiction. Secondly, the Supreme Court found that for the applicants to wait until a day to the general elections before seeking the orders of such magnitude cast the Petitioners/ applicants in a cynical scheme of abuse of the processes of this court. As discussed above, it remains unclear whether the Supreme Court can entertain a pre-election question touching on nomination issues, including eligibility and suitability for office.

The resolution of the conflict between Articles 75(3), 99(3), and 193(3) in future will determine how effectively Chapter Six's objectives are realised. This chapter stipulates that the authority given to a state officer is a public trust, which should be exercised with respect for the populace, honour for the nation, and dignity for the office, while also fostering public confidence in the office's integrity. At the same time, it must ensure the right to a fair hearing, including the opportunity for review by a higher court as mandated by law.

The locus for the determination of these questions also remains unresolved. The Supreme Court deferred to the High Court in its interpretation mandate under Article 165 of the Constitution. The High Court in ***Okiya Omtata,*** citing lack of jurisdiction, invited the parties to exhaust IEBC as a pre-election mechanism before approaching the High Court. However, the resolution of these questions requires a harmonisation of constitutional provisions that appear to be in conflict. The IEBC may not be well suited to find this kind of guidance going forward. Judicial courage will be necessary if life is to be breathed into Chapter Six of the Constitution.

Resignation from public office

In the case of ***Eric Cheruiyot v IEBC & 3 Others*** **Kericho Employment and Labour Relations Court Constitutional Petition No 1 of 2017**, the Employment and Labour Relations Court ruled that public servants intending to run for elective office could remain in their positions until the nomination date. The Court opined that the disqualification for public servants was meant to be lessened by parliamentary legislation as guided by Article 82 of the Constitution. The Court found Section 43(5) of the Elections Act to be unreasonable, oppressive, and unjustifiable.

However, this decision was subsequently overturned in 2022 by the Court of Appeal in ***Public Service Commission & 4 Others v Eric Cheruiyot & 32 Others*** **Civil Appeal 119 & 139 of 2017 (consolidated)**. The appellate court held that the requirement for public servants to resign six months before a general election is crucial to allow the IEBC enough time to manage its processes without causing undue disruptions to the election schedule. The Court determined that this requirement is both reasonable and justifiable under the Constitution.

The requirement for public servants to resign before seeking elective positions was also deemed applicable to individuals aiming to be elected as speakers of the County Assembly, the National Assembly, or the Senate in ***Philip K Langat v IEBC*** **Constitutional Petition E317 of 2022**. In essence, anyone who occupies a public office must resign before seeking elective office, not just those public servants who draw a salary from the Consolidated Fund. In ***Mwawaza v Mwaidza & another*** **Petition E001 of 2022 [2022] KEHC 10031 (KLR) (15 July 2022) (Judgment)**, the High Court clarified that requirement of resignation applies to all public servants, not just those who draw their salaries from the Consolidated Fund. In this case, the Petitioner had not resigned from Coast Technical Institute and it was found that he had not complied with s 43(5) Elections Act.

However, there is no requirement for members of the county assembly who resign from their party to seek election on a different party ticket to resign before a general election. The requirement in section 14(1) of the Political Parties Act that members of County Assemblies who switch from one political party to another for purposes of a general election should resign within one hundred and eighty days of a general election, was declared unconstitutional and a violation of Article 38(3)(c) as read together with Articles 4(2), 10, 19, 20 and 259 of the Constitution in ***Peter Kibe Mbae v Speaker of the County Assembly of Nakuru & Another Registrar of Political Parties and 49 Others (Interested Parties)*** **Nakuru Constitutional Petition No E004 of 2022**.

iii. Public participation

Public participation is enshrined in articles 10(2)(a) and 232(1)(d) of the Constitution as a fundamental principle of governance. Article 259(1)(a) mandates the interpretation of the Constitution to advance its values and principles. The Supreme Court of Kenya in ***British American Tobacco Kenya, PLC v Cabinet Secretary for The Ministry of Health & others*** **[2019] eKLR** articulated the principles for effective public participation, highlighting that it must be genuine and not merely a formality. Public participation should involve reasonable notice, opportunities for both written and oral submissions, and be purposeful.

Challenges have been raised against various legislative measures prior to the 2022 elections, alleging insufficient public participation before their enactment or implementation. In several cases, courts have deemed the legislation unconstitutional due to inadequate public engagement.

In ***Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others (Interested Parties)*** **Petition E043, E057 & E109 of 2022**, the court examined public participation in the amendment of existing laws. It emphasized that public participation and consultation are fundamental to upholding the sovereignty of the people, ensuring that citizens remain actively involved in governance. This principle places the responsibility on public officials and entities to facilitate and ensure meaningful engagement, regardless of the absence of a specific legal framework. Public participation must be substantive and genuine, not merely a procedural formality. It requires both quantitative and qualitative engagement, including reasonable notice and opportunities for involvement. While oral hearings are not always necessary, the effectiveness of the process should be assessed based on specific circumstances, including the mode and extent of engagement.

Meaningful public participation encompasses several essential elements: clarity of the subject matter, accessible and transparent engagement processes, opportunities for balanced public influence, commitment to the process, inclusive representation, and effective engagement capacity, which may involve initial sensitisation.

In ***Public Service Commission & 4 Others v Eric Cheruiyot & 32 Others*** **Civil Appeal 119 & 139 of 2017 (consolidated)**, the issue was whether sections 43(5) and 43(6) of the Elections Act, 2011 were enacted in accordance with public participation requirements set out in Article 118 of the Constitution. Article 10(2)(a) of the Constitution underscores public participation as a national value, requiring citizen involvement in governance. Article 118 mandates that Parliament ensure public involvement in its legislative process.

The appellants argued that public participation was not necessary because Article 118(1)(b) was temporarily suspended by section 2(1)(b) of the Sixth Schedule of the Constitution, which dealt with Transitional and Consequential Provisions until the first general elections under the 2010 Constitution. The trial court had ruled that there was no public participation in the enactment of these sections, declaring them unconstitutional. The appellate court, however, disagreed, finding that the suspension of Article 118(1)(b) during the transitional period aligned with the purpose of the Sixth Schedule. The court referenced ***Dennis Mogambi Mong'are v Attorney General & 3 others*** **[2011] eKLR** and ***Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & 40 Others*** **(CCT27/95) [1995]** to affirm that transitional provisions are integral

to the Constitution. Ultimately, the appellate court held that public participation was not a constitutional requirement for the enactment of the Elections Act, 2011 during the suspension period and that the Employment and Labour Relations Court did not have jurisdiction over the matter.

Several provisions were declared unconstitutional for failing to meet the required standards of public participation.

In *County Assembly Forum & 6 Others v Attorney General & 2 Others* **[2021] eKLR**, section 22(1)(b)(ii) of the Elections Act was found unconstitutional due to inadequate public participation. The court examined whether the adoption of this provision complied with the principle of public involvement in governance, as enshrined in Article 10 of the Kenyan Constitution. This article mandates the involvement of state organs, officers, and citizens in decision-making processes, including law enactment and public policy formulation.

The court also drew on precedents such as ***Simon Mbugua & Another v Central Bank of Kenya & 2 Others*** **Petitions 210 & 214 of 2019 (Consolidated) [2019] eKLR**, which defined and emphasised the significance of public participation. Citing ***Doctors for Life International v Speaker of the National Assembly and Others*** **[2006] ZACC 11**, the court highlighted the active involvement of communities in decisions affecting them. Additionally, the court referenced local precedents like ***Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*** **[2015] eKLR**, which articulated six principles for effective public participation. These principles stress the government's duty to create effective mechanisms for public engagement, ensuring inclusivity, access to information, and meaningful representation of stakeholders' views.

The court's analysis also incorporated international jurisprudence from ***Doctors for Life International v Speaker of the National Assembly and Others*** and ***Matatiele Municipality v President of the Republic of South Africa*** **[2006] ZACC 12**, emphasizing the need for tailored approaches to public engagement. The court scrutinised Parliament's actions in facilitating public participation, finding that the process for enacting section 22(1)(b)(ii) was deficient, as there was no evidence of adequate public participation. Despite no contestation from the Respondents, the Petitioners' claims were upheld, indicating a failure to meet Constitutional obligations under Article 10(2)(a).

In ***Paul Macharia Wambui & 10 Others v The Speaker of National Assembly & 6 Others*** **High Court at Nairobi Petition No. 28 of 2021** (as consolidated with **Petitions Nos. E549 of 2021, E077 of 2022, E037 of 2021, and No. E065 of 2021) [2022] eKLR**, the court reviewed whether section 22(1)(b)(i) of the Elections Act met the constitutional standard for public participation. The court reaffirmed that public participation is a constitutional requirement under Article 10, ensuring that government actions reflect democratic values and principles.

The court noted that the enactment process for section 22(1)(b)(i) lacked transparency and inclusivity, leading to its declaration as unconstitutional. This ruling underscored the necessity for comprehensive public consultation and stakeholder engagement to ensure legislative legitimacy.

In ***Buoga v Attorney General & Another*** **Constitutional Petition E290 of 2022**, the court declared the educational requirements for gubernatorial candidates unconstitutional. It found that imposing discriminatory academic qualifications was inconsistent with Articles 180(2) and 193(1)(b) of the Constitution. The ruling also declared section 22(2) unconstitutional, following the invalidation of section 22(1)(b)(ii) due to inadequate public participation. The court determined that the legislative process leading to the enactment of these requirements did not adequately involve the public. The requirement for gubernatorial candidates to possess specific educational qualifications was introduced without meaningful engagement with stakeholders or affected communities. The court highlighted that such significant legislative changes required broad and inclusive public consultation, which was lacking. The absence of robust public involvement undermined the democratic process and violated the constitutional principle of public participation as mandated by Article 10 of the Constitution.

Katiba Institute & 3 Others v IEBC & 3 Others **Constitutional Petition E540 & E546 of 2021** examined whether the Election Campaign Financing Regulations, 2016 and 2020 complied with constitutional and statutory requirements. The court highlighted the need for public consultation in the legislative process, referencing cases like ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*** **[2017] eKLR** and ***Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others*** **[2016] eKLR**. The court upheld the National Assembly's decision to annul both sets of regulations due to procedural deficiencies and lack of adequate public participation.

In ***Centre for Minority Rights Development (CEMIRIDE) & 2 Others v Attorney General & 2 Others; Independent Electoral and Boundaries Commission (Interested Party)*** **Machakos Petition E002 of 2022**, the court found that the Respondents failed to ensure sufficient public participation and civic education regarding the IPPMS. This failure reflected a broader issue of inadequate timely reforms and stakeholder engagement in electoral processes. The court ordered the Respondents to protect and respect constitutional rights, particularly for marginalized communities.

Free Kenya Initiative & 6 Others v IEBC & 4 Others; Kenya National Commission on Human Rights (Interested Party) **Constitutional Petition E160 of 2022** addressed the importance of public participation, referencing cases such as ***William Odhiambo Ramogi & others v Attorney General & others*** **Mombasa Consolidated Constitutional Petition Nos 159 of 2018 and 201 of 2019 (unreported)** and ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*** **Civil Appeal No 224 of 2017; [2017] eKLR**. The court reiterated that public participation must align with constitutional values and principles, ultimately upholding the petition based on insufficient public engagement. The court found that the process through which the Election Campaign Financing Regulations, 2016 and 2020 were enacted failed to meet constitutional standards for public participation. The regulations were scrutinised for their compliance with the constitutional and statutory requirements for stakeholder engagement. The court observed that the regulations were adopted without adequate opportunity for public input or consultation. This procedural deficiency rendered the regulations unconstitutional, as they did not reflect the inclusive and transparent process required under Article 10 of the Constitution. The court stressed that effective public participation is essential for the legitimacy and acceptance of legislative measures, particularly those impacting electoral processes and campaign financing.

Finally, in ***Cliff Marube Ombeta and Another v Independent Electoral and Boundaries Commission*** **Constitutional Petition No. E211 of 2022 (consolidated with Nairobi High Court Judicial Review Misc. No. E071 of 2022)**, the court quashed letters from the IEBC demanding political parties comply with the two-thirds gender principle. The court found these letters lacked public participation and were procedurally unfair, violating Articles 10, 27, 38, 47, and 91 of the Constitution.

iv. Fair representation of marginalised groups

Non-discrimination is a fundamental national value under Article 10 of the Constitution of Kenya, and Article 27 prohibits discrimination on grounds including disability, age, ethnic or social origin, and sex. The Constitution also mandates State organs and public officers to address the needs of vulnerable groups such as women, youth, persons with disabilities, marginalised communities, and ethnic and other minorities.

Inclusion is achieved not only by securing seats for marginalised groups at the national legislative and appointive levels but also by ensuring their representation in the devolved government structure. Articles 90, 97, 98, and 177 of the Constitution provide for the representation of women, youth, persons with disabilities, and other groups through party lists in County Assemblies. Political parties must comply with the zebra listing rule, alternating between male and female candidates and reflecting Kenya's regional and ethnic diversity (Article 90(2)). For County Assemblies, party lists must reflect community and cultural diversity and ensure adequate representation of minorities, as required by Article 197 and section 7(2) of the County Governments Act 2012.

Political parties are also required to promote the inclusion of marginalised groups. Article 91(1)(e) mandates that parties respect the right of all individuals, including minorities and marginalised groups, to participate in the political process. Compliance with this inclusion mandate is crucial for eligibility to receive funds from the Political Parties Fund, with 15% allocated based on the number of candidates from special interest groups elected (section 25(1)(b) of the Political Parties Act 2011). Additionally, at least 30% of the funds allocated to a party must promote the representation of women, persons with disabilities, youth, ethnic and other minorities, and marginalised communities in Parliament and County Assemblies (section 26(1)(a) of the Political Parties Act 2011).

In ***Centre for Minority Rights Development (CEMIRIDE) & 2 Others v Attorney General & 2 Others; Independent Electoral and Boundaries Commission (Interested Party)*** **Machakos Petition E002 of 2022**, the court found that the Integrated Political Parties Management System (IPPMS) adopted by the Office of the Registrar of Political Parties did not adequately consider the interests of minorities and marginalised groups. The court noted that the State had failed to ensure the system accommodated the rights of these communities, as required by Article 56 of the Constitution, and that there was a lack of sufficient statutory or regulatory framework to protect their rights. The court directed the State to implement measures ensuring the full enjoyment of fundamental rights and freedoms for minorities and indigenous people, as outlined in Articles 6(3), 27, 35, 38, and 56 of the Constitution.

Furthermore, the electoral system must comply with principles ensuring that no more than two-thirds of members of elective public bodies are of the same gender and that there is fair representation of persons with disabilities (Article 81(c) of the Constitution). There is also a constitutional duty to ensure progressive implementation of the principle that at least 5% of members of public offices are persons with disabilities. Additionally, the Constitution and the Persons with Disabilities Act advocate for equal opportunities for persons with disabilities (see ***Reuben Kigame Lichete v IEBC & Another Constitutional Petition E275 of 2022***).

The technology used in elections must be accessible and inclusive for all citizens, including those with disabilities and special needs (Regulation 4(2), Elections (Technology) Regulations, 2017). Political parties are also required to make rules and procedures accessible to members with disabilities (Regulation 6(1)(a), Elections (Party Primaries and Party Lists) Regulations, 2017). The High Court in 2022 criticised the IEBC for failing to ensure fair representation of persons with disabilities, particularly during the candidature stage of elections. For persons with disabilities to effectively participate in elections, reasonable accommodation is necessary. This includes modifications and adjustments to ensure equal enjoyment of rights as outlined in the Convention on the Rights of Persons with Disabilities (CRPD) (Article 29 of the CRPD).

In ***Reuben Kigame Lichete v IEBC & Another Constitutional Petition E275 of 2022***, the High Court observed:

> ***55.*** *By placing the manner in which the DRC treated the Petitioner and the various provisions of the Constitution and the law side by side, there is no doubt that the Petitioner's rights were variously flouted. For instance, there*

> *is no indication or at all that the Petitioner was accorded any assistance to overcome the disability in complying with the election requirements. There has also been no mention that the documents availed to the Petitioner were in braille or how the Petitioner was to access the whole country with a view of collecting the signatures and copies of identity cards of his supporters and in ways to overcome the constraints that arise from his disability…*
>
> ***58.** …the DRC ought to have seized the opportunity and added its weight in ensuring that the Petitioner who was the only person with disability in the presidential race was accorded a reasonable opportunity to participate in the election. The DRC ought to have noted that despite the challenges on his part, the Petitioner had endeavoured to come up with the required number of signatures of his supporters albeit and slightly out of the regulatory timelines. However, the Petitioner was instead placed on an equal footing with the rest of the presidential aspirants. There was no reprieve of any kind that was accorded to the Petitioner on account of his disability. The way the Petitioner was treated, therefore, amounted to placing the bar for him quite high compared to the other non-disabled presidential aspirants…*
>
> *63. The DRC's finding on the Petitioner's disability was, hence, not founded on the Constitution and the law. It openly flouted the Constitution and the law and did not treat the Petitioner with dignity and respect.*

However, Mr Kigame could not be included in the ballot due to the proximity of the court's decision to the election date. In issuing a stay of execution of the order of the High Court requiring his inclusion on the ballot, the Court of Appeal in ***Independent Electoral & Boundaries Commission & Wafula Wanyonyi Chebukati v Reuben Kigame Lichete & Attorney General*** **Civil Application No. E253 of 2022** asserted that a balance had to be struck between the political rights of an individual and the overwhelming public interest in the elections being conducted as scheduled under the Constitution.

In ***Katiba Institute v IEBC*** **Constitutional Petition 19 of 2017**, the court affirmed that political parties must adhere to the two-thirds gender rule when nominating candidates, and the IEBC has the authority to reject nomination lists that do not comply. In ***Adrian Kamotho v IEBC*** **Judicial Review Miscellaneous No. E071 of 2022**, and ***Cliff Marube Ombeta and Another v Independent Electoral and Boundaries Commission*** **Constitutional Petition No. E211 of 2022 (consolidated with Nairobi High Court Judicial Review Misc. No. E071 of 2022**), the court found that the IEBC's decisions demanding compliance with the two-thirds gender principle lacked public participation and procedural fairness, violating Articles 10, 27, 38, 47, and 91 of the Constitution.

Representation of marginalised groups through party lists is discussed in the section on party list disputes below.

v. Independent candidature

One of the issues that came up in the run up to the 2022 elections was whether there was differential treatment between independent candidates and political party candidates in demonstrating community support for their candidature. Whereas copies of identity cards of supporters were not required for political party candidates, the same were required for independent candidates.

In ***Free Kenya Initiative & 6 Others v IEBC & 4 Others; Kenya National Commission on Human Rights (Interested party)*** **Constitutional Petition E160 of 2022,** the court ruled that the requirements in Regulations 18(2)(c), 24(2)(c), 28(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017) that independent candidates supply copies of the identity cards of their supporters alongside signatures was discriminatory as it was not required of political party candidates and it was, therefore, unconstitutional.

Moreover, the Court ruled that the requirement to provide copies of supporters' identity cards contravened Article 31 of the Constitution and the Data Protection Act. The decision of the High Court was stayed pending appeal at the time of going to elections. This provision needs to be amended to align with the decision of the High Court in this regard.

The timelines for compliance with the requirements of election for political party candidates vis-à-vis independent candidates was also the subject of litigation in ***Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others (Interested Parties)*** **(Petition E043, E057 &**

E109 of 2022). In refusing to find the relevant provisions of the Political Parties Act unconstitutional, the court ruled that it was impractical for political party candidates to have the same timelines as independent candidates for several reasons. First, unlike independent candidates, party nominations often led to disputes that required sufficient time for resolution. Additionally, there was a need for discipline in the activities of political parties, which necessitated adherence to specific timelines. Furthermore, the IEBC had a timetable that allowed them to carry out essential tasks such as preparing registers, printing ballot papers, and training agents and officials effectively. In practice, a significant number of independent candidates initially align themselves with political parties. However, when it becomes evident that they are unlikely to secure the party nomination, they often resign from the party before or around the time of party nominations to ensure their eligibility to appear on the ballot. Although it is challenging to fully assess the extent of this trend—since some individuals may not have been formally documented as candidates and others resigned after being recorded—the survey data indicates that up to 80% of independent candidates first sought party endorsement unsuccessfully before deciding to run independently.[65] It is therefore unsurprising that due to the binary nature of the presidential race, many candidates in the lower level races, including independent candidates, seek to align with one or the other presidential candidates.[66]

vi. Campaign finance regulation

The regulation of campaign financing is a key constitutional duty of the IEBC as outlined in Article 88(4)(i) of the Constitution. However, the Election Campaign Financing Act (Act 42 of 2013) has not been fully implemented due to the lack of necessary regulations, which were not approved by Parliament for either the 2017 or 2022 elections. The Act's effectiveness is further limited because it only governs campaign financing during the official campaign period, excluding the substantial funds raised beforehand.

Kenyan electoral law prohibits the use of public resources for campaigning, as per section 14 of the Election Offences Act of 2016. The IEBC has the authority to require candidates holding public office, such as Members of Parliament, Governors, Deputy Governors, or Members of County Assemblies, to account for the public resources under their control and to confiscate any resources misused during campaigns.

65 Karuti Kanyinga & Tom Mboya 'The Cost of Politics' 2021, p 21-22.

66 Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch & Justin Willis (07 Jun 2024): Has Kenya democratized? Institutional strengthening and contingency in the 2022 general elections, *Journal of Eastern African Studies*, DOI: 10.1080/17531055.2024.2359154, p.5.

However, this requirement does not extend to prescandidates seeking re-election or deputy presidents aiming for the presidency, creating a gap in accountability. Despite the clear prohibition, the misuse of state resources during campaigns is widespread, with instances like the launch of government projects, use of official vehicles, and distribution of relief food during campaigns being common.

Regulating campaign spending is essential to prevent the use of illicit funds that could corrupt the political process. The lack of regulation on the use of state resources during elections, combined with the absence of an operational campaign financing regime, allows a small group of wealthy individuals to disproportionately influence elections, thereby heightening the stakes and increasing the likelihood of violence. This influx of campaign funds from the wealthy often comes with an expectation of favours in return, fostering quid pro quo corruption and enabling state capture by an elite minority.

The Election Campaign Financing Act envisions the gazetting of spending limits, capping how much a candidate, political party, or referendum committee can spend during the campaign period, including limits on media coverage. The Act also empowers the IEBC to create regulations to enforce these provisions, which must be approved by Parliament.

In 2017, Parliament rejected the proposed regulations, citing the need to revise the formula used by the IEBC to set spending limits and the reporting process under the Act, which required both candidates and political parties to report campaign expenditures. The argument was made that this reporting requirement duplicated the obligation of political parties to submit audited reports to the Office of the Registrar of Political Parties. In 2021, Parliament again declined to pass the regulations, this time because the IEBC had submitted them too late in the legislative process.

In the case of ***Katiba Institute & 3 Others v IEBC & 3 Others***, **Constitutional Petition E540 & E546 of 2021**, the Petitioners sought a ruling that the regulations on election campaign financing, as envisioned by Article 88(4)(i) of the Constitution, did not require Parliamentary approval since they were constitutional rather than statutory instruments. However, the High Court ruled that since the regulations were enabled by the Election Campaign Finance Act, they were indeed statutory instruments requiring Parliamentary approval. The court also noted that public consultations were mandatory before submitting the draft regulations to Parliament, as stipulated by section 5A of the Act. Due to the IEBC's failure to conduct such consultations and provide an explanatory note, the regulations did not meet

the necessary constitutional and legislative standards, leading to their revocation by Parliament. Additionally, the court ruled that once public consultations on contribution limits, spending limits, and authorised expenditures were completed, there was no need to seek Parliamentary approval for these limits.

It remains to be seen whether traction will be made towards regulating contribution, spending limits and authorised expenditures by the IEBC in 2027. However, it is apparent that subjecting the campaign financing regulations to Parliament, whose membership has a direct interest in their non-enforcement, makes implementation of the campaign financing regulatory framework rather illusory.

Locus standi in election petitions

While the 2010 Constitution provides for the hearing and determination of disputes relating to an election result, other than Article 140, there is no indication on who has a right to file an election petition. Article 140 entitles 'a person' to file a petition in the Supreme Court to challenge the election of the President-elect within seven days of the date of declaration of the presidential election results. 'A person' is defined in Article 260 of the Constitution to include 'a company, association or other body of persons whether incorporated or unincorporated'. While in 2013 and 2017 only natural persons filed petitions challenging presidential election results, one of the nine petitions filed in respect of the 2022 elections was filed by a human rights organisation, Youth Advocacy Africa. No objection was filed to their participation before the Supreme Court, likely because of the broad interpretation given to the term 'person' by Article 260 of the Constitution. It remains to be seen whether the Supreme Court will, in the future, narrow the scope of who can file presidential election petitions, considering that this broad definition could, if taken literally, extend to non-citizens of Kenya. This extension would conflict with Article 38 of the Constitution, which seems to intend to restrict political rights to citizens only. In relation to other elections, the Election Petition Rules 2017 are silent on who can bring an election petition to challenge the result of a parliamentary or county election. While the Rules define who a Respondent, a Petitioner is defined simply as 'a person who files a petition to the election court under the Constitution or under the Act in accordance with these Rules'. It is therefore arguable that the same definition of a person contained in Article 260 of the Constitution is applicable to parliamentary and county election petitions. However, the locus question has been defined in the context of substitution of Petitioners to introduce a residence and voter registration requirement, thus narrowing standing in the lower election courts.

In 2017, the question of locus in a parliamentary petition was considered in the context of an application for withdrawal and substitution in ***Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 others*** **Mombasa Election Petition 7 of 2017.** Since election petitions are brought inherently in the public interest, they should not be extinguished by withdrawal if there are suitable Petitioners willing to take them up to completion.[67] In determining suitability, a central consideration is who would have locus to take up a petition. While the Rules make no provision for this, election courts have held that *locus* is demonstrated by demonstrating that the intended Petitioners are resident and registered voters in the electoral area in question, as demonstrated through their national identification, polling station and wards where they are registered. The requirements of residency and registration as a voter in the affected electoral area were also upheld in ***Johnson Muthawali & another v Kingi Michael Thoyah & 2 others*** **[2018] eKLR.**

In the case of ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others*** **[2018] eKLR**, the court found that the intended Petitioners had disqualified themselves from any favourable exercise of the court's discretion because they did not provide evidence that they were registered voters in Kirinyaga, where the senatorial election result was being challenged. They were actually registered in Nairobi, Mombasa, and Kisii counties. Due to this lack of evidence of residency and voter registration in Kirinyaga, the court determined that there was no basis for claiming that they would be prejudiced by the withdrawal of the petition. This finding was upheld by the Court of Appeal sitting in Nyeri in ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 5 Others*** **Nyeri Election Petition Appeal 3 & 4 of 2017 (consolidated).**

In ***Getuba & another v Kibagendi & 2 others*** **Kisii Election Petition E002 of 2022**, the court was asked to strike out the petition on the basis that the 2nd Petitioner was neither a resident nor a registered voter in Kitutu Chache South Constituency, but was registered in Bahati Constituency, Nakuru County. In support of this claim, the applicant provided a screenshot and the QR Code allegedly showing that the 2nd Petitioner was registered in Nakuru. The Petitioners challenged the admissibility of this electronic evidence due to the absence of an electronic certificate, as required by Sections 78 and 106B of the Evidence Act, to ascertain its authenticity. The Petitioners countered by asserting that Article 258 of the Constitution allows any person to approach the courts to defend the Constitution. They

67 *Mohammed Ibrahim Abdi v IEBC and 2 Others* Nairobi Election Petition 7 of 2017.

argued that the Constitution broadens the scope of locus standi, empowering every person to contest any contravention of the Constitution or Bill of Rights. Articles 22 and 258 of the Constitution permit any person to institute court proceedings if they believe the Constitution has been violated or is under threat.

The Petitioners also cited ***Michael Osundwa Sakwa v the Chief Justice and President of the Supreme Court of Kenya*** **[2016] eKLR**, where the court held that the Constitution has relaxed the standing rules in public law litigation. While locus standi remains relevant, it should not prevent a Petitioner with bona fide grounds from seeking redress.

In this case, the court noted that the electronic evidence presented by the 1st Respondent/Applicant to challenge the 2nd Petitioner's voter registration was inadmissible. With no other evidence supporting the claim that the 2nd Petitioner was not registered in the constituency, the application was unfounded. Furthermore, under Article 258, every person has the right to institute proceedings to challenge a constitutional violation. The court found the claim that the 2nd Petitioner lacked locus standi to be without merit.

It is important to note that the court did not dismiss the definition of "Petitioner" used in the 2013 and 2017 Election Dispute Resolution (EDR) cycles. Rather, the court found that, in this particular case, there was insufficient evidence to demonstrate that the 2nd Petitioner was not registered in the relevant electoral area. Consequently, where locus is contested, the courts may continue to accept the definition of a Petitioner as a person who resides in the electoral area and provides proof of registration when considering standing. The constitutionality of this definition, in light of Article 260 of the Constitution ought to be the subject of judicial reflection.

Impact of election offences and/or pre-election disputes on election outcome

The jurisprudence of the Supreme Court on how to deal with pre-election disputes that was set in 2018 was restated in the 2022 EDR cycle. The principles given by the court in ***Silverse Lisamula Anami v IEBC & 2 Others SCEP 30 of 2018, Sammy Ndung'u Waity v IEBC &3 Others*** **SCEP 33 of 2018** and ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others SCEP 7 & 9 of 2018*** were as follows:

(i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;

(ii) where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the Election Court;

(iii) where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;

(iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the Election Court;

*(v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, **even after** the determination of an election petition;*

(vi) in determining the validity of an election under Article 105 of the Constitution, or Section 75 (1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the Petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election. (emphasis added).

In ***Bryan Khaemba v Didmus Barasa & 2 Others*** **Bungoma EP E001 of 2022**, the 1st Respondent was charged with the offence of murder in Kakamega High Court Criminal Case E032 of 2022. Simultaneously, an election petition was filed challenging the declaration of the 1st Respondent as the winner on the grounds that he had shot Petitioner's aide on election day. Moreover, the election of the 1st Respondent was impugned on the ground of commission of an election offence. Evidence was adduced to the effect that the 1st Respondent has misused a vehicle purchased using CDF resources for his campaign. The same had been painted in the party colours and branded with photos of the 1st Respondent and the party's presidential candidate.

The evidence adduced in the election petition was that of the criminal proceedings pending in the criminal court. The court was also informed that there were threats during counting of votes as reported by a Presiding Officer. However, the election court still found no impact on the election. Also, misuse of public resources being a pre-election issue, the court ruled that the Petitioner ought to have raised it with the IEBC before the election rather than raising it afterwards. The petition was therefore struck out for want of jurisdiction. Similarly, in ***Dr Evans Odhiambo Kidero & Another v IEBC & 4 Others*** **Homabay Election Petition E001 of 2022,** citing the Supreme Court decisions in ***Lisamula, Sammy Waity*** and ***Mohamed Abdi*** cases found that it had no jurisdiction to determine the impact of nomination irregularities on the outcome of the election. The Petitioners sought to link the issuance of a direct ticket to the 3rd Respondent by the 5th Respondent to the incidences of violence witness both before and during election day, and thereby nullify the election result. The court asserted the primacy of established quasi-judicial mechanisms for the resolution of disputes arising before election, failing which those disputes could not be brought to the election court after election day. In the words of the court:

> *535. With all the above in mind, I find that in the instant petition, the Petitioners did not adduce any evidence to prove that the pre-election issues detailed in the petition from paragraphs 85 – 105 affected the outcome of the gubernatorial elections in Homabay County. As earlier noted, none of the witnesses called by the Petitioners testified that they were prevented from voting as a result of the alleged bungled nominations or that they were exposed to violence during nominations such that they were prevented from voting for the Petitioners.*
>
> *536. And as earlier stated, even if this Court were to find that there was a nexus between the alleged bungled nominations as pleaded by the Petitioners and the violence, intimidation, undue influence and corruption that they pleaded occurred prior and during the election, the same would involve this court venturing into the bungled pre-election process to ascertain the said nexus. So far, I find no evidence presented by the Petitioners to ascertain this nexus. Accordingly, the Petitioners ought to have pursued the available dispute resolution mechanisms to resolve the alleged bungled ODM nomination process as stipulated in law, instead of originating their grievances at the Election Court.*
>
> *537. Furthermore, the 1st Petitioner testified that he resigned from membership of the 5th Respondent ODM Party and elected to vie as an independent candidate. He is thus estopped from using the 5th Respondent's nomination process as a springboard upon which he can lay a foundation to bring his petition.*

> *538. In the end, I find that this Court is constitutionally and legally speaking, deprived of jurisdiction to hear and determine pre-election nomination issues raised by the 1st Petitioner and that the Petitioners have not established a link and or proved that the pre-election issues which arose during the ODM party primaries nomination process affected and or had a direct effect on the Homa-bay gubernatorial election results of 9 August 2022.*

The other question that may require jurisdictional clarity in the future is how to harmonise the principles in ***Sammy Ndung'u Waity v IEBC & 3 Others*** **Supreme Court Petition 33 of 2018** with expeditious disposal of electoral disputes.

In light of the principles set out by the Supreme Court in ***Sammy Waity***, the High Court exercises jurisdiction over pre-election matters beyond the scope of electoral dispute resolution as outlined in the Constitution and the Elections Act. The fifth principle established by the Supreme Court in this case allows a party to bring a pre-election dispute before the High Court, either as a judicial review court or under its supervisory jurisdiction pursuant to Article 165(3) and (6) of the Constitution, even after an election petition has been determined. This opens the door for electoral issues to be addressed outside the specialised election court system that handles electoral disputes and within the unique legal framework for resolving such matters. It also allows for the possibility of electoral disputes being resolved outside the six-month timeline set for electoral dispute resolution.

As the Court of Appeal pointed out in ***Annie Wanjiku Kibeh v Clement Kungu Waibara & Another*** **Nairobi Civil Application No. E390 of 2021**, this six-month period does not apply to such cases. While the applicability of the six-month timeline in the High Court remains unclear, except in cases brought under Article 105(2) of the Constitution, there is a need for further jurisprudence from the Supreme Court to provide clarity on how to balance the requirement for timely resolution of electoral disputes with the principles established in **Sammy Waity**.

Jurisdiction of an election court in respect of election offences post-2016

I. Section 87 and the standard of proof for election offences post-2016

The court asserted that there are only two categories of proof in an election petition: the application of the criminal standard of proof of beyond reasonable doubt, and the intermediate standard of proof. The intermediate standard strikes a middle ground between the threshold of proof on a balance of probability in civil cases and beyond reasonable doubt in criminal trials. It is applicable in

election petitions save for two instances: where allegations of criminal or quasi-criminal nature are made; and where there is data-specific electoral pre-condition and requirement for an outright win in the Presidential Election, such as those specified in Article 138(4) of the Constitution. In those instances, the standard of proof must be beyond reasonable doubt.

Both the LSK and ICJ-Kenya as amici had urged the court to reconsider the standard of proof in election petitions. Two arguments in favour of a review of the standard were as follows.

Firstly, election petitions are ordinary Constitutional disputes and the standard applicable to ordinary civil disputes should also be applicable to electoral disputes. They urged the court to not make it impossible to prove Constitutional violations.

Secondly, the law on election offences was reformed in 2016 when Election Law Amendment Act No 21 of 2016 was passed. While section 87 as it read then required the election court to determine, at the conclusion of the hearing of a petition, whether an election offence had occurred, the revised law only required the court to determine whether an election offence 'may have occurred'.

Both in 2017 and in 2022, the apex court asserted that the question of standard of proof was not open to reconsideration. However, where the standard of proof in respect of election offences is concerned, it appears that the apex court has not reflected on the impact of the 2016 amendments to the Elections Act, which altered the role of the election court in relation to allegations of electoral malpractices.

With the introduction of amendments to section 87 of the Elections Act, it is no longer mandatory to make a report concerning electoral malpractices of a criminal nature, the court only puts forward an opinion as to whether an election offence 'may have occurred' (section 87(1) of the Elections Act, 2011) and transmits it to the DPP. In light of this amendment, it has been asserted that an election court should exercise caution and circumspection in determining the validity of an election, bearing in mind that there is a further process contemplated by law to determine whether a person is guilty of an election offence (***Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others*, Machakos Election Petition 4 of 2017; *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC*, Eldoret High Court Election Petition 1 of 2017**).

As such it is not clear why the standard of proof in such cases remains beyond reasonable doubt, seeing as the law anticipates a further legal process to determine whether in fact an election offence did occur. It is arguable that the phrase 'may have occurred' as used in section 87(1) of the Elections Act, 2011 suggests that the courts should use the civil standard of proof in determining whether such malpractices have affected the validity of an election. The apex court may have missed the opportunity to clarify the impact of s 87 in light of the revised law as urged by amici for the following reasons.

Firstly, the threshold for a factual finding that an election offence 'may have occurred' is inconsistent with the establishment of that fact 'beyond reasonable doubt'. Such a standard is only appropriate if it enables the election court to make a determinative finding that an offence occurred (as was the case pre-2016) and where the election court is able to penalise the relevant actors for those acts.

Secondly, the failure by the court to dedicate attention to an analysis of the law post-2016 as urged by amici has an impact on the question of *autre fois convict* in criminal law, a concern that had been raised by Rawal SCJ & VP (as she then was) in her concurring opinion in ***Moses Masika Wetangula v Musikari Kombo* Supreme Court Petition 12 of 2014 [2015] eKLR**. Seeing as section 87 anticipates a subsequent proceeding in a criminal court, the finding on the commission of an election offence is collateral to its main findings in the petition. Section 87 provides that a finding on the possible commission of an election offence is made in addition to any other finding in an election petition. This makes the finding of an election court on the possible commission of an election offence an ancillary finding. If therefore on the basis of this ancillary finding a person is found to have committed an election offence, and they are thereafter subjected to a criminal proceeding, does it not amount to being tried twice for the same set of facts? Such was the position taken by Rawal DCJ & VP (as she then was) in the ***Wetangula*** case.

Thirdly, the failure by the court to review the standard as urged by amicus has an impact on the resolution of disputes by other elections courts. This is because all courts are bound by the jurisprudence of the Supreme Court by virtue of Article 163 (7) of the Constitution. Arising from the 2022 elections, one election court was invited to rule in a petition filed solely on the basis of commission of election offences (***Bryan Mandila Khaemba v Didmus Wekesa Baraza Mutua & 2 Others* Eldoret High Court Petition 1 of 2022**). Simultaneously with the election petition, the 1st Respondent was charged with the offence of murder in Kakamega High

Court Criminal Case E032 of 2022. The evidence adduced in the election petition was that of the criminal proceedings pending in the criminal court. Concerns about double jeopardy were raised by the 1st Respondent. Had the meaning of the new section 87 been interpreted by the Supreme Court, it would have given jurisprudential guidance to election and criminal courts in such instances.

As for the act of violence, the court found that it had no impact on election outcome. In the words of the court:

> *40. The inquiry into the violence allegedly perpetrated by the 1st Respondent must be shown to have violated or undermined the electoral rights of all or the majority of electorates of Kimilili Constituency.*
>
> *41. I have reconsidered, over and over again the pleadings in the petition and my findings are that the same is absent of any allegations of the alleged violence having a bearing on the said electorates.*

Flowing from the decision of the court, several issues remain unresolved concerning the impact of election offences on outcome of an election petition. First, under what circumstances can an election court look into election offences in the course of determining an election petition under section 87 Elections Act? Second, does the institution of criminal proceedings divest an election court of jurisdiction under section 87 and under the Election Offences Act? Third, can an election be challenged purely on the basis of commission of election offences?[68]

The court found instructive the fact that the offence of murder in the ***Barasa*** case had already been sanctioned in a criminal case and therefore it would be a violation of fair trial guarantees for it to be raised again in an election petition. However, if the offence had been purely an electoral one in nature, and not one which could have been raised before election day, it remains unclear whether it could form the basis for an election petition.

In a separate matter, the Court of Appeal ruled that any electoral offence is sufficient of itself to nullify an election. In ***Ayiera v Kimwomi & 2 Others Kisumu Election Appeal E001 of 2023,*** the appellate court stated:

68 See for example sec 144 of the Constitution of Sierra Leone which allows for the Election Offences and Petitions Court to exercise jurisdiction over both election offences and election petitions.

> *96…any electoral offence committed by a candidate for office is, without more, sufficient to nullify that election. Such an offence, once proved, does not have to be subjected to any qualifying or modulating test of seriousness or substantiveness: an established election offence on the part of a candidate for electoral office is a per se dispositively nullifying factor in a subsequent election petition. A party challenging an election who proves that the candidate who was declared the winner in the election committed an election offence or corrupt practice is entitled to a nullification without having to prove anything more. A proven election offence committed by a person declared victor in an election nullifies his illicit victory, period.*

The ***Ayiera*** case, however, did not address the double jeopardy concerns raised in ***Barasa***, neither was an appeal preferred from the High Court to challenge the court's interpretation of its jurisdiction.

Failure to join a necessary party and/or mandatory party to a petition

Joinder goes to the root of natural justice, that no man should be condemned unheard. Amendments to petitions after the filing of the same are also now allowed in light of the strict timelines available to election courts to determine electoral disputes.

What then is the impact of failure to join Returning Officer, Deputy Governor or Returning Officer on the validity of a petition?

Two schools of thought emerged from previous jurisprudence. On one hand, there was a school that stood for the proposition that the failure to join a necessary party did not render the petition defective. This was because Rule 5 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides that it is up to the election court to determine the effect of any failure to comply with the Rules in accordance with the provisions of Article 159 (2) (d) of the Constitution.

This school of thought was exemplified by the following decisions: ***Sumra Irshadali Mohammed v IEBC & Mawathe Julius Musili*** **Nairobi High Court Election Petition 2 of 2017**, where the petition was not found defective despite failure to join the Returning Officer; ***Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission (IEBC) & 2 Others*** **[2017] eKLR** and ***Hassan Omar Hassan & Another v Independent Electoral & Boundaries Commission & 2 Others*** **[2017] eKLR** -where the Petitioner failed to join the deputy governor

On the other hand, several courts took the position that failure to join a necessary party was fatal to a petition. Such were the decisions in ***Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 4 Others*** **[2017] eKLR** and ***Joel Makori Onsando & 2 Others v IEBC & 3 Others*** **Kisii High Court Election Petition 3 & 7 of 2017 (consolidated)** where the election court ruled that failure to enjoin Deputy governor was fatal to the petition; and ***James Kirimi Karubiu v IEBC & Another*** **Kerugoya Election Petition 3 of 2017** where the petition was struck out for failure to join the winner of the Kirinyaga senatorial election.

In the run up to the 2022 elections, it was proposed to amend the Election Petition rules to provide clarity on this matter. It had been proposed to have Rule 2 revised to read:

> *"Respondent" includes the person whose election is the substance of the petition and, in case of petition in respect of a county governor, includes the deputy governor;*

However, amendments to the rules were not adopted prior to 2022 elections, particularly due to the late drafting of these amendments.

Therefore, in 2022, election courts appeared to oscillate still between the two positions. In ***Dziwe Pala Zuma & Another v The Election Boundaries Commission & 2 Others*** **[2023] eKLR,** the High Court took the view that failure to join the deputy governor was not fatal to the petition, even though it was desirable that he be made a party to the same. The court distinguished between various parties in suits, including a 'formal party', a 'proper party' a 'necessary party', and a 'necessary or indispensable party'. The court defined formal parties as 'purely nominal ones and are procedural vehicles who have no real interest in the controversy, such as the next friend who brings a suit to enforce the rights of an infant'.[69]

Proper parties are those 'whose interest may be affected by the judgment, but whose presence is not essential in order for the court to adjudicate the rights of others. Interested parties are also treated under this category where it is shown such party has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'.[70]

69 At para 81 of the judgment.
70 At para 82 of the judgment.

Necessary parties were defined as 'those whose interests in the subject matter of the controversy are separable, and whose absence would not prevent the granting of the proper relief to the parties actually joined; but who should be made parties, if their joinder is feasible, to avoid a multiplicity of actions and to effect a complete adjudication of the controversy'.[71]

Finally, the court defined indispensable parties as 'those whose interests in the subject matter are so interrelated that the court cannot proceed in their absence, since a complete, effective and equitable adjudication of the controversy may not be made unless they are before the court. Further, an indispensable party is a party that must be included in a lawsuit in order for the court to render and execute a final judgment'.[72] Having assessed these categories against Rule 2 of the Election Petition Rules which defines a Respondent, the court asserted as follows:

> *105.The ultimate test of the law, nevertheless, is whether the Deputy Governor is a party who has such an interest in the controversy or subject matter that a final adjudication cannot be made, in his absence. Put in another way, whether his absence, makes it impossible for an effective, complete or equitable determination of the controversy between the parties already before the court…*
>
> *108. I am aware that the DG has a legitimate interest in the election petition which makes him a necessary party. It may also be desirable that he is made a party, if he applies. However, under the applicable election law, his absence does not render the proceeding incapable of effective, complete or equitable determination by the court between the parties before it, except where he brings himself to the test of rule 2 of the Election Rules.*

The court therefore declined to strike out the petition for want of joinder of the deputy governor. Similarly, the election court in ***Hussein Tuneya Dado v Dhadho Godhana & 2 Others*** **Garsen Election Petition No. E001 of 2022,** found that the non-joinder of the Deputy Governor was not fatal to the petition. The election of the Governor and Deputy Governor, while intertwined, did not mandate the Deputy Governor's inclusion in the petition unless specific allegations were made against him. It, therefore, dismissed the application to strike out the petition.

71 At para 85 of the judgment. The court drew this definition from Henry G. McMahon, The Joinder of Parties in Louisiana, Louisiana Law Review, Volume 1/Number 1, Legislative Symposium: The 1958 Regular Session, December 1958.

72 At para 86 of the judgment.

On the contrary, in ***Abdullahi v IEBC & 3 Others*** **Garissa HCEP E006 of 2022,** the petition struck out for failure to join deputy governor as it was a violation of his fair hearing rights and therefore fatal to the petition. Echoing the sentiments expressed by Korir J in ***Samuel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 Others*** [**2018**] **eKLR** and Thande J in ***Mwamlole Tchappu Mbwana v IEBC & 4 Others*** [**2017**] **eKLR**, it was emphasized that the Governor and Deputy Governor were intertwined in the election process. Consequently, any action to remove the Governor, such as through an election petition, would also affect the Deputy Governor. In line with this understanding, it was asserted that the Deputy Governor should be joined as a party in an election petition against the Governor to ensure their right to be heard, as guaranteed under Article 50 of the Constitution of Kenya. Similarly, failure to join and serve the IEBC was ruled fatal in ***Juma v Nyongesa, Budalangi Constituency Returning Officer & 2 others*** **Election Petition E001 of 2022.** The Petitioner, relied on the Supreme Court's jurisprudence in ***Mable Muruli v Wycliffe Ambetsa Oparanya*** **[2016] eKLR** for the argument that the IEBC and the RO are one and the same party as the Returning Officer *is* the IEBC when conducting the relevant duties under the Constitution, the Elections Act and the Regulations made thereunder, the election. The election court, however, distinguished the ***Muruli*** case above, and asserted that it was not applicable in the circumstances of the case.

> *71. This court takes judicial notice of the fact that ROs are ordinarily not permanent employees of the Commission and are officers hired, on a temporary basis, to perform specific functions during the elections. This means that the tenure of an RO comes to an end at the conclusion of the elections. I therefore find that it is not conceivable that an RO will still be part and parcel of the Commission, for purposes of responding to allegations made in a petition, long after the end of his contract term with the IEBC. No material was placed before this court to show that the RO herein is still an employee of the IEBC or that he brought the petition to the attention of the commission.*
>
> *72. It is worthy to note that the petition herein challenges the manner in which the elections for the member of parliament for Budalangi Constituency was conducted. As clearly shown in the provisions of article 88(4) of the Constitution, the body mandated to conduct such elections is the IEBC and not the RO who is merely one of the many temporary employees appointed by the Commission to perform its activities on the ground during the elections. I am therefore not persuaded by the Petitioner's argument that the RO is one and the same as the Commission.*

With tremendous respect to the court, it appears that this decision was made without a proper appreciation of the standing of Returning Officers. Returning Officers are not temporary staff of the Commission, but rather permanent staff who during elections are deployed as ROs, but who otherwise serve as Constituency Election Coordinators during the rest of the electoral cycle. The list of County Election Coordinators published on the IEBC website confirms this position. The substratum of the court's decision is therefore not faulty.

On whether failure to include the IEBC as a Respondent in the petition could be deemed to be a procedural technicality or a substantive issue that went to the root of the petition and the court's jurisdiction, the court found that, according to section 76(4) of the Elections Act, election petitions can only be amended within a strict 28-day window following the declaration of election results. This timeframe is statutory and cannot be extended. The Petitioner filed the petition on the last day of this period and sought to amend it 22 days after the window had closed, making the amendment untimely. The court emphasised that the inclusion of the IEBC is a substantive requirement, as the commission is essential to address allegations regarding the electoral process. Without the IEBC as a Respondent, the petition was deemed defective and non-compliant with election laws. As a result, the court struck out the petition, highlighting that electoral law is a special jurisdiction with strict adherence to statutory timelines and requirements, leaving no room for discretion typically available in civil suits.

The question of joinder has now been addressed by the Court of Appeal, offering jurisprudential clarity on how want of joinder will be addressed in the future.

In ***Mutula Kilonzo Jr v IEBC & 2 Others*** **Election Petition Appeal No. E002 of 2022,** the Court of Appeal found the failure to join deputy governor fatal to the petition. The appellate court, while noting that the law did not prescribe joinder of the deputy governor, ruled that the spirit, intent and purport of the Constitution and rule 2 of the Election Petition Rules militated in favour of the joinder of the deputy governor as a substantive party to an election petition. The court emphasised that the deputy governor ought not be considered a bystander, since the outcome of an election petition would affect them. Fair hearing therefore demanded that they be joined as a party, notified of the proceedings and given a chance to participate. To hold otherwise would be to violate the principles of natural justice and considered illogical, unfair and unjust.

The Court of Appeal therefore reached the conclusion that a petition that failed to join the deputy governor was a violation of natural justice principles, the letter and spirit of the Constitution, rendering it defective for all intents and purposes, and making it liable to be struck out.

It is arguable that this finding is applicable to every respondent within the meaning of Rule 2 of the Election Petition Rules 2017. Therefore, it is likely that failure to join a respondent will in the future lead to a petition being struck out.

Misjoinder of parties

An essential component of fair hearing is that a person who is affected by a decision is given an opportunity to be heard before a decision can be made.

The election petition rules also require that Petitioners include as Respondents any persons whose conduct is complained of, and it has been set out above, failure to join a person whose conduct is complained of by a Petitioner renders the petition fatally defective.[73] What is the effect of joining persons to the petition whose conduct is not complained of or is not related to the issues in controversy in the petition?

In ***Dr Evans Odhiambo Kidero & Another v IEBC & 4 Others*** **Homabay Election Petition E001 of 2022**, the election court was asked to rule on whether there had been a misjoinder of the Orange Democratic Party (ODM) in the election petition where the complaint that the Petitioners had against the party related to the issuance of a direct ticket to the 3rd Respondent, to the disadvantage of other aspirants for the same party. It was contended that the 5th Respondent had been wrongly joined to the petition, seeing as the allegations against the party pointed to a pre-election dispute, falling outside the jurisdiction of the election court. The court, in determining whether there had been a misjoinder, referred to Rule 2 which defines a Respondent to include any person whose conduct is complained of in relation to the election. Since allegations had been made directly against ODM which were the subject of the court's determination in the petition, the court declined to find that ODM had been wrongly joined to the petition.

73 See *Mutula Kilonzo Jr v IEBC & 2 Others* Election Petition Appeal No. E002 of 2022.

In ***Abdullahi v Independent Electoral & Boundaries Commission & 3 Others*** **Election Petition E006 of 2022,** the court ruled that despite the wrong returning officer being cited as a Respondent in the petition, the misjoinder was not fatal to the petition. In this case, the Petitioner had cited Anthony Njoroge Douglas as the County Returning Officer in the petition. Despite this error, evidence showed that Douglas was not directly involved in the proceedings, as he held the position for Nyamira County, not Wajir County. However, this misidentification was deemed inconsequential, as the actual County Returning Officer for Wajir County was properly involved.

In the view of the court, from the evidence placed before it, the appearance of Anthony Njoroge Douglas as part of the description of the 3rd Respondent was as a result of careless copy pasting which did not prejudice anyone, seeing as the 3rd Respondent was actually the County Returning Officer and the description appeared in the petition as the 3rd Respondent. The court therefore found that the name Anthony Njoroge Douglas appeared erroneously on the petition and did not render the petition defective. Nevertheless, the petition was ultimately struck out for failure to particularise election results as required by the Rules.

Failure to file witness affidavits

Affidavit evidence is crucial in the determination of an election petition as they form the basis for auditing the complaints raised in a petition to determine whether an election was conducted in accordance with the Constitution and electoral law. Rule 12 of the Election Petition Rules provides that each witness is required to swear an affidavit which forms part of the record at the hearing and is treated as the deponent's evidence in chief for purposes of examination and cross-examination. Since the adoption of the 2010 Constitution and the repeal of the National Assembly and Presidential Elections Act 1969, trial by ambush, which required that sealed evidence be availed to the court and only when witness took the stand would the contents of the evidence be revealed, is no longer acceptable in election disputes. Every witness who intends to testify, therefore, must first have filed their witness affidavit in support of the petition before they can be allowed to take the stand. Rule 12 of the Election Petition Rules 2017 requires that each person the Petitioner intends to call as a witness file an affidavit, that the affidavit be filed together with the petition and the details that ought to be contained in an affidavit filed together with an election petition. Nevertheless, the parties may, by consent, accept not to cross-examine the deponent but have their evidence admitted as presented in the affidavits.

In ***Walubengo v Independent Electoral and Boundaries Commission & 2 others*** **Bungoma Election Petition E002 of 2022,** the court was asked to rule on whether witnesses could testify in support of the Petitioner's case without prior filing of affidavits. The witnesses had supplied witness statements which had been served a few hours before they were slated to take the stand to testify.

The court observed that any individual intended to be called as a witness by the Petitioner is required to swear an affidavit, which must then be filed and served alongside the petition, in accordance with the relevant procedural rules.

In the matter at hand, it was noted that the two proposed witnesses had executed witness statements dated 6 September 2022. However, these witness statements were not served contemporaneously with the petition and were only served shortly before the scheduled testimony—specifically, on the preceding night and the morning of the hearing.

The Petitioner failed to provide an explanation for choosing to have these individuals execute witness statements instead of sworn affidavits, despite the clear stipulations of the governing rules. The court interpreted these rules to mean that the qualification of a person to testify is contingent upon the prior swearing and filing of an affidavit. It emphasised that an affidavit and a witness statement are fundamentally distinct; an affidavit constitutes a statement made under oath, whereas a witness statement does not carry such formal attestation.

Regarding the possibility of admitting these witness statements and permitting the testimony despite non-compliance, the court referred to Rule 12(9) of the Elections (Parliamentary and County Elections) Petitions Rules 2017, which provides that, except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness has been filed as required. In this instance, the Petitioner neither sought the requisite leave of the court nor demonstrated sufficient cause for the failure to comply with the prescribed procedure.

The court further considered arguments invoking various constitutional provisions to justify overlooking the procedural irregularities. It concluded that such constitutional provisions were not intended to override established procedural rules and that adherence to procedure is essential to the administration of justice. The court asserted that procedural requirements may only be set aside in instances where sufficient cause is shown, which was not the case here.

Additionally, the court underscored the importance of timeliness in election petitions, noting that pre-trial procedures had been conducted in October 2022 and hearing dates had been set accordingly. The Petitioner had ample opportunity to acquaint themselves with and adhere to the applicable laws and procedures or to seek appropriate relief from the court.

Consequently, the court was not persuaded that there was sufficient cause to allow the two witnesses to testify, given their non-compliance with Rule 12. As such, it ruled that the two proposed witnesses did not qualify to take the witness stand and their testimony was disallowed.

Timelines and timeliness

The resolution of electoral disputes remains a time-bound exercise, with both the Constitution and electoral legislation (and restated in the election petition rules) mandating a set period for filing as well as hearing and determination of petitions.[74] The timelines for filing petition, being set in the Constitution and legislation, are not open to extension. This is because failure to abide by these timelines has implications on whether election courts abide by the constitutional imperative to hear and determine electoral disputes within the timeframes fixed by the Constitution. Timelines for filing and serving petitions and appeals are generally considered to be cast in stone.

The strictness of these timelines stems from the constitutional requirement for the prompt resolution of electoral disputes as outlined in Article 87(1) of the Constitution. Similarly, the African Union, in Article 17(2) of the African Charter on Democracy, Elections, and Governance, has emphasised that the creation and strengthening of national mechanisms to resolve election-related disputes swiftly is crucial for ensuring transparent, free, and fair elections. Timely resolution of electoral disputes is a constitutional principle, as it underpins the people's right to exercise their sovereignty under Article 1. The High Court sitting on appeal in ***Nderitu Fidelis Wangui & Another v Margaret Njeri Mwaura & 3 Others Nyeri Appeal No 1 & 4 of 2022 (consolidated)*** allowed an appeal against a decision of an election court which allowed an amended petition to be filed 40 days after the gazettement of the party list. Since petitions are not allowed to be amended outside the 28-day period for filing, the appellate court found that the election court ought not to have allowed the amended peti tion to proceed to hearing.

74 Articles 87 (2), 105 (2) and 140 (2) of the Constitution, sec 75 (2), 75 (4) (b) & 85 A (b) of the Elections Act, Rule 4 of the Election Petition Rules 2017.

In relation to filing of an application to be substituted as a Petitioner, the courts have ruled that whereas election petitions are public interest litigation, compliance with timelines is still required for an application for substitution to be favourably considered. Therefore, where an application for substitution is filed out of time, and no leave is sought to regularise the same, it will not be allowed. This was the finding of the court in **K*uria v Independent Electoral and Boundaries Commission (IEBC) & 2 others; Gichigo (Subsequent Party)* (Election Petition E001 of 2022).**

Failure to serve the petition to Respondents within 15 days and failure to deposit security for costs within 10 days make a petition liable to be struck out (***James Babira Ndeda v. IEBC & 2 Others*** **Vihiga High Court Election Petition No. E001 of 2022)**.

Even where there is discretion to extend time, a basis must be laid for the exercise of the court's discretion to extend time. The Supreme Court in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*** **(2014) eKLR** laid down the following principles for consideration in applications for extension of time:

a. *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;*
b. *a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
c. *whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
d. *whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*
e. *whether there will be any prejudice suffered by the Respondents if the extension is granted;*
f. *whether the application has been brought without undue delay; and*
g. *whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

As discussed in the section on appeals below, there still appears to be some duality on extension of time where filing of appeals is concerned.

Failure to particularise election results

Rule 8 (c) of the Election Petition Rules 2017 requires a Petitioner to state 'the results of the election, if any, and however declared' in their petition. The language of Rule 8 is couched in mandatory terms. However, Rule 5 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides that it is up to the election court to determine the effect of any failure to comply with the Rules in accordance with the provisions of Article 159 (2) (d) of the Constitution.

Failure to particularise election results in election petitions has generated divergent judicial interpretations under the 2010 Constitutional dispensation. One school of thought, rooted in the decision of the Court of Appeal in ***John Mututho v Jayne Kihara & Others*, Nakuru Civil Appeal No 102 of 2008 (unreported)**, considers the requirement to declare election results as mandatory as contained in Rule 8 of the Election Petition Rules. Non-compliance, such as failing to detail the results, is deemed fatal to a petition. This perspective was endorsed by Onyancha J in ***Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others*** **[2013] eKLR** and Karanja J in ***Charles Maywa Chedotum & Another v Independent Electoral and Boundaries Commission & 2 Others, Kitale High Court*** **Election Petition No 11 of 2013 (unreported)**.

Conversely, another school of thought, championed by Majanja J in ***Caroline Mwelu Mwandiku v Patrick Mweu Musimba & 2 Others*** **[2013] eKLR** and ***Wavinya Ndeti v Independent Electoral and Boundaries Commission & 4 Others*** **[2013] eKLR**, views the failure to provide results as a procedural technicality that should not impede substantive justice. This school stood for the proposition that this failure was not fatal since the IEBC, under the then Rule 21(b) was required to supply election material to court within 14 days of being served with petition (the said rule was removed from 2017 Election Petition Rules).

Moreover, it was argued that substantive justice was required to be done under the post-2010 dispensation and therefore petition should not be struck out unless it is so hopelessly defective that it could not communicate the Petitioner's complaints and prayers at all. This approach, which was supported by Githua J in ***Sarah Mwangudza Kai v Mustafa Idd Salim & 2 Others*** **[2013] eKLR** and Lesiit J in ***Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 Others*** **[2013] eKLR**, allows for the continuation of petitions even when such particulars are omitted, so long as no significant injustice occurs.

In the 2017 electoral disputes, courts continued to grapple with these perspectives. For instance, the petition in ***Jimmy Mkala Kazungu v Independent Electoral and Boundaries Commission & 2 Others*** **[2017] eKLR** was struck out due to non-compliance with Rule 8(1), despite the results being included in an affidavit. However, other cases, such as ***Washington Jakoyo Midiwo v Independent Electoral and Boundaries Commission & 2 Others*** **[2017] eKLR** and ***Thomas Matwetwe Nyamache v Independent Electoral and Boundaries Commission & 2 Others*** **[2017] eKLR**, took a more lenient approach, declining to strike out petitions for similar non-compliance.

The Court of Appeal in ***Martha Wangari Karua v the Independent Electoral and Boundaries Commission & 3 Others*** **[2018] eKLR** provided a nuanced view, acknowledging the conflicting jurisprudence. While it recognised the mandatory nature of declaring results, it emphasised that non-compliance must be assessed based on whether it prejudices the Respondents' rights or impedes the court's ability to adjudicate the petition. In this particular case, the results were contained in the supporting affidavit but not in the body of the petition. Seeing as the results were nevertheless supplied to the court and the Respondents, no prejudice was occasioned. The appellate court underscored the importance of balancing procedural rules with the principles of substantive justice, particularly in the context of public interest litigation like election petitions.

This dichotomy continued in the 2022 cycle. In ***Abdullahi v Independent Electoral & Boundaries Commission & 3 Others*** **Election Petition E006 of 2022**, it was noted that the Petitioner only mentioned in the filed election petition documents the number of votes obtained by the 4th Respondent, the applicant whose election was contested.

The court noted that Rule 8 (1) (c) of the Election Petition Rules mandates the inclusion of election results in an election petition. However, there was no indication in the pleading to show who contested against the 4th Respondent and their respective vote counts. Thus, the court ruled that there was no basis for a witness to testify that the 4th Respondent's declaration as the winner was erroneous and needed correction by the court. The court relied on the reasoning in the case of ***Omari Juma Mwakamoli v IEBC & 2 Others*** **[2017] eKLR**, as articulated by Njoki Mwangi J. It underscored that the failure to plead election results deprived the Petitioner of crucial information and hindered the Petitioner's burden of proof, rendering the petition defective.

Moreover, the court took cognisance of the Supreme Court's emphasis in ***Hassan Ali Joho & Another v Suleman Said Shabal & 2 Others*** **[2014] eKLR** of the significance of pleading quantitative election results, stating that they form the basis for election challenges and enable a clear understanding of the election outcome. Consequently, the Petitioner's failure to plead the complete quantitative results of the election undermined their ability to substantiate why the 4th Respondent's victory was invalid. This omission constituted a fatal defect in the petition, rendering it untenable.

On the contrary, in ***Ong'era Rogers Moturi v IEBC and 2 others*** **Nyamira Election Petition No. E001 of 2022,** the election court declined to strike out the petition on account of failure to particularise election results, arguing that it was not fatal to the petition. The court cited the decision of the election court in ***Washington Jakoyo Midiwo v Independent Electoral and Boundaries Commission & 2 Others*** **[2017] eKLR,** where the court cited as follows in relation to whether the Respondents were prejudiced by the omission:

> *The results of this election are therefore on the record. They are also known to the 3rd Respondent and his Advocate's fear that there will be no results to compare the evidence with has been put to rest. In addition, it is my finding that the 3rd Respondent has in no way been prejudiced as even before bringing this Application he had filed his response and evidence meaning that he very well understood the case facing him. It was also argued that as the petition cannot be amended the only solution is to strike it out. While I agree that the rules would not allow for amendment of this petition so as to remedy the omission it is my finding that that in itself is not reason enough to strike out the petition. The results now form part of the record of the petition and an amendment of the petition would not be necessary.*

The court was also guided by the dicta of the Court of Appeal in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others*** **[2013] eKLR** where the appellate court held that deviations and lapses in procedural form that do not affect the jurisdiction of the Court, the core of the dispute, or cause injustice or prejudice to the opposing party, should not be treated as serious offences. Instead, the Court should focus on delivering justice, avoiding the harsh penalty of striking out pleadings for minor procedural errors that do not result in unfairness.

Scrutiny and recount

Since the first EDR cycle in 2013, numerous Petitioners have sought the grant of an order of scrutiny and recount. The rationale for scrutiny is two-fold: first, scrutiny is the basis for establishing the validity and number of votes that a candidate garnered, thereby ensuring that a candidate only had an electoral advantage based on valid votes. This is the quantitative aspect. Secondly, scrutiny has a qualitative aspect, i.e. it makes it possible to impugn an election based on electoral malpractices, misconduct and non-compliance with the law.

Scrutiny can either be granted on application by a party or at the instance of the court *suo moto*.[75] While recount is concerned with the number of votes, recount seeks to establish the number and validity of votes cast for each candidate in an election. Scrutiny, as defined in **Halsbury's Laws of England (1990, Fourth Edition, LexisNexis)**, is a "court-supervised forensic investigation into the validity of the votes cast in an election." It allows for a deeper inquiry into issues such as electoral misconduct, which is not permissible in a recount. Although scrutiny often involves conducting a recount, a recount does not necessitate scrutiny.

i. Foundational principles on scrutiny and recount

It is already established that scrutiny is not granted as a matter of course. Rather a basis must be laid for an order of scrutiny before such an order can be made. This is to avoid the use of scrutiny as a means of bolstering a Petitioner's weak case or using it as a fishing expedition.[76]

In addition to the principles set out by our courts on scrutiny, starting with those laid out in the often-cited decision of the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition 2B of 2014,** it was established that while an order for scrutiny may be sought at any stage of the petition, the grant of an order for scrutiny was discretionary and only to be granted if it assisted the court to arrive at a just and fair determination of the petition.

75 The law on scrutiny and recount of votes is set out in sections 80(4)(a) and 82 of the Elections Act, 2011 as read with Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

76 *Gideon Mwangangi Wambua & Another v IEBC & 2 Others*, Mombasa Election Petition No. 4 of 2013 (consolidated with Election Petition Cause No. 9 of 2013); *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR.

At all times, the reasons for the grant of the order had to be recorded. However, the party seeking recount was required to establish the basis for the grant of the order to the satisfaction of the court,[77] and even where this was done, scrutiny was to be confined to specific polling stations whose results were disputed or the validity of the vote was called into question.[78] In ***Raila 2 2017***, the court established that scrutiny could not be granted where it was not specifically pleaded and an order for scrutiny will fail if it is not supported by the evidence or where there are contrary averments in the petition.

A scrutiny report will not lead to the nullification of an election result unless it can be shown that it would result in the reversal of the candidate who was declared elected.[79]

Scrutiny cannot be granted at the appellate stage as the grant of an order of scrutiny is a matter of fact, outside the scope of the jurisdiction of an appellate court.[22] However, the findings of an election court on a scrutiny exercise, particularly failure to make reference to a scrutiny report in its findings, is properly within the jurisdiction of an appellate court.[80]

Where scrutiny is granted, an appellate court will not interfere with the election court's exercise of discretion unless it can be demonstrated that the order was not supported.[81] Even where an appellate court finds that an election court's decision not to grant scrutiny was unfounded, it cannot remit to a trial court or direct it to undertake scrutiny and recount after the expiry of the timeframes allocated by law for the hearing and determination of the dispute.[82]

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77 For other decisions on this principle, see *Mohamed Mahamud Ali v IEBC & 2 Others*, Mombasa High Court Election Petition 7 of 2017; *Apungu Arthur Kibira v IEBC & 2 Others*, Kakamega High Court Election Petition 6 of 2017; *Michael Gichuru v Hon. Rigathi Gachagua & 2 Others*, Nyeri High Court Election Petition 2 of 2017; and *Joseph Oyugi Magwanga & Another v IEBC & 3 Others*, Homa Bay Election Petition 1 of 2017.

78 For a similar position, see *Albeity Hassan Abdalla v IEBC & 2 Others*, Malindi High Court Election Petition 8 of 2017; and *Annie Wanjiku Kibeh v Clement Kungu Waibara & Another*, Nairobi Civil Appeal 20 of 2018).

79 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014; Clement Kungu Waibara v Annie Kibeh & Another, Supreme Court Petition 24 of 2018, at para 52.

80 Peter Gichuki King'ara v IEBC & 2 Others Nyeri Civil Appeal No. 31 of 2013.

81 Cyprian Awiti & Another v IEBC & 3 Others, Supreme Court Petition 17 of 2018.

82 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others Supreme Court Petition 2B of 2014; Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others Election Petition Appeal 6 of 2018; Annie Wanjiku Kibeh v Clement Kungu Waibara & Another Nairobi Civil Appeal 20 of 2018.

25 Robinson Simiyu Mwanga & Another v IEBC & 2 Others Kitale Election Petition No. 1 of 2017; Lemanken Aramat v Harun Meitamei Lempaka & 2 Others Supreme Court Petition No. 5 of 2014.

In 2022, the court added another pre-requisite of the grant of an order of scrutiny: availability of materials to scrutinise. In ***Arale v Independent Electoral and Boundaries Commission & 4 others*** **Garissa Election Petition E004 of 2022**, the court was asked to grant an order for scrutiny. Unbeknownst to the court, the election materials had been destroyed in when the CDF building in which they were stored was destroyed using a rocket lugged grenade, information which was within the knowledge of both parties. The court therefore ruled that an order for scrutiny and recount could not be made in the circumstances.[83]

ii. Effect of unpleaded irregularities revealed during scrutiny

One of the questions that arose for determination in the 2013 and 2017 election petitions was whether it was open to an election court to pronounce itself on irregularities that were revealed during scrutiny which went beyond the scope of the petition. Since it is trite law that a party is bound by their pleadings, to allow scrutiny to add issues beyond those pleaded would be tantamount to amending the petition outside of the prescribed timeframes, to the detriment of the Respondents. On the other hand, election courts questioned the propriety of ignoring non-compliance with the Constitution or electoral law/procedure when the same was brought to its attention in the Registrar's Report.

From the 2013 decisions, it was established in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others***, **Supreme Court Petition No. 2B of 2014**, that where scrutiny or recount revealed unpleaded electoral malpractices or irregularities, but the Petitioner failed to prove the allegations pleaded in the petition, the court could properly dismiss the election petition. While a Petitioner was obligated to specify disputed issues in their pleadings to argue irregularities after a re-tally, where the court independently ordered a recount and found new irregularities, any party could question these findings and the court would assess their impact on the results.[84] In ***Musikari Nazi Kombo v Moses Masika Wetangula & 2 Others*** **Election Petition No. 3 of 2013,** it was held that an election court could not turn a blind eye on serious electoral malpractices or irregularities exposed by scrutiny or recount merely because such malpractices or irregularities were not pleaded; to do so would be a negation of Constitutional principles on resolution of electoral disputes.

83 At para 288.

84 *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR. This was upheld in the case of *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others* Nairobi Election Petition Appeal 6 of 2018.

In ***Mohamed Mahamud Ali v IEBC & 2 Others*** **Mombasa High Court Election Petition 7 of 2017,** the court, citing the Supreme Court decision in ***Justice Kalpana H. Rawal v Judicial Service Commission and 3 Others*** **[2016] eKLR**, found it could look into unpleaded issues based on the finding in the latter case that while the court would not determine or base its decisions on unpleaded issues, it could validly determine an unpleaded issue where evidence was led, and it appeared from the course followed at the trial that such unpleaded issue was left for the court to determine.

In ***Lenny Maxwell Kivuti v IEBC & 3 Others*** **Embu High Court Election Petition 1 of 2017,** the election court based its determination in part on its own observations over and above the report prepared by the Deputy Registrar on the scrutiny exercise. The court, having determined that it was within its jurisdiction to rule on unpleaded material revealed during a recount, and further that the revealed irregularities, viewed holistically, would affect the outcome of the election, found that the irregularities, errors or non-compliance during collating, counting and tallying fundamentally undermined the electoral process. Having found that the result could not be said to be accountable, verifiable or accurate, the court nullified the election and directed the IEBC to conduct a fresh election.

However, upon appeal,[85] the Court of Appeal disagreed with the election court's rationale. Citing precedent cases like ***Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others*** **[2013] eKLR** and ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*** **[2014] eKLR**, it reiterated that scrutiny and recount processes should not unearth new evidence not raised during the trial. Despite the trial judge's reliance on the ***2015 Wetangula Case***, the Court of Appeal clarified that it did not supersede the aforementioned precedents for two reasons: firstly, in the ***Okoth Obado*** case, the Court dealt with illegalities, such as treating and bribing of voters, not irregularities, and had stated it could address such issues when they arose during the trial. Secondly, the Court distinguished the ***Wetangula*** decision because the illegality had been pleaded, and evidence presented.

85 *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others* Nairobi Election Petition Appeal 6 of 2018.

The Court highlighted that only those irregularities pleaded during trial, or discovered with the Court's permission and with opportunity for questioning, could be considered in determining a petition. It further stressed the importance of scrutiny, emphasizing the burden of the Petitioner to demonstrate how any new irregularities affected the results. Ultimately, the Court found the trial judge erred by addressing matters not pleaded or argued before him. Similarly, in ***Walter Enock Nyambati Osebe v Independent Electoral & Boundaries Commission & 2 others*** **[2018] eKLR** the Court of Appeal held that:

> *In this appeal, the Appellant has shifted his focus from the allegations in his petition to the discrepancies and irregularities which he says have been revealed by the Deputy Registrar's report on scrutiny and recount that were not pleaded in his petition. Therefore, the foundation on which the Appellant's appeal is built is that the scrutiny and recount exercise that was undertaken pursuant to orders of the election court brought out or unearthed malpractices and irregularities, quite apart from those on which the Appellant had based his petition, on the basis of which the election court should have annulled the election. That foundation is weak in that the Appellant is in effect seeking nullification of the election on grounds that were not pleaded.*

Arising from the 2017 jurisprudence, therefore, the general rule therefore appeared to be that whereas the Court could deal with irregularities whenever they appear during a trial, parties were limited to their pleadings and the election court could only make a determination in respect of the issues which had been pleaded by the parties. Any new issues could only be introduced by amending the pleading within the timelines allowed by law.

Where scrutiny was granted *suo moto*, however, the Court was at liberty to form its own impressions on the irregularities revealed during the scrutiny exercise, but parties had to be given an opportunity to interrogate the new findings. The Court of Appeal also made it clear that the burden remained on the Petitioner to demonstrate how any newly discovered irregularities affected the results. This was established by the Supreme Court in ***Raila Amolo Odinga & another v IEBC & 2 others*** **[2017] eKLR (Raila 1, 2017)**, where the apex court emphasised that:

> *…a Petitioner who seeks the nullification of an election on account of non- conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds "to the satisfaction of the court" That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.*

Similarly, in 2022, the Court of Appeal took the same position in ***Garama v Karisa & 3 others*** **Malindi Election Petition Appeal 1 of 2023,** where it deprecated the trial court for relying on unpleaded irregularities revealed during scrutiny. While the finding of the court was eventually upheld and the appeal dismissed, the court found that it had been improper for the election court to have taken into account allegations not originally pleaded. In the words of the court at para 60-63, the appellate court ruled:

> *It is therefore our view and we hold that the Learned Judge ought not to have taken into account the allegation that the results for Majenjeni were relied on instead of the results of Mjanaheri. This position also applies to the findings of the Learned Trial Judge as regards the allegation of numerous unstamped counterfoils of the ballots which was relied upon as evidence of ballot stuffing. That the report of scrutiny cannot be the basis for impugning election results when the revelations of the report did not form part of the pleadings in the petition was appreciated by this Court in* ***Walter Enock Nyambati Osebe v Independent Electoral & Boundaries Commission & 2 others [2018] eKLR****…*
>
> *63. It is therefore our view and we hold that the Learned Judge ought not to have taken into account the allegation that the results for Majenjeni were relied on instead of the results of Mjanaheri. This position also applies to the findings of the Learned Trial Judge as regards the allegation of numerous unstamped counterfoils of the ballots which was relied upon as evidence of ballot stuffing.*

Likewise, the election court in ***Abass Ibrahim Kafow & another v Independent Electoral and Boundaries Commission & 2 Others*** **Election Petition E003 of 2022** nullified an election result based on unpleaded irregularities revealed during a scrutiny conducted at the instance of the Petitioner. On appeal in ***Abdikadir Hussein Mohammed v Abass Ibrahim Kafow & 3 Others*** **Nairobi Election Petition Appeal No E004 of 2023**, the Court of Appeal evaluated the impact of the irregularities revealed during scrutiny on the results declared to determine whether the election court had erred in nullifying the election result.

The Court of Appeal reviewed the Supreme Court's jurisprudence in ***Abdirahman Ibrahim Mohamed v Mohamed Ahmed Kolesh & 3 Others*** **Petition No 26 of 2018** where the Supreme Court found that the court could take into consideration matters that fall outside pleadings so that a court is not seen to condone illegalities. In ***Lenny Maxwell Kivuti v IEBC & 3 Others*** **[2019] eKLR,** the apex court had ruled that scrutiny was not meant to be a fishing expedition and were the court to

have the liberty of making conclusions from the scrutiny report that are not based on pleadings, it would open a pandora's box whereby courts of law would be turned into an automatic sounding board for election losers. It is a cardinal rule that at all times parties must be bound by their pleadings. In the ***Kivuti*** case, the application for scrutiny had been made in respect of specific polling stations and serious unpleaded irregularities which were not pleaded were revealed, which the court could not ignore.

In finding that the trial court erred, the Court of Appeal considered that submissions ought to either solidify or controvert the claims on which the scrutiny was based, not introduce new evidence beyond the scope of the petition. The Supreme Court jurisprudence on how to deal with unpleaded matters revealed during scrutiny demonstrated that the election court must strike a balance between allowing trial by ambush and the court not being seen to condone illegalities. Therefore, in the ***Abdikadir Hussein Mohammed*** appeal,[86] while the Petitioner had in the application for scrutiny made reference to scrutiny of the KIEMS kit, the appellate court noted that no issues were raised regarding discrepancy in voter turnout or the use of the manual register to enable the IEBC to respond to the discrepancies between the forms and the KIEMS kit.

While the irregularities revealed during the scrutiny were serious and could not be ignored, the Court of Appeal took the view that it would have been more balanced had the election court put the adverse party on notice so as to prepare a response. In assessing whether the irregularities revealed were so serious as to warrant a nullification of the result, the Court of Appeal noted that no merit was found in the Petitioner's six complaints of irregularities of violence, changing of polling stations, voter intimidation and voter assistance. The Petitioner had also never raised the issue of absence of counterfoils in two contested polling stations nor contested the votes garnered in those polling stations. The election was therefore conducted substantially in compliance with the law. While the election court had cited narrow margins between the petitioner and the candidate declared the winner, without a change in the final result, the margin of victory was immaterial as the Supreme Court found in ***Gatirau Peter Munya v Dickson Mwenda Kithinji*** **[2014] eKLR.** According to the Court of Appeal, variances revealed during scrutiny fell within allowable discrepancies and were not of such a magnitude as to warrant a nullification of the election.

86 *Abdikadir Hussein Mohammed v Abass Ibrahim Kafow & 3 Others* Nairobi Election Petition Appeal No E004 of 2023.

The Court of Appeal also found that the election court erred in discounting the votes cast after manual identification by relying only on the tally as per the KIEMS kit and without giving the IEBC a chance to adequately prepare and respond to that issue. The election court also did not explain why in carrying out scrutiny, two polling stations which had been sought scrutiny were left out and another was included which was not sought. Having found that there was no proof of a deliberate attempt by the IEBC to manipulate the election, despite the fact that the counterfoils from two of the contested polling stations were missing, the Court of Appeal overturned the finding of the election court nullifying the election on that basis.

Irregularities and illegalities in the conduct of elections

i. Failure to sign result forms

Flowing from the 2017 jurisprudence, the election courts established that while signing of result forms by agents was not mandatory, it is worth interrogating when none of the agents signs the forms.

A reading of Regulation 79(6) of the Elections (General) Regulations indicates that where the Presiding Officer does not have the forms signed by the candidates or their agents, there is need for the reason for this omission to be recorded, and that is the only way that the failure to sign by agents is excusable. This is because signing authenticates the result and indicates that election official and candidates/agents stand by the result declared. In ***Ahmed Abdullahi Mohammed & Another v Mohamed Abdi Mahamed & 2 Others*** **2018 [eKLR]**, the High Court, while noting that the failure to sign by an agent was excusable, noted that such an omission was only excusable where the Presiding Officer recorded the reasons for that failure as required by Regulation 79(4) for purposes of accountability, credibility and verifiability.

Upholding this position in ***Karisa v Independent Electoral and Boundaries Commission & 2 others; Kingi (Interested Party)*** **Malindi High Court Election Petition E001 of 2022,** the election court, upon finding that all the Forms 35A that were unsigned by the candidates or their agents without any reason being indicated by the Presiding Officer for the failure to sign were questionable, nullified the election on the basis that the results could not be said to be credible and verifiable.

> *55. From the foregoing, the Court finds that all the Form 35A's that were unsigned by the candidates or their agents and no reason was indicated by the Presiding Officer for the failure to sign were questionable. The results therein cannot be said to be credible and verifiable.*

Therefore, where result forms are not authenticated by the candidates or their agents' signatures, the results cannot be considered credible and verifiable, unless the presiding officer indicates the reason for their failure to sign. This position was upheld on appeal in ***Garama v Karisa & 3 others*** **Malindi Election Petition Appeal 1 of 2023.**

It is now established that where result forms are not authenticated by the candidates or their agents' signatures, the results cannot be considered credible and verifiable unless the Presiding Officer indicates the reason for their failure to sign.

Moreover, the Court of Appeal took issue with the alterations made to the result forms at the tallying centre by the presiding officer without comments being made on the forms as to the alterations. This, taken together with the fact that only some of the polling agents witnessed the recount and cancellation and there was no indication of which agents were present was taken as an affront to the finality of the vote counting at the polling station.[87]

ii. Re-opening of ballot boxes after declaration of results

The finality of results declared at the polling station as established in the ***Maina Kiai*** case has been cited as the basis for not re-opening results declared at the polling station. As the court found in ***Karisa v Independent Electoral and Boundaries Commission & 2 others; Kingi (Interested Party)*** **Malindi High Court Election Petition E001 of 2022,** even without reliance on the ***Maina Kiai*** case, there was nothing in the Regulations 81, 83, 86 or 93 of the Elections (General) Regulations that gave authority to reopen ballot boxes once sealed at the polling station without an order of the court. This issue was first adjudicated upon in ***Ahmed Abdullahi Mohamed &Anor v Hon Mohamed Abdi Mohamed & 2 Others*** **Election Petition No 14 of 2017 eKLR,** where the court ruled that any attempt by a Returning Officer to rely on internal manuals such as the Training Manual and Guide for Returning Officers or the guidelines in the Polling Station Diary (PSD) as a basis for breaking the seals and re-opening the ballot boxes was an irregularity. The court asserted that it was not open to an election official to arrogate to themselves power they did not have under the law, neither could the law be amended through internal manuals.

87 At para 58.

Therefore, where there was need to amend a procedure contained in law, it was necessary for the amendments to be tabled in Parliament for enactment. Any opening of the ballot boxes after they have been properly sealed at the polling station was thus act ultra vires. Where there was no court order validating the opening, such an act could not be sanitised even by consensus among electoral officers and agents/candidates. This was so because the voting process was an expression of the will of the people and once the act of voting was finalised, no one was allowed to tamper with the material used to express that sovereign will, unless authorised by a court or by the law.

Therefore, in ***Karisa v Independent Electoral and Boundaries Commission & 2 others (supra),*** the court found that the conduct of a recount by the Returning Officer at the tallying centre contradicted the finality of polling station results as contained in the ***Maina Kiai*** case, and deemed the opening of the ballot box a serious irregularity, sufficient to nullify that election result. It was inconsequential that 14 agents and chief agents had consented to the opening of the ballot box to retrieve the Form 35A and to the recount. This irregularity was particularly concerning because there had been an anomaly with the Petitioner's agent being forced to sign a blank Form 35A, which had resulted in an interchange of the results of the Petitioner and 3rd Respondent. The court deprecated the decision to not only do the recount but to also compel the Presiding Officer to alter the results at the Tallying Centre.

This position was upheld on appeal in ***Garama v Karisa & 3 others*** **(Malindi Election Petition Appeal 1 of 2023),** thus:

> *58 It is not in doubt that from the evidence of R1W2, that upon realizing the mistake that arose from Mapimo Youth Polytechnic stream 1, she directed that the seals on the ballot boxes be broken in order to retrieve the original Form 35A which had been locked in the ballot box. Thereafter, a recount was conducted, thereby resulting in the alteration of the results at the tallying centre. In our view the act of not only opening the ballot box but also proceeding to conduct a recount at the tallying centre was clearly against the decision in Maina Kiai Case that the votes counted at the polling station are final. The finality of vote counting at the polling station would make no sense if a window for recounting is left open under some circumstances at the tallying centre.… By opening the ballot box and carrying out a recount at the polling centre before ensuring that all the agents of the candidates were present, the election officials failed to meet the test of transparency.*

iii. Impact of irregularities on electoral result

Not every irregularity will be sufficient to vitiate an election result. While the standard for appraising an election is set out in Articles 81 and 86 of the Constitution, Section 83 of the Elections Act provides that an election will not be invalidated due to a failure to comply with any written law related to that election, as long as it can be demonstrated that the election was conducted in accordance with the principles set out in the Constitution and the relevant written law, or that the non-compliance did not affect the outcome of the election. In ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others***; **Presidential Election Petition No. 1 of 2017 [2017] eKLR**, the Court determined that the interpretation of this section required a disjunctive test. Consequently, it was necessary for a party to prove either that the election was not conducted in accordance with the Constitution and electoral law, or that the non-compliance had an impact on the election results.

In ***Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others*** **[2018] eKLR**, the Supreme Court affirmed that procedural and administrative errors are an inevitable aspect of any election. The court further underscored that the legitimacy and finality of election results would be compromised if elections were easily nullified on the grounds of such administrative errors, thereby eroding public confidence. Justice Mwongo in ***Abdirahman Adan Abdikadir & Another v Independent Electoral & Boundaries Commission & 2 Others*** **[2017] eKLR**, clarified that the petitioner must prove that irregularities affected the results in a way that did not reflect the will of the people. The evidentiary burden shifts to the Respondents once the petitioner establishes this.

In ***Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*** **Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated),** the Petitioners raised multiple instances of irregularities and illegalities during the electoral process. These included technological failures, alleged voter suppression, issues related to the printing and use of election materials, and various indiscretions by the IEBC. Specifically, they pointed to the fraudulent creation of parallel Forms 34A, failures of KIEMS kits, late opening of polling stations, discrepancies in result declaration forms, and allegations of election offences and ethical breaches by the Chairperson of the IEBC.

The court also scrutinised the claims made by the 1st and 3rd Petitioners regarding unexplainable discrepancies between the votes cast for the presidential election and other elective positions. The 1st Respondent, through Ashif Kassam, Executive Chairperson of RSM Eastern Africa LLP, provided detailed rebuttal evidence to these allegations. Kassam explained that the variances in vote counts were due to several factors, including the fact that prisoners and Kenyans abroad are only eligible to vote in the presidential election, leading to differences in the total votes cast for different positions. He also cited rejected votes and stray ballots, which the Petitioners had not adequately considered. Additionally, the postponement of gubernatorial elections in Mombasa and Kakamega counties and the exclusion of votes from specific polling stations contributed to the observed discrepancies. Kassam argued that when all these factors were accounted for, the discrepancies were significantly smaller than the Petitioners claimed and did not suggest systematic ballot stuffing or fraud. The court found these explanations to be reasonable and concluded that the discrepancies were neither unusual nor significant enough to undermine the integrity of the presidential election results.

Further, the court analysed the broader allegations of irregularities and illegalities made by the Petitioners. It was determined that the Petitioners bore the burden of providing cogent and credible evidence to substantiate their claims, requiring a standard of proof that lies between the civil standard of balance of probabilities and the criminal standard of proof beyond reasonable doubt. The court found that several of the Petitioners' claims, including those related to the use of Forms 34A, KIEMS kit failures, delayed opening of polling stations, and interference in ballot paper supply, lacked sufficient evidence to meet this standard. Similarly, the allegations of election offences and ethical breaches by the Chairperson of the IEBC did not meet the required threshold of proof beyond reasonable doubt.

Ultimately, the court concluded that the irregularities and illegalities cited by the Petitioners were not proven to the required standard, affirming the legitimacy of the election results.

Similarly, in ***Matoke Emily Kwamboka v IEBC & 2 Others*** **Nyamira Election Petition E004 of 2022,** while the court made a finding that an election offence may have occurred in the preparation of result forms for one polling station that needed further investigation, it declined to nullify the entire election, asserting that the various irregularities revealed did not substantially affect the outcome of the election.

> *282. There is no doubt that there were irregularities or anomalies in this election. The striking ones are the missing results for a whole stream at Embaro D.O.K Primary School 1 of 2 in Kitutu Masaba; or, even the lopsided campaigning by a former cabinet secretary in favour of the 3rd Respondent. There were also errors in transferring data from some forms 39A into the B and C series. I have also highlighted many cases of cancellations or alterations or overwriting in forms 39A. Some of those changes were countersigned by presiding officers; some of the affected forms were signed by agents.*
>
> *283. But I have also borne in mind the gargantuan task of holding a general election. Like I observed earlier, this disputed poll was a county-wide election. There were 643 polling stations in Nyamira spread out in four constituencies. 206,905 votes or thereabouts were cast for the seat of the County Woman Representative alone. In addition, the disputed poll was a general election for six electoral offices.*
>
> *284. When all those irregularities and anomalies are contrasted against the overall findings in the scrutiny report and the wide margin between the two leading candidates, I have reached the conclusion that they did not substantially affect the outcome of the election. The Petitioner did not prove to the required standard that the Respondents conspired to rig the election or subvert the will of the people of Nyamira. The Petitioner also failed to prove beyond reasonable doubt the allegations of a criminal nature such as bribery or complicity between the 3rd Respondent, certain government officials and IEBC personnel in contravention of section 6 of the Election Offences Act.*
>
> *285. However, I find that malpractices of a criminal nature may have occurred at Embaro D.O.K Primary School stream 1 of 2 in Kitutu Masaba. And I will issue an appropriate order under section 87 (3) (a) & (b) of the Elections Act.*

While the Supreme Court declined to find that the irregularities identified in the presidential election petition were sufficient to nullify the result, the Court of Appeal, referring to the apex court's decision, acknowledged that, in certain circumstances, multiple minor irregularities could collectively lead to the nullification of election results, especially in cases with a negligible margin. In upholding the decision of the election court that had nullified the election in Magarini Constituency, the appellate court noted in ***Garama v Karisa & 3 others*** **(Malindi Election Petition Appeal 1 of 2023):**

> *75…We reiterate that we agree that taken singularly, the said irregularities may not have affected the outcome of the elections. However, in determining whether the irregularities committed did or did not affect the result, the court ought to adopt a holistic approach since it is not merely the numbers that count. As the Supreme Court appreciated, the perception of the electorates also matters.*
>
> *76.To our mind, in a case where several irregularities, though minor on their own, are committed coupled with a major one such as the unlawful reopening of ballot boxes and conducting a recount in the absence of all the agents and without countersigning the alterations arising therefrom, that may, where the margin is negligible, be, in our respectful view, a basis for nullifying the results.*

In ***Dziwe Pala Zuma and Suleiman Ali Mwanguku v IEBC and 2 Others*** **Mombasa Election Petition E002 of 2022**, the court reiterated the necessity of proving that alleged irregularities affected the election outcome to the extent that it did not reflect the will of the people.

iv. Failure to deposit security for costs at the Court of Appeal

While section 78 of the Elections Act makes it clear that no further proceeding shall be taken in an election petition where security for costs is not deposited within 10 days, no mention is made of security for costs at the CoA. Security for costs at CoA is therefore addressed only by Rule 27 of the Court of Appeal (Election Petition) Rules 2017. CoA can therefore grant extension for deposit of security, but only where good cause is demonstrated why a party should get discretion exercised in their favour. In ***Njomo v Waithaka & 2 others*** **(Election Petition Appeal (Application) E002 of 2023),** the Court of Appeal, which acknowledging the discretion under Rule 17 to extend time, gave the following parameters for the exercise of this discretion:

> *26. The basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, and the nature of the case only to mention but some. Ordinarily, these facts are inter-related; they are not individually decisive. An unsatisfactory explanation for any period of delay will normally be fatal to an application…*
>
> *28…the Appellant failed to comply with this Court's directions issued on 14th April, 2023, 2nd May, 2023, and on 5th June, 2023, requiring him to deposit security for costs in court. Failure by the Appellant to comply with the court's directions is, in our view, sufficient to disentitle the Appellant the discretion of this Court.*

Where there is a blatant disregard of court orders directing the deposit of security, this disentitles an applicant from the exercise of the court's discretion.[88]

The place of technology in elections

As indicated in the background section of this text, the use of technology in elections is mandated by the Elections Act. Section 44 of the Elections Act requires the IEBC to 'develop a policy on the progressive use of technology in the electoral process'.

The integrated system that includes biometric voter registration, biometric voter identification and electronic result transmission system is what is referred to as the Kenya Integrated Elections Management System (KIEMS). For practical purposes, whereas BVR is applied prior to the voting day, EVI is used during balloting/voting day and ETR is used for transmission of results after tallying. At present, it is only in relation to the presidential election that electronic transmission of results is mandated.[89]

88 *Njomo v Waithaka & 2 others* (Election Petition Appeal (Application) E002 of 2023), para 32.
89 Section 39 Elections Act.

In ***Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)*** **Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)**, one of the issues for determination was whether the technology used by the IEBCS in the 2022 General Election met the required standards of integrity, verifiability, security, and transparency to ensure accurate and verifiable results was challenged by several petitioners. The petitioners argued that the technology did not meet the standards prescribed by Article 86 of the Constitution and section 44 of the Elections Act. They contended that the IEBC's technology was neither simple nor transparent, and that there were issues regarding the audit of the Register of Voters, late publication of the audit report, and potential manipulation by foreign technology providers.

In response, the IEBC defended its use of a hybrid system that combined biometric voter registration and identification with manual processes for counting and tallying votes. It stated that the electoral process was reinforced through audits and continuous improvements. The IEBC further explained that KPMG had conducted an audit of the Register of Voters, and the necessary remedial measures were implemented. The commission also asserted that the technology was subjected to public testing and simulation exercises to ensure efficiency and transparency.

The court found that the petitioners had provided sufficient evidence to shift the evidentiary burden to the IEBC, which responded with detailed explanations of the steps it had taken to address any shortcomings. The court was satisfied that the Register of Voters had been used effectively in the election, and that any issues identified in the audit had been successfully addressed. Additionally, the IEBC's use of the KIEMS system was deemed efficient despite localised failures, and the court concluded that there was no credible evidence of unauthorised access or manipulation of the system.

The court upheld the integrity, verifiability, security, and transparency of the technology deployed by the IEBC, finding that it met the necessary constitutional and legal standards. Voter suppression due to failure of KIEMS kits was also alleged in the **2022 *Raila Odinga*** petition. The court addressed the Petitioners' claims regarding the failure of KIEMS kits and other alleged irregularities in the election process. The Petitioners argued that these failures led to voter suppression and impacted the final result, citing issues such as late opening of polling stations, discrepancies in the declaration forms, and fraudulent creation of parallel Forms 34A. They also alleged ethical breaches by the Chairperson of the IEBC.

In response, the IEBC maintained that the failures of the KIEMS kits were resolved in a timely manner and did not significantly affect the overall voter turnout. They disputed claims of fraudulent activities and interference in the supply of election materials.

The court found that the Petitioners did not provide sufficient evidence to prove the alleged irregularities and illegalities to the required standard of proof. The failures of the KIEMS kits were not demonstrated to have had a significant impact on the election result, and the allegations of voter suppression and interference were not adequately supported by credible evidence. The court concluded that the irregularities cited were not substantial enough to affect the legitimacy of the election results.

Similarly, in ***Patrick Mweu Musimba v IEBC & 2 Others*** **Makueni Election Petition E001 of 2022,** the court declined to nullify the election result on the basis of failure of widespread failure of KIEMS kits, which the petitioner alleged resulted in voter suppression. The Court observed that the IEBC is tasked with ensuring that electoral technology is user-friendly, accurate, secure, verifiable, accountable, and transparent. Given that technology can fail, the law mandates the use of a complementary mechanism to address any issues that arise. The Court referred to the Court of Appeal decision in ***United Democratic Alliance Party v Kenya Human Rights Commission and 12 Others*** *(supra),* which approved the use of such complementary mechanisms, including manual voting, during the August 2022 general elections. This ensures that voters can still exercise their democratic rights even in cases where advanced technology fails.

The Court acknowledged that there was agreement that the KIEMS kits failed in Kibwezi West Constituency. Based on the Returning Officer's account of how the issue progressed and the actions taken to resolve it, the Court was satisfied that the Commission made genuine efforts to fix the malfunction. The Court also noted that the preparatory stages, as mentioned by the Petitioner, do not involve opening the KIEMS kits. Consequently, there was no evidence to suggest that the malfunction was deliberate or caused by inadequate training of IEBC staff. The failure was deemed a technical issue. Additionally, the Petitioner did not present convincing evidence to prove that there was external interference or manipulation of the KIEMS kits, with the Court dismissing the claim as speculative.

The Court further noted that the Supreme Court, in ***Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)***, had ordered a recount in Kibwezi West Constituency and concluded that the malfunction did not affect voter turnout. Lastly, the Court addressed the issue of voter suppression by confirming that the time lost due to the malfunction was compensated by an extension of polling time. In the same way, the court declined to nullify an election in ***Seth Ambusini Panyako v IEBC & 2 Others*** **Kakamega Election Petition E001 of 2022,** where it found that the petitioner had not adduced proof that failure of the KIEMS kit resulted in voter suppression.

It was noted during the review that there seems to be a confusion between the voting exercise being manual but the registration, identification, results transmission being electronic. The words of the High Court in ***Musimba v Independent Electoral & Boundaries Commission & 2 others*** **(Election Petition E001 of 2022) [2023] KEHC 1380 (KLR)** appear to point to the existence of an electronic voting system, yet voting in Kenya is manual:

> *105…It is trite law that voting exercise in general elections in Kenya is managed electronically save for exceptional circumstances where manual voting can apply through a complimentary mechanism of voter identification…[emphasis added]*
>
> *107. From the wording of Section 44 above quoted, the underlying words are that the commission is mandatorily under obligation to ensure that electronic voting system put in place is simple, accurate, verifiable, secure, accountable and transparent. The objective of this provision is to ensure credibility and integrity in the election process which is expected to be tamperproof…*
>
> *125. The significance of electronic voting cannot be underscored. It is convenient in engagement and time friendly. However, it is prone to fail hence the reason why parliament enacted Rule 26 of the elections (technology)regulations 2017.*

Appeals

There is a distinction in appellate jurisdiction between appeals arising from quasi-judicial mechanisms such as the PPDT or IEBC and appeals arising from election courts, particularly when it comes to second-tier appeals.

First, an appeal from the PPDT to the High Court both law and facts, with a final right of appeal on matters of law only.[90] Unlike the PPDT, there is no express right of appeal from a decision of the IEBC NDRC to the High Court.[91] However, the finding of the Supreme Court in ***Sammy Ndung'u Waity v Independent Electoral and Boundaries Commission & 3 others*** **[2019] eKLR** clarified the kind of jurisdiction the High Court exercises in relation to nomination disputes:

> *Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 164(3) and (6) of the Constitution. The High Court shall hear and determine the dispute before the elections in accordance with the constitutional timelines.*

The High Court therefore exercise either judicial review or supervisory jurisdiction over the IEBC.

In respect of political party disputes, the Court of Appeal is the final port of call. This right of appeal is established by the Political Parties Act. While previously the right of appeal extended all the way to the Supreme Court, now appeals from the decisions of the PPDT lie with the High Court, with a subsequent right of appeal to the Court of Appeal which is final. This was by dint of an amendment to section 41 (2) of the Political Parties Act. In ***Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others (Interested Parties)*** **Petition E043, E057 & E109 of 2022**, the High Court declined to declare Section 41(2) of the Political Parties (Amendment) Act, 2022 unconstitutional for truncating the right of appeal pertaining to matters arising from the Political Parties Dispute Tribunal to the Court of Appeal, and asserted:

90 Section 41 (2) Political Parties Act

91 *Dennis Gakuu Wahome Independent Electoral and Boundaries Commission & 3 others; Ford Kenya & 3 others* (Interested Parties) (Constitutional Petition E321 of 2022), para 157.

> *[311] The 1st and 2nd to 5th Petitioners raised issue with the above section. They claim that the amendment to section 41 of the Act is unconstitutional as it denies disputants the right of appeal to the Supreme Court. We do not agree with them on this because the right of appeal to the Supreme Court is not automatic as can be seen from the provisions of article 163(4) of the Constitution ….*
>
> *[312] ...We therefore find nothing unconstitutional about the above section since the jurisdiction of the Supreme Court of Kenya in hearing appeals is clearly set out in the Constitution and Supreme Court of Kenya Act. Appeals to the Supreme Court must be certified by the Court of Appeal or the Supreme Court to be matters of general public importance, as provided for by the law. The same applies to matters related to disputes arising from party primaries.*

Second, while there are two tiers of appeals for political parties' and IEBC nomination disputes, only one tier of appeal exists for election petition disputes arising from the Magistrates' Court. As discussed in the party lists section below, the Court of Appeal has established that it has no jurisdiction to entertain a second appeal in an election petition concerning the validity of the election of a member of the County Assembly. See also the decisions in ***Tomito Alex Tampushi v Patrick Sosio Lekakeny & 3 others*** **[2018] eKLR;** ***Maina Kiai & 12 others v Party & 5 others*** **(Election Petition Appeal (Application) E001 of 2023) [2024] KECA 62 (KLR);** ***Gedi v Gedi & 2 others*** **(Election Petition Appeal E018 of 2023) [2023] KECA 1336 (KLR).** In ***Isaac Oerri Abiri v Samuel Nyang'au Nyanchama & 2 others*** **2018 Election Petition Appeal No. 27 of 2018**, the Court of Appeal asserted as follows in relation to second tier appeals:

> *Since the promulgation of the 2010 Constitution that established the County Assemblies, concern over the existence of the many levels of elections disputes has given rise to significant discourse. In the more recent case of Wilson Ong'ele Ochola v Orange Democratic Movement and 3 Others, Civil Appeal No 271 of 2017, which involved a nomination dispute for the office of Member of a County Assembly, this Court described as "untenable" the multi-level of hearings and appeals established by section 41 (2) of the Political Parties Act which allowed for appeals from the Political Parties Disputes Tribunal (PPDT) all the way to the Supreme Court. The Court took the view that amongst other challenges, the provisions did not take into account the timelines prescribed in the Constitution and the Elections Act for the expeditious resolution of election petitions. The same disquiet also resonates with the concern over multi-level election petition appeals filed by members of the county assembly in the Magistrates' courts, and which seek to have appeals determined by the High Court, the Court of Appeal, and the Supreme Court. But in these cases, it cannot be gainsaid that whether a matter is appealable or not turns on whether the court has the requisite mandate*

> *or jurisdiction donated to it by either the Constitution or the law to entertain the matter…*
>
> *But that is not all. When the above provisions are analyzed alongside the corresponding mandate of the Court of Appeal, it would also seem that election appeals by members of the county assembly to this Court were neither contemplated nor permitted. We say this because, the Constitution, the Elections Act and the Election Petition Rules specifically delineate the nature of election appeals that are eligible to be heard and determined by this Court, and disputes for members of the county assemblies are distinctly absent….*

This position was affirmed by the Supreme Court in ***Hamdia Yaroi Shek Nur v Faith Tumaini Kombe & 2 Others*** **[2018] eKLR** and more recently in ***Josephine Wairimu Kinyanjui & 4 others v Mary Kalinga & 6 others*** **SC Petition (Application) No. E014 of 2024.**

The imperative to not entertain second tier appeals is borne out of the need to ensure expeditious resolution of electoral disputes. Therefore, there is also a limitation of second tier appeals for petitions challenging parliamentary or county elections heard at the High Court. Therefore, save for cases where the decision involved a matter of interpretation of the Constitution or where the appeal raises matters of general public importance, no automatic right to appeal to the Supreme Court exists. As stated by the Supreme Court in the ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** **Supreme Court Petition No. 2B of 2014** case:

> *To argue that, notwithstanding the non-provision for a second appeal in section 75(4) of the Elections Act, such right of appeal nonetheless subsists under Article 164(4)(3)(a) of the Constitution, would be subversive of 87 of the Constitution. It is worth repeating that the Constitution cannot subvert itself. Indeed, what may appear as a limitation of the jurisdictional reach of Article 164(3)(a) of the Constitution is borne out of Article 87 of the same Constitution.*

i. Deferred and sequential appellate jurisdiction

The principle of 'deferred and sequential' jurisdiction of appellate courts in EDR leads to the conclusion that the automatic stay of proceedings does not apply to interlocutory decisions made by an election court. Prior to these amendments, established jurisprudence held that a court with appellate jurisdiction in EDR could grant conservatory orders, stay of proceedings, or other similar reliefs while an appeal was being filed, heard, and determined. This approach is reflected in cases such as ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** **Supreme**

Court Civil Application No. 5 of 2014, ***Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 Others*** **Supreme Court Civil Application No. 18 of 2014**, and ***George Mike Wanjohi v Steven Kariuki*** **Supreme Court Civil Application No. 6 of 2014**.

In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** **Supreme Court Civil Application No. 5 of 2014**, the court outlined three key conditions for granting such reliefs: the intended appeal must be arguable and not frivolous; the appeal would be rendered nugatory if successful but relief was not granted; and it must be in the public interest to issue such orders.

However, in ***Samwel Kazungu Kambi v Nelly Ilongo, the Returning Officer, Kilifi County & 2 Others*** **Malindi Election Petition Nos. 4 & 5 of 2017**, the Court reconsidered the authorities in light of the 2016 amendments to the Elections Act. It concluded that the appellate court's jurisdiction is deferred and only takes effect upon the final determination of the matter. Where an election petition is dismissed at the interlocutory stage, that dismissal is considered a final determination, and the appellate court is granted jurisdiction to hear an appeal against it.

A person who seeks to appeal against the final determination of the High Court in EDR must file a notice of appeal within 7 days of the decision (Rule 6(2) of the Court of Appeal (Election Petition) Rules, 2017). This deferred and sequential jurisdiction was re-asserted in ***Anuar Loitiptip v IEBC & 3 Others*** **Supreme Court Petition 18 of 2018:**

> *[72] The combined effect of the above is that a person who seeks to appeal from a final determination of the High Court must file a Notice of Appeal within 7 days of the decision in accordance with Rule 6(2) of the Court of Appeal (Election Petition) Rules, 2017, and one who seeks to appeal against an interlocutory decision must file their intended notice within 14 days of the decision, in line with Rule 75 of the Court of Appeal Rules 2010.*
>
> *[73] However, we note that this position may present some impracticalities as where judgement is in ones favour, a party who had filed Notice of Appeal against an interlocutory order may be faced with unnecessary costs, a situation which may make parties shy away from filing Notices of Appeal pending the hearing and determination of the petition.* ***We therefore direct that, for the purposes of election petitions only, where one is aggrieved by a decision in an interlocutory application in election petitions, such a party must file a Notice of Appeal against the interlocutory decision consecutively with the Notice of Appeal against the final judgement.***

> *Indeed, it is his notice that shall grant an appellate Court jurisdiction to determine issues before it.*

While the CoA's jurisdiction over interlocutory appeals remains deferred and sequential, failure to lodge Notice of Appeal within 7 days of the interlocutory decisions extinguishes right to appeal against that decision. As asserted in ***Garama v Karisa & 3 others*** **Malindi Election Petition Appeal 1 of 2023:**

> *56. Though an appeal arising from an interlocutory order must be subject to the deferred or consequential jurisdiction of this Court, that does not bar such a party from filing a Notice of Appeal against that decision in the meanwhile. Failure, however, to give notice of intention to appeal against an interlocutory order means that the party is thereby locked out from taking up the issue at the hearing of an appeal against the final decision*

However, this jurisdiction does not crystallise until the final decision of the election court, as re-asserted in ***Beatrice Saki Muli & Another v Hon. Jude Kang'ethe Njomo & Another*** **Nairobi Civil Application No E021 of 2023**

In ***IEBC & 2 Others v Moses Juma Wabomba & 3 Others*** **Bungoma Civil Appeal E001 of 2023**, the High Court declined to exercise jurisdiction over an appeal against an interlocutory decision declining to strike out the Petitioner's witness affidavits from the record. The Court found that exceptional circumstances limb of Supreme Court guidelines in ***Martha Karua*** not properly invoked.[92]

In ***Josephat Peter Shambi v Doreen Taabu Rodgers & Anor*** **Voi EP Appeal No E001 of 2023,** the High Court was asked to determine an interlocutory appeal challenging election court's dismissal of a Preliminary Objection to its jurisdiction in respect of a party list dispute.

> *82.The position on whether to lock out interlocutory appeals has not been full settled by statute. The case law indicates it is not advisable to file and for good measure. However, the courts may never lock them out completely as we may crate tyranny in lower courts.*
>
> *83.The court can, as it is bound to do, refuse or decline to take up jurisdiction for procedural matters as these will of necessity invoke determinations of fact, which are not within the domain of the appellate elections court, like improper admission of evidence.*

92 See *Martha Wangari Karua v IEBC & 3 Others* Supreme Court Petition No. 3 of 2019, para 55

> *85…there is no jurisdiction in election matters to handle interlocutory matters of procedure and/or fact or even admission of evidence. The only reason issue of jurisdiction may be challenged is to avoid the court proceeding on a nullity and wasting judicial time.*
>
> *86. In other words, if the preliminary objection is allowed or refused, or an application to strike out is allowed, an interlocutory appeal may be filed. Given very punishing timelines the law does not anticipate interlocutory appeals hence the need to be restrictive.*

While High Court referred to the '*exceptional circumstances*' limb of appellate court's jurisdiction, it was not clear on what amounted to 'exceptional circumstances'. The Court was nevertheless clear that even where the appeal did not emanate from a ruling striking out the petition, it did not automatically oust the jurisdiction of the appellate court.

ii. Validity of omnibus appeals

Arising from the 2017 jurisprudence, two schools of thought emerged on how to deal with omnibus appeals, i.e. those which seek to appeal against the whole judgment or which appeal against issues of mixed law and fact. The first school of thought holds that where an appeal is purportedly anchored on mixed grounds of law and facts, it is unsustainable. It was argued that since the Notice of Appeal was the primary jurisdictional document, where it was defective, it divests the Court of jurisdiction.[93] This school was best exemplified in the following decisions. In ***Apungu Arthur Kibira v IEBC & 2 Others*** **Kisumu Election Petition Appeal No. 11 of 2018**, the majority of the bench ruled to strike out the appeal which challenged the whole decision of the trial court. The position of the court was that appealing against the whole decision included appealing against factual matters, which did not lie to the Court of Appeal. The Court ruled the Notice of Appeal a nullity and found that it was divested of jurisdiction in the matter. This was especially because there was no jurisdiction given to extend time to file the correct Notice. Similarly, in ***Lesirma Simeon Saimanga v IEBC & 2 Others*** **Nakuru Election Petition Appeal (Application No. 7 of 2018)** the Court faulted the Notice of Appeal for, *inter alia* seeking to appeal against the whole decision/judgment of the trial court. Since the Court's jurisdiction was limited to appeals arising from election petitions on matters of law only, the Court ruled the notice wanting to the extent that it sought to challenge the whole of the judgment, which judgment was based on facts and the law. The Notice of Appeal, without which there could not be a valid appeal, was struck out.

93 *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR.

The second school of thought, which was the more liberal approach, allowed for a broader examination of cases even when they involved mixed issues of law and fact. This approach, demonstrated in cases such as ***Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission & 2 Others*** **[2018] eKLR** and ***Stanley Muiruri Muthama v Rishad Hamid Ahmed & 2 Others*** **[2018] eKLR**, indicated that the COA believed appeals should not be dismissed solely due to poor drafting if they raised clear legal issues.

In the ***Stanley Muiruri*** case, the COA had reportedly declined to strike out an appeal that raised mixed issues, emphasizing that procedural technicalities should not override substantive justice. Similarly, in the case of ***Babu Owino v Francis Wambugu Mureithi & 2 Others*** **Nairobi Election Appeal No. 18 of 2018**, the COA was said to have deemed the appeal properly filed, invoking constitutional and statutory provisions to prioritize justice over form.

In the ***Wavinya Ndeti*** case, the COA reportedly held that section 85A of the Elections Act should not automatically bar the Court from considering appeals with factual elements, stressing that a thorough examination was necessary to avoid unjust dismissals. Furthermore, in ***Hassan Aden Osman v The IEBC & 2 Others*** **Election Petition Appeal No. 11 of 2018**, the COA had reaffirmed that jurisdiction is conferred by law and cannot be undermined by poor drafting.

However, in the case of ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*** **Nairobi Election Appeal No. 2 of 2018**, the COA was reported to have stressed the importance of strict compliance with section 85A, although it still addressed the merits of the appeal. The Supreme Court, in ***Mawathe Julius Musili v IEBC & Another*** **SC Petition No. 16 of 2018**, had supported the COA's approach, confirming that the COA correctly focused on legal issues despite the presence of mixed grounds in the appeal.

The CoA's approach, as reported, appeared to be influenced by the public interest nature of election petitions, prioritizing justice by considering the substance of appeals and ensuring that legal issues were not overshadowed by procedural technicalities. This same approach was adopted in the High Court's decision in ***Kitavi Sammy v IEBC & 2 Others*** **Kitui Election Petition Appeal No. 3 of 2017**, where the Court had reportedly identified and addressed points of law despite the presence of factual issues.

In the appeals that were determined on merit in the 2022 cycle, the liberal approach appeared to have held sway. In ***Garama v Karisa & 3 others*** **Election Petition Appeal (Application) 1 of 2023,** the court declined to strike out an appeal on the basis that it was omnibus, mixing issues of law and fact. In reviewing its rules, the Court of Appeal found that rule 6, which requires a specification of whether all of part of the judgment is appealed against, allows for one to appeal against the entire judgment. Therefore, taken together with the decision of the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji*** **[2014] eKLR,** complaints about the reduction of standard of proof, errors in interpretation of the relevant laws, imposition of unrecognised obligations and determination of matters not pleaded were all within the ambit of section 85A of the Elections Act and therefore the appeal fell squarely within the court's jurisdiction. Similarly, in ***Erick Ntabo Omwenga v IEBC & 2 Others*** **Kisii High Court Election Petition Appeal No. E005 of 2023,** the High Court declined to determine the grounds of appeal which raised issues of fact and focused solely on the question of whether the election was conducted in accordance with the Constitution, electoral laws and regulations. Rather than strike out the appeal for contained mixed grounds of law and fact, the High Court opted to address the matters of law raised in the appeal, ultimately finding that the allegations were not proved and there was no basis for unsettling the finding of the trial court.

iii. Failure to file Notice of Appeal on time

A long-standing issue in relation to timelines and timeliness under the 2010 Constitution has been the distinction between timelines which are prescriptive and those in respect of which the court may exercise discretion, on good grounds shown, to extend. The dividing line has been the prescribing document: those anchored in the Constitution or an Act of Parliament are mandatory, which those set out in subsidiary legislation can be extended on application by a party.

The Supreme Court decision in ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*** **[2014] eKLR** emphasised that compliance with timelines is not inconsistent with the Constitution, but it is in fact a Constitutional principle that reinforces the Constitutional values attendant upon the electoral process. In ***Nick Salat v IEBC & 7 Others*** **[2014] eKLR,** the Supreme Court issued guidelines for the extension of time as follows:

> *1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
>
> *2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
>
> *3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
>
> *4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
>
> *5. Whether there will be any prejudice suffered by the Respondents if the extension is granted;*
>
> *6. Whether the application has been brought without undue delay; and*
>
> *7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

From the 2017 jurisprudence, it appeared that where there is non-compliance with the timelines for filing a Notice of Appeal under the Rules, the courts were prepared to exercise discretion under the Rules for the extension of time. This extension of time would have to be sought by the applicant and good cause for the delay shown, in addition to demonstrating that no prejudice would be occasioned to the Respondents. (***John Munuve Mati v RO Mwingi North & Others*, Election Petition Appeal 5 of 2018**; ***Sumra Irshadali v IEBC & Another*, Nairobi Election Appeal 22 of 2018**). This aligns with Rule 17 of the Court of Appeal (Election Petition) Rules 2017 which grants the Court power to extend or reduce the timelines prescribed by the Rules for sufficient reason and on such terms and conditions as it may deem just and expedient.

This duality continued to be witnessed in the 2022 jurisprudence. The Court of Appeal re-asserted the centrality of timelines to the dispute resolution process, emphasising that it is an issue of substance not procedure. In ***Hussein Tuneya Dado v Dhadho Gaddae Godana & 2 Others* Malindi Election Petition Appeal No E002 of 2023**, the Court of Appeal has stated:

> *32…It is therefore our view that where the timelines are prescribed by the Constitution or Acts of Parliament, time is a matter of substantive law as opposed to being procedural law where the timelines are prescribed by subsidiary legislation…*

> *38… even where the timelines are prescribed by subsidiary legislation, in election matters, the Court will adopt a more restrictive approach as opposed to ordinary civil cases since the delays in taking steps may impact on the adherence to the prescribed Constitutional and statutory timelines.*

In ***Abdullahi v IEBC & 3 Others*** **Nairobi EP Appeal E004 of 2022,** the CoA ruled that there was no room either under s 85A of the Elections Act or under Rule 17 (2) CoA (EP) Rules for extension of time for lodging Notice of Appeal. Similarly, in ***Arale v IEBC & 4 others*** **Nairobi Election Petition Appeal E013 of 2023**, the Court of Appeal was emphatic that it was the Notice of Appeal which conferred jurisdiction upon the court and that jurisdictional failings were inexcusable and could not be waived. The centrality of timeliness in the resolution of electoral disputes was cited as the basis for not extending time for lodging the Notice of Appeal. As stated by the Court of Appeal in ***Hussein Tuneya Dado v Dhadho Gaddae Godana & 2 Others*** **Malindi Election Petition Appeal No E002 of 2023**:

> *27. Compliance with timelines is even more critical when the dispute before the Court relates to general elections. In such disputes the Court must always keep in mind that being public law litigation, it is not just the interests of the protagonists that are in focus. General elections transcend the interests of the parties before the Court as their outcome do affect the electorate who are keen to know, within the shortest time possible their representative to whom they have delegated their sovereignty pursuant to Article 1(3) of the Constitution. Governors as the Counties' Chief Executive Officer have at their disposal, the budgetary allocations and it is only fair and just that the person entrusted with the management of such allocation of taxpayers' money be the one that the electorates have actually entrusted with the task of doing so. Accordingly, such determinations ought to be made as soon as practically possible without unnecessary delays.*

The Court in ***Arale*** determined that the Appellant failed to file the Notice of Appeal within the required timeframe. According to rule 6 of the Court of Appeal (Election Petition) Rules, **2017**, the Notice of Appeal must be lodged within seven days from the date of the High Court judgment. In this case, the impugned judgment was delivered on 6 March 2023, so the Notice of Appeal was due by 13 March 2023. The Appellant attempted to file the Notice electronically on 7 March 2023 but faced system errors. However, the court found that the Notice was also filed at the High Court on 8 March 2023, which did not comply with the requirement of lodging at the Court of Appeal Registry as established in ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*** **[2019]** eKLR. The court noted that the Notice of Appeal must be filed at the Court of

Appeal Registry, not the High Court, as confirmed in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** **[2014]** eKLR. For failure to lodge the Notice of Appeal on time and in the correct registry, the Court of Appeal struck out the Notice. In the same way, the Notice of Appeal in ***Bardad Mohamed Farah v IEBC & 2 Others*** **Nairobi Election Petition Appeal No E007 of 2023** was struck out for being filed 7 days out of time. This the court found could not be remedied by the Record of Appeal being filed on time.

On the contrary, in ***Hussein Tuneya Dado v Dhadho Gaddae Godana & 2 Others*** **Malindi Election Petition Appeal No E002 of 2023,** the court appeared to take the position that the timelines for filing a Notice of Appeal could be extended if the Appellant were able to sufficiently explain the delay in filing within the prescribed time. The appellate court was nevertheless quick to clarify that sufficient explanation was just one of the factors for consideration, along with others, and did not, on its own, constitute a basis for extension of time.[94] In the words of the court:

> *24. Whereas it may be argued that adopting such a stand is too restrictive when it comes to exercise of discretion, it must be appreciated that once the compliance with the rules is relaxed and subjective to vague considerations, without clear legal parameters being set as to how discretion is to be exercised, rules of procedure are bound to be rendered meaningless. When, for example non-compliance is excused on the grounds of short delay, without explanation, the doors for the whimsical exercise of discretion creeps in and with that the floodgates of mischief are thrown wide open. Without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law…*

The *sui generis* nature of electoral disputes makes it such that even where an explanation is rendered for the delay, it is subjected to a higher threshold to determine its sufficiency in inviting the court's discretion compared to purely civil disputes.[95]

However, even where Court of Appeal was inclined to extend time, proper procedure for seeking extension of time had to be engaged. The position of the Court of Appeal therefore appeared to be that where a Notice of Appeal was not filed in

94 At para 23 of the judgement.

95 *Hussein Tuneya Dado v Dhadho Gaddae Godana & 2 Others* Malindi Election Petition Appeal No E002 of 2023, para 40.

time, the correct procedure was to seek an extension of time to file appeal; rather than filing and seeking to regularise Notice filed out of time. In the words of the court:

> *47…We therefore agree, as we are bound to do, that where timelines are prescribed and the law requires an Applicant to seek extension of time the same if not filed within the prescribed time, it would be an abuse of the process to file the document and then seek to have the same regularised…*
>
> *48. For the reasons of the failure by the Appellant to sufficiently explain the delay in filing the Notice of Appeal within the prescribed time as well as the fact of filing the Notice of Appeal before the time is extended to do so, we find that the Notice of Appeal was not properly filed and, as held by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others (supra), it is a nullity.*

In ***Michael v Orange Democratic Movement Party & 3 others*** **(Election Petition Appeal E001 of 2023),** although the Court was open to extending the time for filing the Notice of Appeal, the appeal was struck out because the Record of Appeal was also filed out of time.

Abdullahi v IEBC & 3 Others **Nairobi Election Petition Appeal E004 of 2023**, the appeal struck out for being filed out of time. In doing so, the court cited SC position in ***Wavinya Ndeti v Independent Electoral & Boundaries Commission (IEBC) & 4 Others*** **(2015) eKLR** that s 85A Elections Act is not inconsistent with the right of access to justice and fair hearing.

iv. Competency of the Notice of Appeal

The Court of Appeal in ***Arale v IEBC & 4 others*** **Nairobi Election Petition Appeal E013 of 2023** addressed the issue of whether the Notice of Appeal was competent or defective. Rule 6(3)(c) of the Court of Appeal (Election Petition) Rules, 2017, requires that the Notice of Appeal set out the grounds of appeal in separate numbered paragraphs. The Appellant's Notice of Appeal did not meet these requirements, as it was argued to be a matter of law rather than fact. This was consistent with the rulings in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** **[2014]** eKLR and ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*** **[2019]** eKLR, which emphasised strict adherence to procedural rules. While the court was open to sustaining the appeal, as discussed below, since the Record of Appeal was filed out of time, the appeal was struck out.

v. Failure to lodge Notice of Appeal at the Appropriate Registry

While the Court of Appeal was willing to extend time in relation to the filing of the Notice of Appeal, this liberality did not extend to instances where the Notice of Appeal was lodged at the wrong registry. Upholding the jurisprudence in ***Apungu Arthur Kibira v IEBC & 2 Others*** **Kisumu EPA 11 of 2018;** ***Lesiirma Simeon Saimanga v IEBC & 2 Others*** **Nakuru EPA (Application No. 7 of 2018);** ***Musa Cherutich Sirma v IEBC & 2 Others*** **Supreme Court Petition 13 of 2018** and ***Anuar Loitiptip v IEBC & 2 Others*** **Supreme Court Petitions 18 and 20 of 2018 (Consolidated)** to the effect that where a Notice of Appeal is filed in the wrong registry, it is not a valid Notice of Appeal. Since the Notice is the primary jurisdictional document, without it the Court of Appeal cannot be vested with jurisdiction.

The court struck out the appeal in ***Hassan Mohamed Adam v Ahmed Abdullahi Jiir & 3 Others*** **Nairobi Election Petition Appeal E008 of 2023** for being filed in the High Court of Garissa rather than the Court of Appeal registry in Nairobi as required by Rule 6 of the Court of Appeal (Election Petition) Rules 2017. The same fate befell the Notice of Appeal in ***Beatrice Saki Muli & Another v Hon. Jude Kang'ethe Njomo & Another*** **Nairobi Civil Application No E021 of 2023,** which appeal was also filed out of time.

In ***Arale v IEBC & 4 others*** **Nairobi Election Petition Appeal E013 of 2023, t**he court emphasised that filing a Notice of Appeal at the High Court did not meet the requirements set out in the Court of Appeal (Election Petition) Rules, 2017. This was supported by the Supreme Court's ruling in ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*** **[2019] eKLR**, which confirmed that the notice must be filed at the Court of Appeal registry. The court further referenced ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** **[2014] eKLR**, which underscored the jurisdictional necessity of filing a Notice of Appeal correctly.

The Appellant claimed a system error prevented the filing on 7 March 2023, yet the court found it notable that he successfully filed the notice at the High Court the next day. The court questioned why the Appellant did not make further attempts to file it at the Court of Appeal within the remaining six days. It was pointed out that the judiciary's e-filing system is uniform across all courts, which contradicted the Appellant's claim of being able to file at the High Court but not the Court of Appeal. Consequently, the appeal was struck out.

However, in ***Dolphine Nyangara Onkoba v Michelle Kemuma Omwonyo & 2 Others*** Election Petition No. E014 of 2023, the court opted to transfer the appeal, filed in Nairobi, to Kisumu, since the decision had emanated from the High Court in Nyamira, thus bringing the matter within the jurisdiction of the Court of Appeal sitting in Kisumu.

vi. Failure to file Record of Appeal on time

Several appeals were struck out for being technically incompetent or for failure to file them on time.

Abdullahi v Independent Electoral and Boundaries Commission & 3 Others **(Election Petition Appeal E004 of 2022)**

> *Although the Appellant raised various issues for our determination, the appeal turns on the question of its competence. It matters not that the preliminary objection was not filed within seven (7) days of service of the appeal as required under rule 19. The objection touches on the jurisdiction of the court to hear and determine the appeal on its merits. Such an objection can be raised at any stage of the proceedings, even by the court on its own motion. See Attorney General & 2 Others v Okiya Omtata Okoiti & 14 Others [2020] eKLR. The 1st to 4th Respondents submitted that the appeal was filed out of time and that, therefore, this court has no jurisdiction to hear and determine it on its merits. The Appellant does not dispute that the appeal was filed three days outside the statutory period but urges us to exercise our discretion and enlarge the time so that we can assume jurisdiction and determine the appeal on its merits.*

In *Arale v IEBC & 4 others* Nairobi Election Petition Appeal E013 of 2023, the Court also found that the Record of Appeal was filed late. According to rule 8(5) of the Court of Appeal (Election Petition) Rules, 2017, the Record of Appeal must be filed within 30 days from the High Court judgment. The deadline was 5 April 2023. The Appellant's Record of Appeal was dated 3 April 2023, but the court found that it was filed on 6 April 2023, which was one day late. The court referenced ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*** **[2019]** eKLR, which underscored strict adherence to filing deadlines. Despite the Appellant's contention that the Record of Appeal was filed on 5 April 2023 but stamped on 6 April 2023, the Court clarified that the process of lodging an appeal involves several steps, including payment of court fees and the issuance of a receipt. The Court concluded that the Record of Appeal was filed on 6 April 2023, one day late, thus rendering it out of time. This conclusion was reinforced by the Court's examination of its registry procedures, which showed that

all steps must be completed for the filing to be deemed successful. The process of lodgement must be understood as working conjunctively and not disjunctively, meaning all required steps must be completed together for the filing to be valid.

The Record of Appeal was also impugned for want of timely service. Although the Record of Appeal was served on 12 April 2023, which was within the extended period accounting for public holidays, the Court's determination that the Record of Appeal was filed late rendered this issue moot. The relevant rules, including rule 8(6) of the Court of Appeal (Election Petition) Rules, 2017, specify service requirements, but the timing of the filing was critical. In ***Bardad Mohamed Farah v IEBC & 2 Others*** **Nairobi Election Petition Appeal No E007 of 2023,** the court declined to extend time for the filing of the Record of Appeal, urging that no such discretion was granted by section 85A of the Elections Act.

In the same way, the Record of Appeal was struck out in ***Ongiro v Independent Electoral & Boundaries Commission & another; Orange Democratic Movement Party (Interested Party)*** **(Election Petition Appeal E001 of 2022)** for want of compliance with Rule 34 (6) of the Elections (Parliamentary and County) Election Petition Rules 2017 on timelines for filing the Record of Appeal. However, the court noted that had the Appellant demonstrated that the delay was occasioned by the failure of the election court to supply proceedings, it would have given the appellate court a sufficient basis to finding that the non-compliance was the fault of another party. Likewise, the High Court declined to extend time in ***Rose Nyamoita Oyugi & Another v IEBC & 3 Others*** **Election Petition Appeal No E008 of 2023** because while the Appellant asserted that failure to comply with Rule 34 (6) of the Elections (Parliamentary and County) Election Petition Rules 2017 was occasioned by a delay in obtaining certified copies of the proceedings, the same were shown to have been ready on time to allow filing within the 21-day timeline.

vii. Failure to deposit security for costs at the Court of Appeal

While section 78 of the Elections Act makes it clear that no further proceeding shall be taken in an election petition where security for costs is not deposited within 10 days, no mention is made of security for costs at the CoA. Security for costs at CoA is therefore addressed only by Rule 27 of the Court of Appeal (Election Petition) Rules 2017. CoA can therefore grant extension for deposit of security, but only where good cause is demonstrated why a party should get discretion

exercised in their favour. In ***Njomo v Waithaka & 2 others*** **(Election Petition Appeal (Application) E002 of 2023),** the Court of Appeal, which acknowledging the discretion under Rule 17 to extend time, gave the following parameters for the exercise of this discretion:

> *26. The basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, and the nature of the case only to mention but some. Ordinarily, these facts are inter-related; they are not individually decisive. An unsatisfactory explanation for any period of delay will normally be fatal to an application…*
>
> *28…the Appellant failed to comply with this Court's directions issued on 14th April, 2023, 2nd May, 2023, and on 5th June, 2023, requiring him to deposit security for costs in court. Failure by the Appellant to comply with the court's directions is, in our view, sufficient to disentitle the Appellant the discretion of this Court.*

Where there is a blatant disregard of court orders directing the deposit of security, this disentitles an applicant from the exercise of the court's discretion.[96]

Powers of an election court to review its orders

It is now a well-established principle that electoral disputes are disputes *sui generis.* As such, the ordinary rules of civil procedure are inapplicable in electoral dispute resolution. With the adoption of the Elections Act 2011, which sets out the powers of an election court in section 80, one of the unresolved questions has been whether an election court has power to review its own orders. This is because the power of review is not one of the powers granted to an election court by section 80. Divergent positions have been taken by the High Court on this matter. In ***Clement Kung'u Waibara & Another v Francis Kigo Njenga*** **[2013] eKLR,** the High Court held that the election court has no power to review since

96 *Njomo v Waithaka & 2 others* (Election Petition Appeal (Application) E002 of 2023), para 32.

the provisions of the Civil Procedure Act cannot be imported into the substantive and procedural electoral regime.In the same way, in ***Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others*** **Machakos Election Petition No 8 of 2013,** the election court asserted that the Petitioner could not call to aid the provisions of the Civil Procedure Rules. The Elections Act, Rules and Regulations were a comprehensive code of substantive and procedural election hence the Civil Procedure Act and Rules did not apply to the Elections Act except where expressly provided for in the Act and Rules.

On the contrary, some courts have held that, despite the absence of an express power of review, the court would fail in its duty to administer justice if it allowed an incorrect or misleading record to stand due to a clear mistake or error on the face of the record, simply because the Rules of Procedure do not explicitly grant the power to correct such errors. In ***Godfrey Masaba v IEBC & 2 others*** **Bungoma High Court Petition 8 of 2013 [2013] eKLR,** the court was not deterred by the absence of express provisions in finding that there was a power to review its orders in light of a clear mistake or error on the face of the record. The court asserted that a failure to provide for the power to review offended the provisions of the Constitution:

> *22. The question which arises is whether the failure to expressly provide for review of the courts orders negates the application of this remedy in the appropriate circumstances?*
>
> *23. Article 35(2) of the Constitution guarantees every person the right to correction or deletion of untrue or misleading information that affects the person. Article 20(3)(a) on the other hand, enjoins a court when applying a provision of the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom.*
>
> *24. By failing to make provision for the court to review its orders in the appropriate circumstances, especially where there is a mistake or error apparent on the face of its record that needs to be corrected or deleted in order to set the record straight, it would appear that the Elections Act, 2011 and the Rules made thereunder offends the spirit and letter of Article 20(3)(a) as read with Article 35(2) of the Constitution.*
>
> *25. For this reason, notwithstanding lack of any express provisions for review in the Election Act and the Rules made thereunder, I hold the view that an election court would, in the appropriate circumstances, review its orders if in so doing, it would give effect to a right or fundamental freedom that the law in*

> *question had failed to recognize or give effect to.*

In the same way, in ***Mohammed Ali Mursal v Saadia Mohamed & Others*** **[2013] eKLR** ruled that an election court could in appropriate cases review its orders if in so doing it would give effect to a right or fundamental freedom that that law in question failed to recognise.

In 2022, the High Court in ***Evans Okacha v Democratic Action Party Kenya (DAP-K) & 3 Others*** **Kakamega Election Appeal No E008 of 2022** while acknowledging the divergent positions found instructive that the Court of Appeal had ruled on a similar issue in relation to the Law Reform Act, a special jurisdiction law just like election law. In ***Nakumatt Holdings v Commissioner of Value Added Tax*** **[2011] eKLR,** the appellate court noted that like the Elections Act, the Law Reform Act did not provide for review. That notwithstanding, the Court of Appeal declined the invitation to decline jurisdiction, asserting:

> *Mr Otweka for the Respondents in his submissions to us seemed to suggest that where the law is silent on whether a review is permissible, then courts must decline jurisdiction where a review is sought. While we agree with him that judicial review is a special jurisdiction, we do not agree that in clear cases courts should nevertheless fold their arms and decline jurisdiction.*

As indicated in the recommendations section below, legislative amendment may provide clarity on the power of review for election courts.

Costs

As a general rule, costs follow the cause. This position is encapsulated in section 84 of the Elections Act which provides:

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

Section 84 mandates that costs of and incidental to a petition shall be awarded in accordance with the outcome. This provision initially restricts discretion in awarding costs, implying an automatic correlation between the petition's result and cost liability.

However, the Election Petition Rules 2017, amended to enhance the election court's authority in relation to costs, appear to expand the provision. The 2017 Rules, which were amended to enhance the election court's authority in the grant of costs now allow the courts to specify who should pay the costs and to whom

they are awarded. Rule 30 also allows the election court to set a maximum limit on the costs payable. This modification provides flexibility and aims to prevent excessive costs that might deter legitimate Petitioners. The said provision stipulates:

> *(1) The election court may, at the conclusion of a petition, make an order specifying –*
>
> *(a) the total amount of costs payable;*
>
> *(b) the maximum amount of costs payable;*
>
> *(c) the person who shall pay the costs under paragraph (a) or (b); and*
>
> *(d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid.*
>
> *(2) When making an order under sub-rule (1), the election court may-*
>
> *(a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and*
>
> *(b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense.*
>
> *(3) The abatement of a petition shall not affect the liability of the Petitioner or of any other person to the payment of previously incurred costs.*

The debate on costs in election petitions revolves around two opposing views. The first argues for the need to limit the excessive costs awarded to successful parties in election petitions. This concern arises from the potential burden these costs place on unsuccessful litigants and the deterrent effect they have on individuals with legitimate grievances, who may be discouraged from filing petitions due to the fear of incurring exorbitant costs. Conversely, the opposing perspective asserts that it is necessary to permit advocates to charge high fees in election petitions. This is justified by the strict legal time frames for hearing and resolving these cases, which require advocates to devote their full attention to the petition during its duration.[97]

97 These arguments were acknowledged by the High Court in *Esposito Franco v Amason Kingi Jeffah & 2 Others* [2014] eKLR..

In certain cases, the election court articulates the reasoning behind its cost orders, whereas in many others, the rationale for the manner of cost awards remains opaque. Balancing these perspectives is imperative: discouraging frivolous petitions while facilitating access to justice for *bona fide* grievances. This equilibrium is pivotal for upholding fairness and accessibility in the electoral process, emphasising the need to strike a balance that regulates costs and ensures equitable compensation for advocates. Maintaining the integrity and accessibility of the electoral process hinges upon finding this middle ground.

The Court of Appeal acknowledged the legitimacy of capping costs as permitted by the 2017 Election Petition Rules. However, the court also emphasized the need for clear guidelines to direct the election court's discretion in this matter. Without such parameters, there is a risk of arbitrary decision-making.[98]

The Supreme Court in ***Cyprian Awiti & Another v IEBC & 3 Others*** **Supreme Court Petition 17 of 2018,** recognised the widespread and often contentious nature of cost awards in election petitions, which it deemed significant enough to warrant judicial notice. In response, the Court sought to provide guidance on how judicial discretion should be exercised in these cases, aiming to balance the conflicting considerations previously identified.

It proffered the following guidelines for the award of costs in election petitions:

> *(a) the general rule that "costs follow the event" is applicable in election matters in which no special circumstances are apparent;*
>
> *(b) however, an election Court holds discretion in reserve, for awarding costs as merited by the occasion;*
>
> *(c) a discretion vests in the Election Court to prescribe a ceiling for the award of costs;*
>
> *(d) in setting a ceiling to the award of costs, the Election Court stands to be guided by certain considerations, namely:*
>
> > *(i) costs are not to be prohibitive, debarring legitimate litigants from moving the judicial process;*
> >
> > *(ii) inordinately high costs are likely to compromise the Constitutional right of access to processes of justice;*

98 *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 others* [2014] eKLR, para 76

> *(iii) costs are not to bear a punitive profile;*
>
> *(iv) Courts, in awarding costs, are to be guided by principles of fairness, and ready access to motions of justice;*
>
> *(v) costs are intended for decent and realistic compensation for the initiatives of the successful litigant;*
>
> *(vi) costs are not an avenue to wealth, and are not for enriching the successful litigants;*
>
> *(vii) the award of costs shall not defer to any makings of opulence or profligacy in the mode of conduct of the successful party's cause.*

In ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 5 others*** **[2018] eKLR** the Court of Appeal gave the following guidance on costs, in a case which was withdrawn before full hearing:

> *… electoral disputes are in the nature of public interest litigation. They do not belong to the Petitioner. The public in the electoral area and the general public in the Republic has an interest on how those matters are handled and determined. A balance must be drawn on the issue of costs where successful litigants are awarded costs but those who lose in electoral disputes should not appear to be punished by award of costs that may send the wrong message that a party should not approach the court if they feel aggrieved in the manner elections are conducted. We think these are necessary principles to guide a court in awarding costs in election petition.*

In this case, the costs of 5 million shillings awarded by the election court were reduced by half upon appeal.

In ***Thoya & 2 others v Independent Electoral and Boundaries Commission & 2 others; Fondo & another (Interested Parties)*** **Election Petition E004 of 2022,** the court asserted that the award of costs was predicated not on the financial ability of the Petitioner but ought to grants costs that are commensurate to the industry of each party. However, where a petition is withdrawn early, it militates against a high award of costs.

> *the court is not bound by the financial ability or otherwise of the Petitioner but ought to grant costs that are commensurate to the industry of each party. This court takes into consideration that this petition was withdrawn at a very early stage before directions on the hearing were taken and that the parties have appeared before this court four (4) times on very short mention sessions. The*

application to withdraw was not opposed and as such, it took very little time for the orders to be granted.

Allocation of pre-election jurisdiction among the IEBC, PPDT and the courts

The PPDT and IEBC have concurrent jurisdiction relating to adjudication of pre-electoral disputes. The two institutions, through administrative arrangements, refinements in the statutory framework and judicial deference attempted to distribute this adjudicative mandate. The 2022 amendments to the Political Parties Act (PPA) redefined the nomination framework and timeframes, making it more practicable for the two institutions to discharge their respective mandates.

The jurisdictional competence of the two institutions is also informed by the timeframes set out in the Elections Act. In practice, the PPDT's jurisdiction relates to disputes concerning party nominations and party list nominations, while the IEBC has jurisdiction over disputes that relate to or directly impact on the rights and abilities of party members and citizens to participate as candidates in the elections.

The PPDT's jurisdiction is contingent upon demonstrating that the internal dispute resolution mechanism of the party (IDRM) has been attempted. The requirement to attempt to exhaust IDRM applies to disputes between members and political parties as well as to coalition partners within a coalition (s 40 (1) (e) PPA; ***Republic v Registrar of Political Parties & 3 others; Hasan (Ex parte)*** **Miscellaneous Application E048 of 2022**).

In ***National Elections Board, Orange Democratic Movement Party v Odongo & another*** **Civil Appeal E317 of 2022**, the High Court emphasised that simply submitting letters of complaint about a nomination process does not constitute an attempt to exhaust IDRM if the complainant fails to follow the specific procedures outlined in the party's constitution and rules. The High Court criticised the PPDT for assuming jurisdiction without verifying whether these procedural steps had been observed. In this case, the complainant wrote letters before a direct ticket was allegedly issued to one of the aspirants. However, without evidence that the party had decided to use direct ticketing as a nomination method, there was no actual dispute before the party organ. Therefore, the letters did not amount to an attempt to exhaust IDRM, which is a prerequisite for the PPDT to exercise jurisdiction. This position contrasts with the view expressed by the Court of Appeal in ***Samuel Kalii Kiminza v Jubilee Party & another*** **(2017) eKLR,** para 25-26,

where the appellate court asserted as follows when it comes to compliance with party IDRM procedures:

> *25. The 1st Respondent's Nomination Rules required that appeals to the Appeals Tribunal be in a prescribed format and that a prescribed fee had to be paid. There would appear to be some contention that the Appellant's appeal was neither in the prescribed format nor was the prescribed fee paid. This notwithstanding, the letter dated the 10th May, 2017 expressly referred to a complaint that the Appellant had lodged with the 1st Respondent's Appeals Tribunal. The complaint, titled "Appeal", was dated the 9th May, 2017 and signed by the Appellant, and was attached to the letter. We have had a look at the Appeal, and are of the view that though it may not have been in the prescribed format, it nevertheless contained all the ingredients of an appeal. The document gave particulars of the position in relation to which the appeal was lodged; it also had the statement of facts; the specific complaint of the Appellant; as well as the prayers that he was seeking. Article 159 (2) (d) of the Constitution enjoins courts in their exercise of judicial authority, to administer justice without undue regard to procedural technicalities. We are therefore of the view that if there was any failure by the Appellant to lodge the appeal in the prescribed format, such failure is easily cured by Article 159 (2) (d) of the Constitution, considering that the substance of the Appellant's appeal included all the ingredients necessary for one to decipher what his complaint was and the remedies he was seeking. We therefore make a finding that the Appellant filed an appeal with the 1st Respondent's Appeals Tribunal.*
>
> *26. Further, we cannot help but note that the Appellant wrote to the 1st Respondent not once but twice and none of these letters elicited any response from the 1st Respondent. The Appellant is a member of the 1st Respondent having paid the requisite fees. The Appellant had also paid Kshs. 250,000/= in order to be eligible to take part in the nomination exercise for the position of Member of the National Assembly for the Kitui South Constituency. We are therefore of the view that the least that the 1st Respondent could have done, taking into account that the Appellant was its member, is to respond to the Appellant's letters and advise him on the right way to go about the appeal. Having failed to do so we hold that the Appellant was entitled to approach the PPDT and that the PPDT therefore had jurisdiction to hear and determine the matter.*

It is noteworthy that the PPDT has continued to apply the jurisprudence in ***Samuel Kalii Kiminza*** in assessing whether IDRM was exhausted.[99]

In delimiting the adjudicative mandate of the IEBC and PPDT in nomination disputes, two decisions are instructive. The position of the statutory provisions introduced by the 2022 amendments aligns with the decision in ***Moses Mwicigi v IEBC & 5 Others*** **Supreme Court Petition 1 of 2015.** In the ***Moses Mwicigi*** case, the Supreme Court asserted that the Constitutional mandate of the IEBC in relation to nominations only extended to the settling of disputes relating to or arising from nominations. As such, the IEBC cannot adjudicate over election disputes and disputes subsequent to the declaration of election results. Neither can the IEBC adjudicate upon the nomination processes of a political party, as that is strictly within the province of a political party. In relation to the party list, the IEBC is only mandated to ensure that the list complies with the relevant laws and regulations. In ***Party of National Unity v Dennis Mugendi & 3 Others Nairobi High Court Election Appeal 1 of 2017,*** the High Court, citing the ***Moses Mwicigi*** case, found that the Constitution's intention was that only the IEBC would have jurisdiction to resolve disputes arising out of the IEBC level processes, and political parties were responsible for their own internal governance issues, with possible appeal to the PPDT and thereafter to the High Court.The question of when the jurisdiction of the PPDT ends and that of the IEBC begins is addressed through an interpretation of section 13 of the Elections Act. Jurisdiction of the PPDT ceases once the IEBC has cleared a political party nominee. The Court of Appeal has reinforced this in ***Ochola v Odhiambo & 2 Others; IEBC (Interested Party)*** **Civil Appeal E389 of 2022** and ***Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & 3 Others*** **Civil Appeal No E326 of 2022**, indicating that the PPDT's jurisdiction is extinguished upon the IEBC's acceptance of a candidate's nomination papers. This establishes a clear jurisprudence concerning party nominations.

99 See *Sankei Noonyuat v United Democratic Alliance & Another* PPDT Nairobi B Complaint No E003 of 2022, para 19; *Jubilee Party of Kenya v Paul Bwire Ouma* Nairobi Election Appeal E327 of 2022; *Paul Tapukai Ole Mebarne v United Democratic Alliance* PPDT Nairobi B Complaint E023 of 2022; *Abdi Osman Khalif v ODM & Another* PPDT Nairobi A Complaint No E037 of 2022; *Hon. Musdaf Hussein Abdullahi v National Elections Board Orange Democratic Movement & 3 Others* PPDT Nairobi A Complaint No E078 of 2022; *Beatrice Mugeni Odiele v The Chairperson Elections Board, Ford-Kenya Party & Another* PPDT Nairobi A Complaint No 106 of 2022; *Nasra Mohamed Ibrahim v Jubilee Party* PPDT Nairobi A Complaint No E126 of 2022; *Michelle Kemuma Omwoyo v Jubilee Party & Another* PPDT Nairobi A Complaint No 136 of 2022; *Abdullahi Bashir Maalim v United Democratic Alliance* PPDT Nairobi A Complaint No E137 of 2022; *Njelekela Ashura Michael v ODM & Another* PPDT Nairobi A Complaint No 130 of 2022.

It is important to note, however, that in some instances, the PPDT has maintained that its mandate ends not with the submission of candidates' names to the IEBC but rather when the candidates are officially gazetted. This position is supported by the High Court's findings in ***Jubilee Party of Kenya v Ouma*** **Election Petition Appeal E327 of 2022 [2022] KEHC 10490 (KLR)**, ***Nick Evance Okoth Ochola v Ted Marvin Odhiambo & 3 others*** **Nairobi High Court Civil Appeal E384 of 2022**, and ***Odongo v Murimi & another*** **Civil Appeal 72 of 2022 [2022] KEHC 10742**, which assert that the orders of the PPDT remain valid until the IEBC has officially gazetted a candidate. For instance, in ***Jubilee Party of Kenya v Ouma***, the High Court noted that the IEBC had not gazetted the 1st Interested Party for the MCA seat in Umoja 1 Ward following the Appellant's submission, directing compliance with the PPDT orders and decree immediately.

Furthermore, the High Court in ***Khala v National Elections Board Orange Democratic Movement Party (ODM) & 2 others; Independent Electoral & Boundaries Commission (Interested Party)*** **Civil Appeal E314 of 2022** found a discrepancy between Rule 8 of the Political Parties Disputes Tribunal (Procedure) Regulations 2017 and section 31 (2A) of the Elections Act. The court noted that while Rule 8 mandates resolution of disputes arising from party nominations by the day before the IEBC's nomination deadline, section 31 (2A) permits dispute resolution up to 60 days before the elections. The court concluded that this discrepancy did not remove the Tribunal's jurisdiction under Rule 8. Nevertheless, the prevailing jurisprudence following the Court of Appeal's decisions in ***Ochola v Odhiambo & 2 Others; IEBC (Interested Party)*** and ***Hussein Weytan Mohamed Abdirahman v Deka Ali Khala & 3 Others*** suggests that the PPDT's jurisdiction is now generally considered to end upon the IEBC's acceptance of a candidate's nomination papers.

Where a party member fails to participate in the IDRM and PPDT proceedings, they cannot approach the courts for a resolution of the dispute (***Ondiek v Omar & another*** **Mombasa Civil Appeal 73 of 2022;** ***Republic v Registrar of Political Parties & 3 others; Hasan (Ex parte)*** **(Miscellaneous Application E048 of 2022).**

vii. Failure to deposit security for costs at the Court of Appeal

While section 78 of the Elections Act makes it clear that no further proceeding shall be taken in an election petition where security for costs is not deposited within 10 days, no mention is made of security for costs at the CoA. Security for costs at CoA is therefore addressed only by Rule 27 of the Court of Appeal (Election Petition) Rules 2017.

CoA can therefore grant extension for deposit of security, but only where good cause is demonstrated why a party should get discretion exercised in their favour. ***In Njomo v Waithaka & 2 others*** **(Election Petition Appeal (Application) E002 of 2023),** the Court of Appeal, which acknowledging the discretion under Rule 17 to extend time, gave the following parameters for the exercise of this discretion:

> *26. The basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, and the nature of the case only to mention but some. Ordinarily, these facts are inter-related; they are not individually decisive. An unsatisfactory explanation for any period of delay will normally be fatal to an application…*
>
> *28…the Appellant failed to comply with this Court's directions issued on 14th April, 2023, 2nd May, 2023, and on 5th June, 2023, requiring him to deposit security for costs in court. Failure by the Appellant to comply with the court's directions is, in our view, sufficient to disentitle the Appellant the discretion of this Court.*

i. Powers of the PPDT in party nomination disputes

While PPDT is mandated to resolve disputes arising from party nominations, it is not open to the PPDT to dictate to political parties the nomination method they use, so long as the political party complies with the PPA and the party nomination rules in carrying out party nominations. This means that a political party cannot communicate its intention to use one nomination method and then proceed to use another as it would violate the legitimate expectation of its members (***ODM National Elections Board & another v Gare & 2 others*** **Civil Appeal 44 & 45 of 2022 (Consolidated)).**

In various decisions, the Tribunal has criticised political parties for issuing direct tickets after an internal dispute resolution mechanism (IDRM) hearing has mandated a fresh nomination exercise. This stance is evident in cases such as ***Abrari Mohamed Omar v Kelvin Ondieki & 2 others*** **(PPDT Mombasa Misc. Application No. E002 of 2022)**, ***Allan Ojuki Gordon v Moses J. Odhiambo Ochele & 2 Others*** **(PPDT Kisumu Complaint No. E021 of 2022)**, ***John Andiwo Mwai v The National Election Board (ODM) & 2 Others*** **PPDT Nairobi A Complaint Number E019 of 2022 (Ruling)**, and ***Nicholas Ouma Ounda & 3 Others v ODM & 2 Others*** **PPDT Nairobi A Complaint E053 of 2022**. In ***Geoffrey Otieno Opiyo & Orange Democratic Movement Party v IEBC*** **(PPDT Nairobi Complaint No. E012 of 2022)**, the Tribunal emphasised that issuing a direct ticket after nullifying the initial process requires candidate consultation and an opportunity for them to be heard.

The High Court and Court of Appeal have reinforced this view, interpreting section 38E of the Political Parties Act (PPA) to mean that when a nomination process is nullified and a fresh exercise is ordered, the same method initially used must be applied. In ***Edwin Otieno Odhiambo v ODM National Elections Board & 3 others*** **(Kisumu High Court Civil Appeal E043 of 2022)**, the High Court ruled that if the PPDT or the Court orders a repeat of the nomination process, members would have a legitimate expectation that the same method—universal suffrage—would be employed to select the party's candidate. The court dismissed arguments citing the popularity of a candidate or tight timelines as justifications for issuing a direct ticket instead of repeating the universal suffrage process. This reasoning was supported in cases like ***Moses Odhiambo Ochele v Achan Ojuki Gordon & 2 others*** **(Kisumu Civil Appeal No. E037 of 2022)** and ***Zakayo Ongondo Oguma v Geoffery Otieno Opiyo & 3 others*** **(Kisumu High Court Civil Appeal E034 of 2022)**.

In ***ODM National Election Board & another v Gare & 2 others*** (**Civil (Election) Appeal E003 of 2022**), the Court of Appeal supported the Kisumu High Court's decision by affirming that when the PPDT orders a fresh nomination through universal suffrage, it effectively requires a repeat election. The court stressed that the party had committed to conducting primaries for the MCA position in Sakwa West via universal suffrage during the 2022 election cycle and was obligated to adhere to that method unless it could provide compelling reasons for a change, which it did not.

Although a political party has the discretion to choose its preferred method for party nominations, it is obligated under section 38E of the PPA to notify both its members and the Registrar of Political Parties about its decision. The choice of method is not merely a procedural formality; party members are entitled to participate actively in the process, creating legitimate expectations for a fair and transparent system.

Rule 6(m) of the Code of Conduct for Political Parties, established under section 6(2)(e) of the PPA, requires parties to uphold democratic practices by ensuring that party nominations are conducted in a free, fair, and credible manner. Changing the nomination process without valid reasons and without involving or notifying the party membership goes against these principles. Ultimately, the appellate court concluded that the decisions of the Appeals Tribunal, the PPDT, and the High Court were all aimed at safeguarding intra-party democracy within the ODM, especially concerning the nomination for the MCA position in West Sakwa. Upholding intra-party democracy is vital not only for the party's integrity but also for the broader democratic framework of the nation. The law requires this, and the courts must enforce it.

However, if a candidate who participated in a universal suffrage nomination subsequently resigns from the party to run as an independent, the party may select its new flagbearer using any method consistent with its Party Nomination Rules (PNR) and constitution, as demonstrated in ***National Elections Board, ODM v Kepher Ojil Odongo & Another*** **(Civil Appeal E317 of 2022).**

ii. IEBC jurisdiction in nomination and party list nominations

The nomination of candidates by political parties, which precedes their registration or clearance by the IEBC, creates an inherent connection between the two processes. This interconnection can result in jurisdictional overlap, confusion, and forum shopping between the PPDT and the IEBC. To address these issues, amendments to the Political Parties Act were made, specifically granting the PPDT jurisdiction over party nominations under section 40(1)(fa) PPA. Additionally, there were proposed amendments to the Elections Act aimed at further clarifying this distinction. While the amendments to the Political Parties Act were adopted, the proposed changes to the Elections Act remained pending as of the 2022 elections. Once the party nomination process is completed, the IEBC is

responsible for registering candidates for elections and, under Article 88(4)(e) of the Constitution, resolving any disputes that arise from nominations.[100]In respect of party list nominations, the IEBC's role is limited to ensuring compliance with legal requirements regarding category representation, while the placement and order of members within each list was determined by the respective political parties.

Party list disputes

i. Party autonomy in preparation of party lists

It is the responsibility of political parties, rather than the courts or the IEBC, to determine which of their members should be included in a party list, in which category, and in what order of priority. This has been established in the cases of ***Moses Mwicigi & 14 Others v IEBC & 5 Others*, Supreme Court Petition No. 1 of 2015** and ***Linnet Kemunto Nyakeriga & Another v Ben Njoroge & 2 Others*, Nairobi Civil Appeal No. 266 of 2013.** However, this autonomy can be interfered with where the Constitution and Elections Act are not complied with.[101]

Nevertheless, it is not open to the PPDT in resolving a party list dispute to direct a party as to a member's positioning on the list. In ***Katangie v ODM & 2 Others* Narok Election Petition E005 of 2022,** the High Court ruled that a directive of the PPDT that the Petitioner be listed as the top nominee from Narok South Ward could not be interpreted to mean that the party was mandated to include her at the top of the Gender Top Up List or that others be removed from the list to make room for her.

In the preparation of party lists, political parties are required to comply with the principles of gender equity, diversity (regional and ethnic diversity for Parliament and community and cultural diversity for county assembly nominations) and should make an indication of the interest sought to be represented. Party autonomy will there be interfered with where the Constitutional and statutory requirements are not complied with. In ***Mogeni v IEBC & 2 Others* Nyamira EP Appeal No E004 of 2023,** the party list nomination could not be upheld where the party and IEBC allowed nomination of a non-Youth to represent the interests of

100 It is noteworthy that one of the amendments from the National Dialogue Conference (NADCO) is to amend Article 88 (4) (e) of the Constitution to remove the dispute resolution mandate from the IEBC.

101 *CIC v A-G & Others* Civil Appeal No 351 of 2012; *Rose Wairimu Kamau & 3 Others* Civil Appeal No 169 of 2013; *Isaack Osman Sheikh v IEBC & 2 Others* 2014 eKLR.

the youth in the County Assembly of Nyamira. The court in this case concluded that the 3rd Respondent's nomination was irregular because the primary document used for eligibility verification did not comply with legal requirements. The reliance on the birth certificate, presented after the nominations, did not rectify the initial procedural deficiencies. As a result, the court invalidated the nomination and the trial court's judgment. It directed the 1st Respondent to issue a gazette notice revoking the 3rd Respondent's nomination and ordered fresh nominations for the youth position in Nyamira County Assembly.

Likewise, in ***Mary Charles Kalunga v IEBC & Others*** **Mombasa High Court Election Petition Appeal No. E087 of 2023,** the court found that a gazetted list that did not include any persons with disabilities or youth was not in consonance with the Constitution. In overturning the finding of the election court which had dismissed the petition, the High Court directed as follows:

> *a) The failure to nominate persons with disability is unconstitutional, null and void.*
>
> *b) Nomination of persons who are neither resident nor registered voters of Kwale County is invalid.*
>
> *c) I therefore declare that* ***Fartun Mohamed Musa, Josephine Wairimu Kinyanjui, Augustine Ndegwa, Mulki Abdullahi Adan and Rachael Katumbi Mutisya*** *were not validly elected by nomination to the special seats they were elected to and as such declare that the said seats as vacant.*
>
> *d) I declare that the 6th, 7th, 8th, 9th and 10th Respondents, that is, Khadija Ngala, Melder J. Nyakiti, Kengo Judy Chizi, Ruwa Elizabeth Mwangola, Teresia B. Muoki were validly elected as nominated members of the county assembly of Kwale and continue to serve.*
>
> *e) I direct the First Respondent to choose from the qualifying lists provided by the parties in the proportions of the votes garnered by prioritizing under the marginalized as provided in section 36 of the elections act as doth: -*
>
> *i.* ***one or two persons living with disability****, then,*
>
> *ii.* ***two youth, a man and woman resident*** *or voter in the county of Kwale,*
>
> *iii****. if one slot is available****, a person in the list of marginalised qualifying as a foresaid as resident or voter in the county of Kwale county.*
>
> *f) I further direct in filling the gender top up and in appointing people with*

> *disability, and the youth the determination already made as to party entitlements is be maintained, save that shall a party entitled to have a person with disability, does not have in its list a person with disability,* ***then such a party shall forgo*** *that seat and it be given to the next qualifying party with one elected member as per the formula already adopted by IEBC.*
>
> *g) In filling the positions, priorities in the list must be respected save only where the Commission has to comply with the order on residence and registration, and prioritizing persons to be nominated, persons living with disability are deemed to be on top of the lists with the youth as number 2.*
>
> *h)* ***None of the candidates found to have been invalidly elected are legible for re-election.***
>
> *i) As per the constitution, the youth and people with disability must have that marginalization till the end of the term.*

Political parties are therefore obligated to confirm membership at the time of nomination and ensure that party members seeking to be nominated are eligible to vie political office and represent the special interest group they claim to belong to.[102] While Article 193(1)(a) of the Constitution and Section 25(1)(a) of the Election Act require that nominees to county assemblies be registered as voters (***Amani National Congress Party & Another v Hamida Yaroi Shek Nuri & Another*****, Nairobi Election Petition Appeal No 5 of 2018 & 1 of 2017 (consolidated)**), there is no requirement that they be registered as voters in the counties where they seek nomination. In ***Lydia Matuli & ANC v IEBC and 2 Others*** **Kapsabet High Court Election Petition Appeal No. E001 of 2022**, the High Court, in overturning the decision of the election court, found that there was no constitutional or statutory provision that required a person to be a registered voter in the county whose county assembly they sought to be elected in. A similar finding was made in ***Richard Masese Makori v IEBC & 3 Others*** **Kisii High Court Election Appeal No. E006 of 2023** where the court, citing the decision of Ougo J in ***Esther Okenyuri Anyieni v Mokumi Edmond Anthony & 3 others*** **Kisii Election Petition Appeal No. 1 of 2018**, found that no obligation was imposed either by Article 193 of the Constitution or Regulations 15, 54, 55 or 56 of the Election (Party Primaries and Part Lists) Regulation 2017 for one to be registered in the county whose assembly they were nominated to, provided they were registered as a voter at the time of nomination. Therefore, even where party nomination rules require registration in the county, they could not trump the Constitution or the Elections Act.

102 *Mogeni v IEBC & 2 Others* Nyamira EP Appeal No E004 of 2023.

However, in ***Mary Charles Kalunga v IEBC & Others*** **Mombasa High Court Election Petition Appeal No. E087 of 2023,** a different High Court sitting on appeal found that there was an obligation for a nominee to either be a resident or a registered voter of the county to whose assembly they are nominated. In overturning the decision of the Kwale Magistrate's Court, the High Court found:

> *b) Nomination of persons who are neither resident nor registered voters of Kwale County is invalid.*
>
> *c) I therefore declare that* ***Fartun Mohamed Musa, Josephine Wairimu Kinyanjui, Augustine Ndegwa, Mulki Abdullahi Adan and Rachael Katumbi Mutisya*** *were not validly elected by nomination to the special seats they were elected to and as such declare that the said seats as vacant.*

These two findings need harmonisation to find an interpretation that aligns with the values of the Constitution as well as the objects of devolution. Of the two findings listed above, the former raises concerns regarding its compatibility with the objectives of devolution as outlined in Article 174 of the Constitution. These objectives include empowering local communities with self-governance, enhancing public participation in state matters, recognising community rights to manage their affairs, and promoting social and economic development within proximate, accessible services. The decisions in ***Lydia Matuli & ANC v IEBC and 2 Others*** **Kapsabet High Court Election Petition Appeal No. E001 of 2022** and ***Richard Masese Makori v IEBC & 3 Others*** **Kisii High Court Election Appeal No. E006 of 2023** may be seen as undermining these principles by allowing individuals without a direct voter registration link to the county to represent its interests, potentially weakening the intended local governance framework.

Since political parties are constitutional institutions, they are obligated to provide their members with the reasons for their decisions where those members will be affected by their actions. It is on this basis that an assessment can be made as to whether decisions made by political parties are justifiable in an open and democratic society such as Kenya. This means that where a party member applies for nomination through the party list, they must be accorded a fair chance to participate and where they do not meet the selection criteria, the party ought to give them reasons for their non-inclusion in the list or alteration of their position on the list. This culture of justification was necessary where party lists are concerned to demonstrate that special interests under the Constitution are properly taken into account in preparing the list.

While the constitution leaves the process of nomination of persons to specialized seats to the political parties, the process is to be supervised by IEBC. Section 34 (6A) of the Elections Act requires the IEBC to review the lists submitted by parties to ensure compliance with the Constitution and nomination rules of the political party concerned. (See ***National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another*** **[2013] eKLR;** ***Lydia Matuli & ANC v IEBC and 2 Others*** **Kapsabet High Court Election Petition Appeal No. E001 of 2022).** In ***Moses Mwicigi & 14 Others v IEBC & 5 Others*** **[2016] eKLR,** the Supreme Court established the following in relation to the role of the IEBC:

> *[94] Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations...*

If the IEBC gazettes a list of nominees that deviates from the list previously published in national newspapers and on its website before a general election, and there is no evidence of an amended or fresh party list provided by the concerned political party, the IEBC is deemed to have unlawfully interfered with the nomination process. Such a list is considered illegal, with the IEBC having exceeded its authority in the preparation of the list (***United Democratic Movement & Another v IEBC & 2 Others*** **Garissa Election Petition Appeal No. E005 of 2023 (Consolidated with Election Petition Appeal Nos. E002 and E004 of 2023)**).

ii. Jurisdiction in relation to party list disputes

PPDT & IEBC jurisdiction

There are two types of jurisdictions in relation to party list disputes: jurisdiction over disputes arising from preparation of the list and jurisdiction arising from gazettement of nominees. In relation to the disputes arising from the preparation of the list, dispute resolution mandate is shared by the PPDT and the IEBC. To clearly delineate the jurisdiction between the two institutions, the IEBC and PPDT signed an MoU in March 2017, which was renewed in 2022 to align it with legislative amendments ushered in by the Political Parties (Amendment) Act 2 of 2022. PPDT's jurisdiction relates to disputes concerning party nominations and party list nominations, while the IEBC has jurisdiction after it receives names of party candidates or party lists for clearance. While the PPDT may adjudicate over disputes relating to party nominations and party list nominations, that jurisdiction stops once IEBC has cleared a political party nominee.

In ***Moses Mwicigi & 14 Others v IEBC & 5 Others*** **[2016] eKLR,** the Supreme Court asserted that the Constitutional mandate of the IEBC in relation to nominations only extended to the settling of disputes relating to or arising from nominations. As such, the IEBC cannot adjudicate upon the nomination processes of a political party, as that is strictly within the province of a political party. In relation to the party list, the IEBC is only mandated to ensure that the list complies with the relevant laws and regulations.

The Political Parties Act, while not clearly delimiting party list disputes for determination by the PPDT, gives the PPDT the jurisdiction in respect of disputes between members and a political party. However, in ***Anne Khakasa Situma & 2 Others v Lydia Chelimo Kiboi*** **Kitale High Court Election Petition Appeal E002 of 2023,** the High Court asserted that while section 40 of the PPA grants jurisdiction to the PPDT in relation to disputes between members and a political party, section 4 of the IEBC Act, which grants jurisdiction to the IEBC to settle disputes relating to or arising from nominations grants an aggrieved party the right to approach the IEBC Dispute Resolution Committee for resolution of a party list dispute. This, however, does not align with the Memorandum of Understanding between the two institutions, by virtue of which deference is had to the PPDT to settle party list disputes. While the MoU is not legally binding, the practice has been to refer party list disputes to the PPDT, with a right of appeal to the Court of Appeal. It is noteworthy that in proposed amendments to the Constitution following the National Dialogue Conference, it was proposed to amend Article 88 of the Constitution, to delete sub-article 4 (e), thus removing IEBC's pre-election jurisdiction. This would make PPDT the only body with jurisdiction in relation to party list disputes.

For both the PPDT and the IEBC, jurisdiction does not subsist following gazettement of nominated party representatives after a general election. In ***Independent Electoral Boundaries Commission V Jane Cheperenger & 2 Others*** **Supreme Court Petition No. 5 of 2016,** the apex court asserted, in relation to the IEBC:

> *… the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts.*

PPDT & IEBC jurisdiction precedes gazettement of persons elected by nomination using party lists.

When does the party list close for purposes of determining jurisdiction? According to the High Court, the list closes upon publication of the list by the IEBC in at least two newspapers with nationwide circulation pursuant to Regulation 54 (8) of the Elections (Party Primaries and Party List) Regulations 2017.

In ***Bett Anne Jepleting v IEBC & 3 Others*** **Eldoret HC Election Petition Appeal No. E001 of 2022,** the High Court asserted that the jurisdiction in relation to party lists was as follows:

> *96. Having said as much, the following three salient elements on the law on party lists can be summed up, at this point in time, as under: -*
>
> *(a) that, party lists are deemed to be closed once they are published in the newspapers by the IEBC.*
>
> *(b) that, when the party lists are closed, any challenge thereto is the preserve of the IEBC DRC or the PPDT as the case may be.*
>
> *(c) that, a party's internal dispute mechanism can only be invoked before the party list is closed.*
>
> *97. Deriving from the above, the following findings do hereby suffice, that is: -*
>
> *(i) the party list in this case was closed on 27th July, 2022.*
>
> *(ii) any challenge to the said party list was to be vide the IEBC DRC or the PPDT, as the case may be.*
>
> *(iii) the proceedings by the UDA's internal dispute committee after the closure of the party lists were a nullity and with no force of law. The proceedings were those undertaken by the UDA party as well as by the Appellant.*
>
> *(iv) the UDA did not have the mandate in law to revise the party list after it was closed by IEBC on 27th July, 2022.*
>
> *(v) the revised party list by the UDA communicated to the IEBC vide the UDA's letter dated 5th August, 2022 was invalid, null and void ab initio.*
>
> *(vi) the IEBC did not have the jurisdiction to accept and act upon the revised party list forwarded to it by the UDA on 5th August, 2022 without an order of the IEBC DRC or the PPDT.*
>
> *(vii) the IEBC did not have the jurisdiction to change the party list that was forwarded to it by UDA and which was deemed closed on 27th July, 2022 without an order of the IEBC DRC or the PPDT*

While this decision attempts to provide finality to the nomination process, and ensure that the list is closed before elections and not tampered with by political parties in a way that undermines the nomination process, it may need to be harmonised with the dictates of section 40 (2) of the Political Parties Act. While the court asserted that there could not be a dispute resolution process within the political party after publication of the list in the newspaper, and that such disputes ought to move to the PPDT, PPDT has no jurisdiction unless and until there is proof of an attempt to resolve the dispute within the political party first. That of necessity would provide for a dispute resolution process at the party level, contrary to the finding in ***Bett Anne Jepleting v IEBC & 3 Others*** **Eldoret HC Election Petition Appeal No. E001 of 2022** that there could not have been a dispute resolution phase after IEBC published the names in the newspapers. Moreover, the decision does not take into cognisance that the publication in the newspaper is for the sake of inviting challenges to the list as supplied by political parties, and therefore it cannot be closed until those disputes are resolved. This was the position taken by the High Court sitting on appeal in ***Amos Liyayi Munasya v Geoffrey Muhongo Mitalo & Another*** **Election Petition Appeal No E001 of 2023,** asserted that the political party has the liberty to review the party list until the nominated members are declared elected. It was only upon gazettement that the list could not be re-opened, save with an order of the court. Likewise, in ***Josephat Peter Shambi v Doreen Taabu Rodgers & Anor*** **Voi EP Appeal No E001 of 2023,** the court found that 'all processes related to elections are terminated once elections are held. After elections, the remainder of the matters are specifically designated to be within the realm of the elections court'.

Moreover, the court in the ***Bett Anne Jepleting*** **case** did not consider that the publication of the list in newspapers is intended to invite challenges to the list provided by political parties, which implies that the list cannot be considered closed until those disputes are resolved. Of necessity, the resolution of disputes may require political parties to reconstitute their lists where they have not complied with their own rules or the Constitution and/or Elections Act.

One shortcoming in the current legal framework is the absence of a requirement for the IEBC to republish the list in national newspapers following the resolution of disputes at both the PPDT and IEBC DRC. Consequently, the gazetted list may still be subject to challenges that should have been addressed before election day. To address this, it would be prudent to amend the legal framework to require the publication of the final list after dispute resolution, thereby ensuring that the outcome is publicised and that those who have successfully navigated the nomi

nation process have a realistic expectation of being declared elected if their party performs well in the elections.

In ***Richard Masese Makori v IEBC & 3 Others*** **Kisii High Court Election Appeal No. E006 of 2023,** the High Court reasserted that the gazettement is what brings to an end the mandate of the PPDT. After gazettement, there was no obligation for an aggrieved party member to go to the PPDT. Their recourse would only lie to the election court. Likewise, the High Court in Nyeri asserted in ***Nderitu Fidelis Wangui & Another v Margaret Njeri Mwaura & 3 Others Nyeri Appeal No 1 & 4 of 2022 (consolidated)*** that political parties, the PPDT and the IEBC have no jurisdiction where the party list has been gazetted. Therefore, it was improper for the party IDRM and the PPDT to determine a party list petition after the general election and for the trial court to adopt and implement their decisions.

However, disputes that ought to be determined before gazettement ought to be filed in the PPDT or IEBC cannot be transmuted into election petitions by the effluxion of time, as discussed below.

Jurisdictional residuum where pre-election disputes are not resolved before elections

Where some pre-election issues are not addressed, the election court is said to retain 'jurisdictional residuum' to review whether there was adherence with the Constitution and electoral laws in the pre-election phase. In ***Ismail v Independent Electoral & Boundaries Commission (IEBC) & 2 others Clerk, County Assembly of Kajiado (Interested Party)*** **(Election Petition Appeal E002 of 2023),** the court in asserting that the election court erred in declining jurisdiction, asserted that drawing from the jurisprudence of the Supreme Court in the ***Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others*** **[2019] eKLR;** ***Mohammed Abdi*** **case,** where a pre-election issue is not addressed or raised before election day, it may still be raised before the High Court (not an election court) in exercise of its supervisory jurisdiction or sitting as a judicial review court.

> 94. *The lack of public participation and adherence with other relevant provisions of law as regards the nomination process as pointed out by the Appellant opened a window of "jurisdictional residuum" through which the Appellant could challenge the said process as these "other tragedies" warranted a review by the court, especially given the fact that the same were affected on 6th August 2022, the very last date when disputes could be lodged at IEBC disputes tribunal and PPDT. The Appellant was essentially locked out without being heard and thus*

95. *had no option but to approach court to be heard.*
96. *It is thus my finding that given the special circumstance and facts of this appeal, even though the dispute herein is clearly a pre-election dispute, which normally would be settled by IEBC disputes tribunal or PPDT, the court erred by failing considering the legal issues raised by the Appellant.*

Appellate jurisdiction

Regarding appeals, it is important to note that only one right of appeal exists in relation to member of county assembly petitions to the High Court, and such appeals can only be lodged on points of law. The Court of Appeal has established that it has no jurisdiction to entertain a second appeal in an election petition concerning the validity of the election of a member of the County Assembly in ***Joel Nyabuto Omwenga & 2 Others v Independent Electoral and Boundaries Commission & another*** **[2014] eKLR;** ***Isaac Oerri Abiri v Samwel Nyang'au Nyanchama & 2 others*** **[2014] eKLR;** ***Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 Others*** **Nairobi Election Petition Appeal No 30 of 2018;** ***Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others; Emmanuel Changawa Kombe (Interested Party)*** **Election Appeal (Application) No. 261 of 2018;** ***Marthlida Auma Oloo v Independent Electoral & Boundaries Commission (IEBC) & 3 others*** **Election Petition Civil Appeal 36 of 2018 [2019] eKLR;** ***Hamdia Yaroi Sheikh Nuri v Faith Tumaini Kombe & 2 others*** **Election Petition Appeal No 27 of 2018.** The position was affirmed by the Supreme Court in ***Hamdia Yaroi Shek Nur v Faith Tumaini Kombe & 2 Others*** **[2018] eKLR** and more recently in ***Josephine Wairimu Kinyanjui 4 others v Mary Kalinga & 6 others*** **SC Petition (Application) No. E014 of 2024.**

Despite efforts to differentiate between petitions arising from the direct election of members of county assembly and those stemming from party list nominations, the Court of Appeal in ***United Democratic Movement & Another v IEBC & 2 Others*** **Nairobi Election Petition Appeal E017 of 2023** clarified that no distinction exists in the appellate jurisdiction between these two categories of petitions. Section 85A of the Elections Act does not contemplate a second appeal in relation to these petitions. In arriving at its decision, the Court of Appeal asserted that the Supreme Court rulings in ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch (Interested Party)*** **[2019] eKLR** and ***Synergy Industrial Credit Limited v Cape Holdings Limited*** [2019] eKLR, although influential, pertain to second appeals in arbitration disputes and are therefore distinguishable from election proceedings, which possess a *sui generis* character. Likewise in ***Dolphine Nyangara Onkoba v Michelle Kemuma Omwoyo & 2 Others,*** **Kisumu Court of Appeal Election Petition No. E014 of 2023** & ***Obino v IEBC & 2 Others*** **Election Petition Appeal No 15 of 2023,** the

Court of Appeal declined to exercise jurisdiction, even though the issue of party list nomination had been litigated at the PPDT, because the appeal did not flow from the PPDT but from the election court. The Court of Appeal asserted that nominations are part of the election process, which can be challenged after elections via an election petition. Therefore, the right of appeal applies the same way as in other election petitions.

Since dispute did not arise as an appeal from decision of PPDT, s 41 (2) of the PPA was not applicable. None of the authorities relied on to invite the court's jurisdiction had addressed question of finality of appeals and therefore they could be distinguished.

iii. Interpretation of the Constitution in party list disputes

The jurisprudence of the High Court in the case ***Republic v Chairman, Political Parties Dispute Tribunal & 2 others Ex parte Susan Kihika Wakarura*** **Miscellaneous Civil Application No 305 of 2017** seemed to obfuscate, rather than, clarify the boundaries of jurisdiction, where a dispute that is otherwise undoubtedly within the jurisdiction of the PPDT under Section 40 of the Act ends up raising Constitutional issues e.g. whether the candidate proposed to be cleared by the party is Constitutionally eligible for the elective position in question. The High Court distinguished between interpreting the Constitution, which is what Article 99 called for in that case,[103] and applying the Constitution, which is a power given to subordinate courts and tribunals under Article 20(4) of the Constitution. While the Tribunal has power to apply the Bill of Rights in disputes before it and to promote 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom', the High Court was emphatic that the interpretative mandate remains the preserve of the High Court, even where political disputes are concerned.

It is argued that the approach by the High Court in the ***Susan Kihika case*** of splitting up jurisdiction can only result in greater confusion, and not certainty. In the 2022 cycle, the High Court upheld this position in ***Losikany James v Independent Electoral & Boundaries Commission*** **Nairobi High Court Constitutional Petition E313 of 2022**, where the Court asserted that the question of interpretation on the eligibility of a person aged 34 years to be nominated to represent the interests

103 The complaint before the Tribunal was that the ex parte applicant, who still held a public office, was ineligible for nomination by Jubilee Party to vie for the senatorial seat. The Tribunal found in favour of the 2nd Respondent that the ex parte applicant was indeed disqualified, but this finding was overturned by the High Court on the basis of want of jurisdiction.

of youth in the county assembly could not be determined by the PPDT. The most the PPDT could do was to apply the Constitution. This limits the powers of PPDT to resolve with finality questions falling within their jurisdiction which involve interpretation of the Constitution.

iv. Party list disputes as election petitions

Party list disputes often transmute into election petitions due to the limited time available for resolution of disputes before election date. It is therefore not uncommon for party list nominations to form the subject of an election petition upon publication of the list of nominated legislators after election. Does an election court have jurisdiction to deal with a party list dispute that is reintroduced as an election petition, particularly where the same had already formed or ought to have been subject of a dispute before the PPDT or the IEBC?

In ***Dorcas Monyangi Mogaka v. Orange Democratic Movement (ODM) & 4 Others*** **Kisii Election Petition Appeal No. E003 of 2023,** the matter had already been the subject of a PPDT dispute and orders issued which the IEBC implemented. Where the election court exercised jurisdiction over the dispute, the High Court found that since the appellant knew about the reviewed party list, the proper forum for her to have approached was the IDRM of her party. It was therefore improper for the election court to have entertained the dispute as the proper forum for addressing the dispute was not exhausted.

In ***Michael v Orange Democratic Movement Party & 3 others*** **Nairobi Election Petition E002 of 2022,** the High Court struck out a petition, having ruled that it is not open to a party to approach the PPDT or the IEBC, have the matter determined and then attempt to have a second bite at the cherry through an election petition. The learned judge held that the available legal mechanism to such a party is an appeal to the High Court sitting as a judicial review court or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution.

The court in ***Anne Khakasa Situma & 2 Others v Lydia Chelimo Kiboi*** **Kitale High Court Election Petition Appeal E002 of 2023** also opined that it was also open to an aggrieved person to file a constitutional petition challenging the constitutionality of the party list or initiate judicial review proceedings or invite the High Court to exercise its supervisory jurisdiction under Article 165 (3) or (6) of the Constitution. In determining the appeal, the High Court found that the election court had no jurisdiction to determine the petition since it related to a pre-election issue. As such, the Petitioner in the election petition (Respondent in

the appeal) ought to have challenged the list either in the PPDT or the IEBC rather than going to court. In arriving at this conclusion, the High Court relied on the principles established by the Supreme Court in the case of ***Sammy Ndung'u Waity v IEBC & 3 Others*** **[2019] eKLR**, to the effect that a pre-election issue cannot be raised in an election petition.

Therefore, if a person is dissatisfied with the decision of the PPDT, the correct approach is to appeal against those decisions or lodge a complaint at IEBC NDRC concerning the compliance of the list with the Constitution and electoral law, not lodge an election petition. If not, after election, matter can be pursued in the High Court sitting as a judicial review court or in exercise of its supervisory jurisdiction as set out in the principles in the ***Sammy Waity*** case.

As the High Court ruled in ***Nancy Nyanchoka Ongeri & Another v Manson Nyamweya & 7 Others*** **Kisii Election Petition Appeal No E004 of 2023,** where a complaint filed at the PPDT was struck out for failure to exhaust IDRM before approaching the Tribunal, it is not open for one to file an election petition instead. It still remains a political party dispute that should be solved at the IDRM and recourse had to the PPDT where the party is unable or unwilling to resolve the same.

v. Powers of an election court in a party list petition

One of the questions that has arisen in election appeals relating to party lists is whether the election court has the power to reconstitute or nullify the list gazetted by the IEBC where it is found that the list, as gazetted by the IEBC after the election, does not comply with the provisions of the Constitution and/or the Elections Act. Does the election court have the power to reconstitute the list or does it simply nullify the list and direct the IEBC to properly constitute the list in accordance with the Constitution and Elections Act?

In ***United Democratic Movement & Another v IEBC & 2 Others*** **Garissa Election Petition Appeal No. E005 of 2023 as Consolidated with Election Petition Appeal No. E002 of 2023 and Election Petition Appeal No. E004 of 2023,** the High Court, while sitting on appeal, addressed the role of the Independent Electoral and Boundaries Commission (IEBC) regarding party lists and the implications of an improperly constituted list as gazetted by the IEBC. At para 13 of its decision, the High Court found:

> *13. A Party List belongs to the political party nominating. Hence the IEBC has no power to amend a Party List or publish names not in the Lists, as did IEBC in this case which is tantamount to it nominating for political parties instead of the political parties nominating by themselves. IEBC's role on Party Lists is merely advisory, supervisory and facilitative, rather than parallel, supplemental or complemental. By doing what it did in this case, the IEBC hijacked the Party Lists, thereby overstepping its powers and acting without jurisdiction and in fragrant excess of its remit.*

The court determined that the list originally published before the elections was the valid list, rejecting the IEBC-gazetted list, which the court found to have been improperly altered. The election court had directed the degazettement of one nominee, declared the valid nominee and directed the IEBC to gazette them to represent PWDs under the marginalised category.

In its decision affirming the election court's finding to degazette the individual listed as elected under the UDM Party in position No. 1 on the marginalised list youth category, on the basis that he was not a member of UDM at the time of the list's submission, the High Court underscored that, in the absence of evidence showing that an amended or fresh party list had been properly submitted to the IEBC by the relevant party, any subsequently gazetted list would be deemed unlawful.

> *This renders the resultant List an outright illegality ab initio, hence null and void. With the consequence that such a List cannot confer on anyone any benefit; and any benefit derived from it by any nominee is not retainable. If the process is wrong and illegal, the result cannot be right, legitimate or valid.*

Furthermore, the court determined that any new or amended party list submitted to the IEBC after its initial publication must be circulated through a prominent national newspaper to ensure broad public awareness. The court also ruled that, without satisfactory documentary evidence from the IEBC, an amended list could not be upheld. Consequently, the IEBC was ordered to gazette the list it had published on 27 July 2022 as the valid list within seven days, and the nominations of the individuals gazetted as representatives for the youth and persons with disabilities representing UDM in the Mandera County Assembly were nullified.

Likewise, in ***Mogeni v IEBC & 2 Others*** **Nyamira EP Appeal No E004 of 2023,** the High Court nullified a party list nomination where the IEBC allowed nomination of a non-Youth to represent the interests of the youth in the County Assembly of Nyamira. The IEBC accepted a birth certificate as the primary document for

eligibility verification, whereas the Regulations required a national identity card to be supplied by nominees. The nominee had requested to use a birth certificate since they had two national identity cards showing diverse dates of birth, which the IEBC accepted. The court found that the reliance on the birth certificate, presented after the nominations, did not rectify the initial procedural deficiencies. As a result, the court invalidated the nomination and the trial court's judgment. It directed the 1st Respondent to issue a gazette notice revoking the 3rd Respondent's nomination and ordered fresh nominations for the youth position in Nyamira County Assembly.

Similarly, in ***Mary Charles Kalunga v IEBC & Others*** **Mombasa High Court Election Petition Appeal No. E087 of 2023,** the High Court directed the IEBC to 'choose from the qualifying lists provided by the parties in the proportions of the votes' two persons with disabilities, two youth and one person from the marginalised list where it found the list illegal for failure to include persons with disabilities and declared as illegal the nomination of persons who were neither resident nor registered as voters in Kwale county. However, the High Court ruled that where a political party did not have on its list a person with a disability, such a party was to forgo its seat and it would be allocated to the next qualifying party. The court further directed that none of the candidates found to have been invalidly elected was eligible for re-election. An appeal against this decision was struck out for want of jurisdiction.[104]

Does the IEBC have the power to gazette a new list in the absence of commissioners?

In ***Josephat Peter Shambi v Doreen Taabu Rodgers & Anor*** **Voi EP Appeal No E001 of 2023,** the court noted that it was the role of the IEBC to balance the gazetted list for purposes of balancing ethnicity and gender. Since this role is terminated after gazettement, does the election court have power to reorder the list to correct discrepancies? Or is the proper approach to remit the list to the IEBC for correction and re-gazettement? How should the court approach the lack of a properly constituted commission for purposes of gazettement?

The powers of the IEBC in the absence of a full complement of commissioners has been the subject of protracted litigation. Despite the IEBC Act's requirement that the process to fill vacancies within the commission be initiated at least six months before the tenure of commissioners expires or within 14 days of a vacancy being

104 *Kinyanjui & 5 others v Kalunga & 12 others* (Election Petition Appeal E002 of 2023 & Election Petition Appeal (Application) E002 of 2023 (Consolidated)).

declared, vacancies created by resignation in 2017 and end of term in 2022 have never been filled timeously. This hampers policy-making at the IEBC and raises questions on the capacity of commission to fulfil the mandate reserved for the commissioners.

In ***Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & Another*** **Nairobi High Court Petition 212 of 2018 [2018] eKLR,** the court declined to find that the Commission was invalidly constituted on account of failure to promptly fill vacancies arising from resignations of 4 commissioners.

> *[25] Even though the issue of whether or not there are vacancies in the Commission was not contested by the parties, this court is still minded to consider the provisions of the law on how a vacancy may occur in the Commission and determine whether, on the facts presented before this court, it can be said that indeed vacancies were created following the alleged resignation of some of the commissioners. In support of his claim on the alleged resignations, the petitioner attached a signed copy of Ms. Roselyn Akombe's press statement (marked "**IBK-2**") and a copy of an unsigned joint statement of resignation by the other three Commissioners (marked "**IBK-3**").*
>
> *Section 7A of the IEBC Act provides as follows on vacancy in the Commission:*
>
> ***7A. Vacancy in the office of chairperson and members***
>
> *(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—*
>
> *(a) Dies;*
>
> *(b) Resigns from office by notice in writing addressed to the President; or*
>
> *(c) Is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.*
>
> *[26] A reading of Section 7A (1) (b) of the Act clearly shows that resignation is by notice in writing to the President. Other than a copy of the press statement released by Ms. Roselyn Akombe and a copy of an unsigned joint resignation statement by her three colleagues, there was no other tangible evidence placed before this Court to demonstrate that there were vacancies created, through resignation, as is envisaged under Section 7A (1) (b) so as to enable me arrive at the conclusion that there are indeed, vacancies in the commission as alleged by the petitioner. My take is that the commissioners who issued the press statements regarding their alleged resignations were fully aware of the provisions of Section 7A (2) and (3) which provides for the steps that follow their*

resignation regarding the publishing of the occurrence of a vacancy and the immediate recruitment of the new commissioners.

Section 7A (2) provides:

(2) The President shall publish a notice of a vacancy in the Gazette within seven days of the occurrence of such vacancy.

***Section 7A (3)** provides:*

(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).

*[27] In the instant case, no evidence been presented before this Court to show that the President has published a notice of vacancy as dictated by **Section 7A (2).** Section 7A (3) clearly states that the recruitment of a new chairperson or member can only commence after the declaration of vacancy by the President under subsection (2). From the above provision, one can say that the Act contemplated that vacancies could occur due to resignations and gave clear provisions on what action was to be taken by the appointing authority to facilitate the recruitment of new commissioners. Clearly therefore, the mere fact that there are vacancies in the commission does not mean that the Commission becomes unconstitutional and by extension, the mere fact that the appointing authority has not initiated the process of recruiting new commissioners does not mean that the commission as presently constituted, is not constitutional. Considering that the Commission still meets the minimum threshold of three members as envisaged under Article 250(1) of the Constitution.*

[28] From a legal standpoint therefore, and in light of the clear provisions on how a vacancy may be created in the commission, this court is unable hold that there is any vacancy in the Commission following the alleged resignations communicated through the press statements. My finding is that if indeed, the lawmakers intended that a vacancy, through resignation, may be communicated through any other means other than a letter addressed to the President, then the Act would have explicitly stated as much. Perhaps this case will serve as a wake-up call to lawmakers to reconsider the provisions relating to the resignations by commissioners with a view to plugging the gaps therein so as deal with the stalemate that is currently existing at the commission as a result of the commissioners opting to tender their resignations through the press instead of a letter addressed to the President as is required by the law.

[29] Be that as it may, this court takes judicial notice of the fact that the issue of the resignation of the four commissioners, albeit without complying with

the law on resignations, is an issue that has been in the public domain for some time now and is a matter that the court cannot ignore in determining the merits of this petition. The lingering question is whether the commission can be said to be improperly constituted purely on account of resignation of some of its commissioners. Section 7(3) of the Act provides that the Commission shall be properly constituted notwithstanding a vacancy. This position is confirmed by the provisions of Section 7A (4), (5) and (6) which stipulate as follows:

Section 7A

(4) Whenever a vacancy occurs in the office of the chairperson, the vice-chairperson shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(5) Where the positions of chairperson and vice-chairperson are vacant, a member elected by members of the Commission shall act as the chairperson and exercise the powers and responsibilities of the chairperson until such a time as the chairperson is appointed.

(6) The provisions of section 6(1) shall not apply to the vice-chairperson or a member acting as chairperson under this section.

[30] My finding is that the occurrence of a vacancy in the commission does not invalidate the composition of the commission and it is for this reason that the lawmakers enacted clear provisions regarding the prompt replacement of commissioners upon the resignation of any one of them. [emphasis added]

Following an amendment to the Elections Act vide Election Laws (Amendment) Act No 34 of 2017, Katiba Institute challenged the constitutionality of those amendments in ***Katiba Institute & 4 Others v The Attorney General & 2 Others*** **[2018] eKLR.** Mwita J. pronounced himself on the issue of the quorum of the commission as follows:

Quorum being the minimum number of Commissioners that must be present to make binding decisions, only majority commissioners' decision can bind the Commission. Quorum was previously five members out of the nine commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to seven, including the Chairperson, half of the members of the Commission, or three commissioners now form the quorum. Instead of making the quorum higher, Parliament reduced it to three which is not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions are to be made through voting, only decisions of majority of the Commissioners should be valid. Short of that anything else

would be invalid. For that reason, paragraphs 5 and 7 of the Second Schedule are plainly skewed and unconstitutional.

With the resignation of 3 commissioners, removal of 1 and coming to an end of the tenure of the remaining three commissioners, the controversy in 2022 focused on whether the Secretariat could issue gazette notice in compliance with court orders in the absence of commissioners.

In ***Wachira James Maina & 12 Others vs Celestine Chepchirchir Mutai and Others*** **Eldoret High Court Election Petition Appeal No. E002 of 2023,** Nyakundi J ruled as follows on the role of Gazettement by the Independent Electoral and Boundaries Commission:

Guided by the foregoing discussion, this court is called upon to grant a relief that will effectively cure the violation as a way of enforcing the constitution and strike a blow to any future incentives for any state organ, state officer or public officer to violate, infringe and or frustrate a legitimate constitutional or legal process.

I have taken note of the 4th Respondent has allegedly cited incapacity as a reason for not complying with the court's order. That the 4th Respondent is not properly constituted and as such it is unable to comply. It then triggers the next issue for determination.

Whether Gazettement is such a fundamental step to an election process.

The next issue I shall consider is whether the issue of Gazettement is such a fundamental step in the election process that it can keep an elected or nominated aspirant from assuming office. The provisions of Article 259 require the Constitution to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights fundamental freedoms and that permits the development of law and good governance.

In the present circumstances, IEBC has not been properly constituted. Any further delays would then mean that the Applicants' rights will be put on hold until such a time when the commission will be constituted. Will such an approach breathe life into the Constitution, being a living document?

In my view, when parties suffer a constitutional violation, they quite naturally turn to the courts for relief. The function of the courts then is to assist in fashioning a legal system which is effective and responsive to individual demands for an orderly and expeditious resolution of issues.

Therefore, while this court appreciates the fact that the Constitution of Kenya 2010, did not envisage such a lacuna where there are no IEBC Commissioners, thereby holding all its functions in abeyance, the court is also aware of its mandate to fashion appropriate remedies to the aggrieved party. To this end, the court cannot then sit back and watch the applicant suffer a glaring prejudice for reasons that a properly constituted commission doesn't exist.

Why Gazette? Is it mandatory legal requirement?

While I appreciate the importance of Gazettement in the election process, I insist on realizing the Applicants' constitutional rights who equally have a legitimate expectation to be sworn in as Members of the County Assembly having exhausted the available avenues in pursuing their cause…

From the foregoing cited provisions, it is safe to conclude that a gazette notice is evidence, at face value, of the existence of a law or a notice that has been duly formulated. It then implies that a Gazette notice is an official communication or a formal expression of the existence of the notice or law...

The 4th Respondent's reasons as put forth by the applicants that it is unable to comply with the court's orders for lack of a quorate commission, is therefore untenable and an attempt to take advantage of the lacuna created by the absence of the Commissioners, an issue that is out of control of the Applicant.

My reading and understanding of the above provisions is that once members of the County Assembly are nominated and/or elected, it is the IEBC's role to publish their names in the Kenya Gazette to inform the public of the prospective office holders. It is noteworthy that there is no mandatory provision to the effect that an MCA can only be sworn in after Gazettement. Gazettement only serves as an avenue to formally inform the public of the successful candidates and as such closing the election process.

In the exercise of discretion, the rule of law dictates that like cases are treated alike. In the sense there should be a degree of predictability and certainty that such individuals in the position of petitioners can benefit from the application of the law and remedies provided therein to plan their lives in reference to a particular legitimate administrative decision. From a more practical point of view holding back the gazettement of the petitioner denies their constituency right of representation in the County Assembly. Therefore, the argument being advanced by the petitioners is a valid one particular circumstances change in the composition of IEBC should be prohibited for that change impairs their civil and political rights. The failure to generate the necessary instruments leading to them taking oath of office as members of County Assembly is unjust and causes unfairness. A case in point is where the statutory framework is

> *crystal clear as to the procedure to be adopted. Here the appropriate test is for the chief executive officer to find ways and means to give this matter the weight it deserves and the implications of not fulfilling the letter and spirit of the law. There is an overriding public interest which transcends the individual rights in this litigation.*
>
> *From the facts of this petition the measures adopted by the state organ of not processing the procedural legal instruments in favour of the petitioners largely infringes their fundamental rights and freedoms and the objective which was intended to be achieved by their nomination as occasioned severe prejudice and injustice to the communities/groups designated to be represented by them in the County Assembly I may unhesitatingly remark that this limitation on the petitioners enjoyment of their right is of a nature beyond their individual interest and rights. This is about the interest of the public. This action in a democratic society fails to meet the objectives of the legitimate expectation.*
>
> *Lastly the emerging scope of this petition cannot escape an illumination on the remedies available under Art. 23 93) (f) of the Constitution on judicial review. This is meant to redress any threats to or actual violation of any right or freedom including by private persons. In Art. 47 (1) of the Constitution it guarantees a right to fair administrative action that does not violate or threaten to infringe any fundamental rights or freedoms. In this unprecedented petition due to the lack of establishment and operationalization of IEBC as a critical organ of state in matters to do with election management I invoke the writ of mandamus to compel the chief executive officer to execute the tasks in favour of the petitioners within the limitations of the law.*

The gazettement has been declared by the courts to be a merely administrative act which should not stand in the way of a litigant who has obtained victory in the courts, and which must be enjoyed within a specified time period, since a legislative term is time-bound.[105] Okwany J. in ***Michelle Kemuma Omwoyo v Independent Electoral & Boundaries Commission & Another*** **Nyamira Constitutional Petition No. E005 of 2023; [2023] KEHC 24521 (KLR) (31 October 2023) (Ruling)** held that:

105 In *County Government of Kisii and Others v Independent Electoral and Boundaries Commission and Others* Kisii High Court Petition No. E006 of 2024, the High Court made a similar finding where the IEBC asserted that it had no commissioners to gazette the returning officer for purposes of declaring elected a deputy governor who was to replace the impeached deputy governor in Kisii. The court found that gazettement was a mere administrative task, not dependent on the quorum of the Commission.

67. The reasoning by the Supreme Court was that the substantive process of electing or nominating an MCA is what may be challenged in a court of law and that gazettement only serves the purposes of notifying the public of the outcome of the nomination. It's my view that the process of gazettement is merely an administrative task arising from an already concluded legal process. I find that gazettement cannot vitiate the status of a person who has been duly elected or nominated during an election process. This is the position that was adopted by Odunga J. (as he then was) in Director of Public Prosecutions v Samuel Kimuchu Gichuru & Another (supra), when he held thus: -"…In my view, unless the instrument in question expressly provides that an appointment thereunder is effective on gazettement, the gazettement is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment."

70. I have, in the same vein, considered the fact that as a court of equity, this Court should consider the peculiarity of the circumstances that the parties find themselves in where, for some unexplained reason, there is no properly constituted IEBC, and draw reference from the equity maxim which states that; "Equity sees as done that which ought to have been done". The Respondents herein have not disputed that the Applicant would have been gazetted if the 1st Respondent was properly constituted. Indeed, the Applicant would have been gazetted immediately upon the determination of the suit in the Chief Magistrate's Court on 11th January 2023 in which the nomination of Dolphine Nyang'ara was nullified. The lower court's decision was upheld on appeal. I therefore find that there is no impediment or barrier to the Applicant's swearing in and assumption of office. This Court takes the view that, in the interest of justice and in circumstances of this case, the issue of gazettement, which is not a legal prerequisite but an administrative formality/directive, may be by-passed or be deemed to have been done. I find that nothing should further stand in the way of the Applicant, who has been vigilant in pursuing her cause, from assuming her rightful place in office as an MCA. My finding is bolstered by the provisions of Article 177 of the Constitution which limits the term of an MCA to 5 years.

What happens when an appellate court nullifies the election of an individual whose election was not contested in an election court?

Fair hearing is a central tenet of our justice system and so is participation of the people through representation. Where a person is wrongly sworn into elective office, the courts have found that such an illegality ought not to be allowed to stand, even where the affected person has not been joined to the proceedings nullifying their election. In ***United Democratic Movement & Another v IEBC***

& 2 Others **Garissa Election Petition Appeal No. E005 of 2023 as Consolidated with Election Petition Appeal No. E002 of 2023 and Election Petition Appeal No. E004 of 2023**, the IEBC was also directed to degazette a member who had been declared elected under the marginalised category, even though she had been listed as nominated in the gender top-up category in the pre-election list. Although she was not a party to the proceedings in the election court, the High Court held that she could not retain her seat due to the illegality.

While the decision of the High Court was further challenged in the Court of Appeal in ***United Democratic Movement & Another v IEBC & 2 Others*** **Election Petition Appeal E017 of 2023,** the Court of Appeal upheld the finding of the High Court on degazettement, asserting that while the right to a fair hearing must be acknowledged, the court should not turn a blind eye to an illegality:

> *65. It is a fact that Sokorey Maalim Isaakow was not a party to the proceedings before the Elections Court, and naturally, the court could not, and indeed it did not issue any orders against her. It is the High Court in its judgment in the consolidated appeals that made orders that affected her.*
>
> *66. In arriving at the impugned decision, the High Court held that although Sokorey Maalim Isaakow was sworn in and was serving as Member of County Assembly for Mandera, she was not in the UDM's Party nomination priority list published in the Standard Newspaper of July 27, 2022. The court held that although she was not a party to the proceedings before the election court, she could not be allowed to keep her seat amidst the illegality. In the learned judge's words, "a court's hands are never tied and neither can its legs be shackled."*
>
> *67. While we appreciate that Sokorey Maalim Isaakow had a constitutional right to be heard before any adverse orders were issued against her, we agree with the holding of the learned judge that having found that her nomination to the Mandera County Assembly was based on the wrong party list, her nomination could not be allowed to stand. In other words, it was an illegality which the High Court and indeed this Court cannot turn a blind eye to and allow it to perpetuate. While this Court sympathizes with the situation Sokorey Maalim Isaakow finds herself in, we nonetheless are alive to the fact that the IEBC had published the party lists under the various categories in the Standard Newspaper on July 27, 2022 and in Gazette Notice No 10712 of September 9, 2022. The reason for publishing the names of nominated candidates in a nationwide newspaper and in the Kenya Gazette is to create awareness and to give opportunity to any party or person dissatisfied with the names as published to seek redress through the appropriate avenue. Sokorey Maalim Isaakow was most certainly aware that her nomination was in the Gender Top-up category and*

> *not under the marginalized category. Her swearing in as a nominated member of county assembly for Mandera County was pursuant to the Gazette Notice No 10712 of September 9, 2022. While we appreciate that the IEBC erred in publishing her nomination in the wrong category, we are not convinced that she (Sokorey Maalim Isaakow) could not have taken the necessary legal steps on her own to correct the apparent error. In the circumstances, therefore, this Court acknowledges her right to a fair trial, but hastens to note that it cannot overlook the error by the IEBC and allow her to retain her seat in the Mandera County Assembly as this would be perpetuating an illegality.*

In the category of cases discussed above, the court nullified the respective lists and directed the IEBC to gazette the correct nominees.

VIII. RECOMMENDATIONS

1. **Harmonisation of amendment/legislative enactment efforts:** The allocation of jurisdiction among political parties, the IEBC and PPDT in relation to nomination disputes has been a persistent challenge in every election. Since the nomination of candidates by political parties precedes their registration/clearance by the IEBC, the two processes are intricately linked. The interconnection between the two processes creates a potential for jurisdictional overlap, confusion and forum shopping between the PPDT and the IEBC. Attempts to delimit party processes (party nominations) from the registration of candidates by IEBC were made through amendments to the Political Parties Act (particularly s 40(1)(fa) granting jurisdiction over party nominations to PPDT) and proposed amendments to the Elections Act. While the amendments to the Political Parties Act were adopted, the amendments to the Elections Act remained pending at the time of going to elections in 2022. It is recommended that there be a harmonisation of amendment efforts to ensure that consequential amendments to all affected legislation are adopted simultaneously for harmony.

2. **Timely amendments to electoral laws:** It is recommended that no amendments be made to electoral laws within a year of an election. The enactment of the Political Parties Amendment Act No. 2 of 2022 adversely impacted the effective conduct of party nominations. According to section 27 of the Elections Act, political parties are required to submit their nomination rules to the Commission at least six months prior to a general election. Due to the late amendments to the Political Parties Act, many party constitutions remained unchanged leading up to the 2022 elections, and nomination rules had already been submitted to the Office of the Registrar of Political Parties (ORPP) and the IEBC, making any alterations within the established timelines impossible. This discrepancy resulted in a mismatch between the nomination methods outlined in party rules and those mandated by the Political Parties Act. This inconsistency was reflected in the jurisprudence of the Political Parties Dispute Tribunal (PPDT) and the courts in determining whether the nomination methods employed by political parties conformed to the requirements of the Act. Some of these disputes extended into the post-election period, with nomination issues evolving into election petitions. Thus, the importance of making early amendments to electoral laws cannot be overstated.

3. **Amendment to regulations-**Regulation 87 (2) of the Elections (General) Regulations was declared unconstitutional for conferring on the chairperson the

power to solely verify and tally results at the national tallying centre. However, Regulation 83 (2), which confers an identical power, was not referred to by the court. Seeing as previously the courts have declared laws unconstitutional and they have remained on the statute books,[106] it is necessary to ensure that the process of law reform is undertaken.

4. **Monitoring election offences in election courts-**in the absence of direction from the Supreme Court, there is a lack of clarity on section 87 of the Elections Act. This was tested in ***Bryan Mandila Khaemba v Didmus Wekesa Baraza Mutua & 2 Others*** **Eldoret High Court Petition 1 of 2022**. As stated earlier in the text, it is not clear why the standard of proof in such cases remains beyond reasonable doubt, seeing as the law anticipates a further legal process to determine whether in fact an election offence did occur. It is arguable that the phrase 'may have occurred' as used in section 87(1) of the Elections Act, 2011 suggests that the courts should use the civil standard of proof in determining whether such malpractices have affected the validity of an election. The Supreme Court may have missed the opportunity in 2022 to clarify the impact of s 87 in light of the revised law as urged by amici for the following reasons. Firstly, the threshold for a factual finding that an election offence 'may have occurred' is inconsistent with the establishment of that fact 'beyond reasonable doubt'. Secondly, the failure by the court to dedicate attention to an analysis of the law post-2016 has an impact on the question of *autre fois convict* in criminal law, a concern that had been raised by *Rawal SCJ & VP (as she then was)* in her concurring opinion in ***Moses Masika Wetangula v Musikari Kombo*** **Supreme Court Petition 12 of 2014 [2015] eKLR**. Seeing as section 87 anticipates a subsequent proceeding in a Magistrate's Court, the finding on the commission of an election offence is collateral to its main findings in the petition. Section 87 provides that a finding on the possible commission of an election offence is made in addition to any other finding in an election petition. This makes the finding of an election court on the possible commission of an election offence an ancillary finding. If therefore on the basis of this ancillary finding a person is found to have committed an election offence, and they are thereafter subjected to a criminal proceeding, does it not amount to being tried twice for the same set of facts?

   Thirdly, the failure by the court to review the standard as urged by amicus has an impact on the resolution of disputes by other elections courts. This

106 See Election Laws (Amendment) Act 34 of 2017 which was declared unconstitutional in *Katiba Institute & 3 Others v Attorney General & 2 Others*, Nairobi Petition No 548 of 2017 but the law was not revised.

is because all courts are bound by the jurisprudence of the Supreme Court by virtue of Article 163 (7) of the Constitution. As argued elsewhere in this text, flowing from the decision of the court in ***Bryan Mandila Khaemba v Didmus Wekesa Baraza Mutua & 2 Others (supra)***, several issues remain unresolved concerning the impact of election offences on outcome of an election petition. First, under what circumstances can an election court look into election offences in the course of determining an election petition under section 87 Elections Act? Second, does the institution of criminal proceedings divest an election court of jurisdiction under section 87 and under the Election Offences Act? Third, can an election be challenged purely on the basis of commission of election offences?[107]

5. **Powers of an election court to review its decision:** While section 80 of the Elections Act makes reference to the various powers of an election court, it does not confer the power to review its decisions to the election court. Since the Civil Procedure Rules are not applicable to electoral disputes, being *sui generis*, the provisions of the Civil Procedure Act and Rules cannot be imported into electoral disputes. The lack of clarity on this power has created divergent views among election courts.[108] It is necessary to have legislative clarity on this question.

6. **Policy and oversight responsibilities of the Chairperson, CEO and Commissioners of the IEBC-**In crafting appropriate reliefs in the presidential election petitions, the Supreme Court has asserted that it does not have power to issue reliefs that extend beyond its jurisdiction under Articles 140 and 163 of the Constitution. however, nothing stopped the court from crafting recommendations to address structural challenges faced by the IEBC. Among these was a lack of clarity in the policy and oversight responsibilities of the Chairperson, CEO and Commissioners of the IEBC. The Supreme Court recommended that the IEBC should establish formal internal guidelines to clearly delineate the

107 See for example sec 144 of the Constitution of Sierra Leone which allows for the Election Offences and Petitions Court to exercise jurisdiction over both election offences and election petitions.

108 The election courts in *Clement Kung'u Waibara & Another v Francis Kigo Njenga* [2013] eKLR & *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others* Machakos Election Petition No 8 of 2013 found that an election court had no power to review as it was not expressly granted by statute. On the contrary, in *Mohammed Ali Mursal v Saadia Mohamed & Others* [2013] eKLR; *Godfrey Masaba v IEBC & 2 others* Bungoma High Court Petition 8 of 2013 [2013] eKLR & *Evans Okacha v Democratic Action Party Kenya (DAP-K) & 3 Others* Kakamega Election Appeal No E008 of 2022, the election courts asserted that the power to review was necessary to correct apparent mistakes or errors on the face of the record, and it was antithetical to the Constitution to decline to exercise this power because it was not expressly provided for by statute.

policy, strategy, and oversight responsibilities of its Chairperson, Commissioners, and Chief Executive Officer. It was further suggested that roles for IEBC officials and third parties be explicitly defined in both legislative and administrative directives to ensure clarity and accountability.

7. **Public participation in the adoption/implementation of legislation:** Numerous challenges were brought against various pieces of legislation in the lead-up to the 2022 elections, primarily on the grounds that these laws lacked adequate public participation before their enactment or implementation. These include Section 22(1)(b)(i) Elections Act, Section 22(1) (b) (ii) of the Elections Act, section 22 (2) Elections Act which related to educational qualifications for seeking office as well as the two-thirds gender rule. It is recommended that there be stakeholder engagement on the necessity of these qualifications. Where it is considered necessary to retain them, comply with the dictates of public participation

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8. **Campaign finance regulation:** Regulation of campaign financing remains a challenge in Kenya's elections. Parliament has deferred implementation of the legislative and regulatory framework since adoption of the legislation in 2013, as detailed earlier in the text. In 2022, Section 29(1) of the Election Campaign Financing Act was declared unconstitutional in the case of ***Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others*** **Constitutional Petitions No. E540 & E546 of 2021** as it contravened Article 10(2) (c) and 88(4) of the Constitution in requiring parliamentary approval of regulations before gazettement. It is recommended that Section 29 (1) ECF Act be amended to remove requirement to table Election Campaign Financing Regulations in Parliament before gazettement.

9. **Harmonisation of requirements for independent candidature and political party candidature:** In the lead-up to the 2022 elections, a key issue arose concerning whether independent candidates were being treated differently from those affiliated with political parties in terms of proving community support for their candidacy. Unlike political party candidates, independent candidates were required to submit copies of their supporters' identity cards, highlighting a disparity in the requirements for demonstrating community support. In ***Free Kenya Initiative & 6 Others v IEBC & 4 Others; Kenya National Commission on Human Rights (Interested party)*** **Constitutional Petition E160 of 2022,** Regulations 18(2)(c), 24(2)(c), 28(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017)

were declared unconstitutional for discriminating against independent candidates. To align with the decision of the court, it is recommended to revise the regulations to ensure that independent candidates are subject to the same requirements as those for party-nominated candidates.

10. **Fair representation of marginalised groups:** In the run-up to the 2022 elections, the participation of marginalised groups such as persons with disabilities and marginalised communities were the subject of litigation in in ***Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party)*** **Machakos Petition No E002 of 2022** and ***Reuben Kigame Lichete v IEBC & Another,*** **Constitutional Petition E275 of 2022 (unreported)**. In the former case, the court, in considering the constitutionality of the IPPMS, directed that proper structures be established to put in place measures guaranteeing the full enjoyment of the fundamental rights and freedoms encapsulated under Articles 6(3), 27, 35, 38 and 56 of the Constitution of Kenya, 2010 with specific attention to minorities and indigenous peoples. In the latter case, which was appealed against and the appeal remained pending as the country went into election, the High Court found that the IEBC ought to have offered assistance to the candidate to overcome the disability in complying with the election requirements. It also recommended that the Commission ought to have considered availing documents in braille or recommend ways of overcoming the constraints that the candidate, who was visually impaired, accessed the country to collect signatures. It may be time for the IEBC consider adoption of accessible formats and other reasonable accommodation measures to ensure that that is fair representation and participation of marginalised groups in elections. This could be done through the Election (General) Regulations to facilitate reasonable accommodation in addressing the requirements for registration as a candidate for persons with disabilities to remove the barriers for those PWDs interested in seeking elective seat in line with Article 54 of the Constitution and international human rights obligations.

IX. SUMMARY OF LAW REFORM PROPOSALS

	Relevant law	Shortcoming	Recommendation
	Independent Electoral and Boundaries Commission Act, No. 9 of 2011	In ***Raila Odinga & 16 others v William Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)**, the court found that there was a lack of clarity in the policy and oversight responsibilities of the Chairperson, CEO and Commissioners of the IEBC.	The IEBC should establish formal internal guidelines to clearly delineate the policy, strategy, and oversight responsibilities of its Chairperson, Commissioners, and Chief Executive Officer. It was further suggested that roles for IEBC officials and third parties be explicitly defined in both legislative and administrative directives to ensure clarity and accountability.
	Section 22(1)(b)(i) Elections Act	Section was declared unconstitutional in ***Paul Macharia Wambui & 10 Others v The Speaker of National Assembly & 6 Others* High Court at Nairobi Petition No. 28 of 2021 (as consolidated with Petition Nos. E549 of 2021, E077 of 2022, E037 of 2021 and No. E065 of 2021) (2022) eKLR** for want of public participation by the National Assembly.	Stakeholder engagement on the necessity of these qualifications. Where it is considered necessary to retain them, comply with the dictates of public participation.
	Section 22(1) (b) (ii) of the Elections Act	Declared unconstitutional in ***County Assembly Forum & 6 Others v Attorney General & 2 Others* (2021) eKLR** for want of public participation.	Stakeholder engagement on the necessity of these qualifications. Where it is considered necessary to retain them, comply with the dictates of public participation.

	Relevant law	Shortcoming	Recommendation
	Section 22 (2) of the Elections Act	The court found in ***Buoga v Attorney General & Another*** **Constitutional Petition E290 of 2022** that section 22(2) of the Elections Act was unconstitutional as it contravened Article 180(2) of the Constitution by creating a differentiation in the eligibility criteria between a Member of County Assembly and a Governor. The court noted that Article 180(2), when read together with Article 193, established that the qualifications for the election of a County Governor were identical to those required for the election of a Member of County Assembly.	Stakeholder engagement on the necessity of these qualifications. Where it is considered necessary to retain them, comply with the dictates of public participation.
	Section 34 (fd) of the Political Parties Act	In ***Salesio Mutuma Thuranira & 4 Others v Attorney General & 2 Others; Registrar of Political Parties & 4 Others (Interested Parties) (Petition E043, E057 & E109 of 2022),*** section 34(fd) of the Political Parties (Amendment) Act was found to be in contravention of article 88(4)(d) and (k) of the Constitution, which vests the power to regulate political party nominations in the IEBC. The court found that statute cannot purport to bestow the same powers in the Registrar of the Political Parties. That would amount to usurpation of IEBC's constitutional mandate.	To revise PPA to harmonise this section with Article 88 of the Constitution.

	Relevant law	Shortcoming	Recommendation
	Section 29(1) of the Election Campaign Financing Act	Section 29(1) of the Election Campaign Financing Act was declared unconstitutional in the case of ***Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others*** **Constitutional Petitions No. E540 & E546 of 2021** as it contravened Article 10(2)(c) and 88(4) of the Constitution in requiring parliamentary approval of regulations before gazettement.	Section 29 (1) ECF Act should be amended to remove requirement to table Election Campaign Financing Regulations in Parliament before gazettement.
	Regulation 90 Elections (General) Regulations	Lack of mechanisms for implementing procedures for special voting.[109]	The Supreme Court in its 2022 decision encouraged the IEBC to establish mechanisms for special voting, as outlined in regulation 90 of the Elections (General) Regulations.

109 It is worth noting that Kenya is one of many African countries that does not have any special voting arrangements (SVAs) provided for. According to International IDEA, 17 countries in Africa (33%) allow early voting for some voters and only Angola allows it for all voters. The use of early voting is comparatively spread out across the continent. 65% of countries in the continent do not allow early voting in any form. See https://www.idea.int/data-tools/tools/special-voting-arrangements accessed 6 May 2024.

	Relevant law	Shortcoming	Recommendation
	Regulation 87 (2) as read with Regulation 83(2) of the Elections (General) Regulations	Regulation 87 (2) of the Elections (General) Regulations was declared unconstitutional for conferring on the Chairperson the power to solely verify and tally results at the national tallying centre. However, Regulation 83 (2), which confers an identical power, was not referred to by the court.	Need to harmonise the regulation with the Constitution and any possible amendments to the IEBC Act. Seeing as previously the courts have declared laws unconstitutional and they have remained on the statute books,[110] it is necessary to ensure that the process of law reform is undertaken.
	Regulations 18(2)(c), 24(2)(c), 28(2)(c) and 36(2)(c) of the Elections (General) Regulations, 2012 (as amended in 2017)	The Regulations were declared unconstitutional in ***Free Kenya Initiative & 6 Others v IEBC & 4 Others; Kenya National Commission on Human Rights (Interested party)*** **Constitutional Petition E160 of 2022** for discriminating against independent candidates.	Revise the regulations to ensure that independent candidates are subject to the same requirements as those for party-nominated candidates.

110 See Election Laws (Amendment) Act 34 of 2017 which was declared unconstitutional in *Katiba Institute & 3 Others v Attorney General & 2 Others*, Nairobi Petition No 548 of 2017 but the law was not revised.

	Relevant law	Shortcoming	Recommendation
	Section 80 Elections Act	While the section makes reference to the various powers of an election court, it does not confer the power to review its decisions to the election court. Since the Civil Procedure Rules are not applicable to electoral disputes, being *sui generis*, the provisions of the Civil Procedure Act and Rules cannot be imported into electoral disputes. The lack of clarity on this power has created divergent views among election courts.	Revise section 80 to include a specific power of review.
	Rule 29 (1) Election Petition Rules	Provides for abatement of election petitions upon the death of a Petitioner. However, the rules, which are also applicable to appeals to the High Court, do not provide for instances when a Respondent dies before an appeal is heard.	Revise Rule 29 to provide for abatement of appeal in the event of death of a Respondent.
	Elections (General) Regulations	Does not provide reasonable accommodation for persons with disabilities	Amend the Regulations to make provision for participation of marginalised groups.

X. INDEX

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ii Threshold of validity

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iii. Pre-election issues touching on presidential elections

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Independent Electoral & Boundaries Commission & Wafula Wanyonyi Chebukati v Reuben Kigame Lichete & Attorney General Civil Application No. E253 of 2022

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court Advisory Opinion No. 2 of 2012

International Centre for Policy and Conflict & 5 others v Attorney General & 5 Others, Nairobi High Court Constitutional Petition No. 552 of 2012

Isaac Aluoch Polo Aluochier v IEBC & 19 Others, Supreme Court Petition 2 of 2013

Maina Kiai and Others v IEBC and Others High Court, Petition 207 Of 2016, [2017] eKLR

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Kenya Council of Employment and Migration Agencies & Another v Hon. Hussein Dado & 3 Others Mombasa Miscellaneous No E001 of 2022

Lilian Gogo v Joseph Mboya Nyamuthe & 4 others [2017] eKLR

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Namunyu & 3 Others v Ndonji & 3 Others; Namunyu & 2 Others (Interested Parties) Civil (Election) Appeal E413, E414, E430 & E433 of 2022 (Consolidated) [2022]

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er PPDT Nairobi A Complaint No 106 of 2022

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Party of National Unity v Dennis Mugendi & 3 Others Nairobi High Court Election Appeal 1 of 2017

Paul Tapukai Ole Mebarne v United Democratic Alliance PPDT Nairobi B Complaint E023 of 2022

Republic v Registrar of Political Parties & 3 others; Hasan (Ex parte) Miscellaneous Application E048 of 2022)

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Party list disputes

i. Party autonomy in preparation of party lists

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Esther Okenyuri Anyieni v Mokumi Edmond Anthony & 3 others Kisii Election Petition Appeal No. 1 of 2018

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Mary Charles Kalunga v IEBC & Others Mombasa High Court Election Petition Appeal No. E087 of 2023

Mogeni v IEBC & 2 Others Nyamira Election Petition Appeal No E004 of 2023

Moses Mwicigi & 14 Others v IEBC & 5 Others Supreme Court Petition No. 1 of 2015

National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another [2013] eKLR

Richard Masese Makori v IEBC & 3 Others Kisii High Court Election Appeal No. E006 of 2023

United Democratic Movement & Another v IEBC & 2 Others Garissa Election Petition Appeal No. E005 of 2023 Consolidated with Election Petition Appeal Nos. E002 and E004 of 2023

ii. Jurisdiction in relation to party list disputes

Anne Khakasa Situma & 2 Others v Lydia Chelimo Kiboi Kitale High Court Election Petition Appeal E002 of 2023

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Dolphine Nyangara Onkoba v Michelle Kemuma Omwoyo & 2 Others Kisumu Court of Appeal Election Petition No. E014 of 2023

Hamdia Yaroi Sheikh Nuri v Faith Tumaini Kombe & 2 others Election Petition Appeal No 27 of 2018

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Independent Electoral Boundaries Commission V Jane Cheperenger & 2 Others Supreme Court Petition No. 5 of 2016

Isaac Oerri Abiri v Samwel Nyang'au Nyanchama & 2 others [2014] eKLR

Ismail v Independent Electoral & Boundaries Commission (IEBC) & 2 others Clerk, County Assembly of Kajiado (Interested Party) Election Petition Appeal E002 of 2023

Joel Nyabuto Omwenga & 2 Others v Independent Electoral and Boundaries Commission & another [2014] eKLR

Josephat Peter Shambi v Doreen Taabu Rodgers & Anor Voi EP Appeal No E001 of 2023

Josephine Wairimu Kinyanjui 4 others v Mary Kalinga & 6 others Supreme Court Petition (Application) No. E014 of 2024

Marthlida Auma Oloo v Independent Electoral & Boundaries Commission (IEBC) & 3 others Election Petition Civil Appeal 36 of 2018 [2019] eKLR

Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others; Emmanuel Changawa Kombe (Interested Party) Election Appeal (Application) No. 261 of 2018

Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others (Petition 1 of 2015)

Nancy Nyanchoka Ongeri & Another v Manson Nyamweya & 7 Others Kisii Election Petition Appeal No E004 of 2023

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Nyutu Agrovet Limited v Airtel Networks Kenya Limited Chartered Institute of Arbitrators Kenya Branch (Interested Party) [2019] eKLR

Obino v IEBC & 2 Others Election Petition Appeal No 15 of 2023

Richard Masese Makori v IEBC & 3 Others Kisii High Court Election Appeal No. E006 of 2023

Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR

Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR

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iii. Interpretation of the Constitution in party list disputes

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iv. Party list disputes as election petitions

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Dorcas Monyangi Mogaka v. Orange Democratic Movement (ODM) & 4 Others Kisii Election Petition Appeal No. E003 of 2023

Michael v Orange Democratic Movement Party & 3 others Nairobi Election Petition E002 of 2022

Nancy Nyanchoka Ongeri & Another v Manson Nyamweya & 7 Others Kisii Election Petition Appeal No E004 of 2023

Sammy Ndung'u Waity v IEBC & 3 Others [2019] eKLR

v. Powers of an election court in party list disputes

Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & Another Nairobi High Court Petition 212 of 2018 [2018] eKLR

Josephat Peter Shambi v Doreen Taabu Rodgers & Anor Voi EP Appeal No E001 of 2023

Katiba Institute & 3 Others v Attorney General & 2 Others Nairobi Petition No 548 of 2017

Mary Charles Kalunga v IEBC & Others Mombasa High Court Election Petition Appeal No. E087 of 2023

Michelle Kemuma Omwoyo v Independent Electoral & Boundaries Commission & Another Nyamira Constitutional Petition No. E005 of 2023; [2023] KEHC 24521 (KLR) (31 October 2023) (Ruling)

Mogeni v IEBC & 2 Others Nyamira EP Appeal No E004 of 2023

United Democratic Movement & Another v IEBC & 2 Others Garissa Election Petition Appeal No. E005 of 2023 as Consolidated with Election Petition Appeal No. E002 of 2023 and Election Petition Appeal No. E004 of 2023

United Democratic Movement & Another v IEBC & 2 Others Election Petition Appeal E017 of 2023

Wachira James Maina & 12 Others vs Celestine Chepchirchir Mutai and Others Eldoret High Court Election Petition Appeal No. E002 of 2023

The Cover Depicts a hand casting a vote in the 2022 general elections. The 2022 elections marked a milestone in the Kenyan election jurisprudence. Despite the inclusion of technology interventions including a biometric voting system to ensure fair and transparent elections, the elections were characterised by social and political tensions. The third under the Constitution of Kenya 2010, the 2022 election cycle highlighted that Democracy is a process, not a static condition. It is becoming, rather than being. It can easily be lost, but never is fully won. Its essence is an eternal struggle.

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