



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Koome; CJ & P, Mwilu; DCJ & VP, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. E017 OF 2023

-BETWEEN-

HASSAN MOHAMMED ADAM..... APPELLANT

VERSUS

AHMED ABDULLAHI JIIR 1ST RESPONDENT

AHMED MUHUMED ABDI 2ND RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION 3RD RESPONDENT

COUNTY RETURNING OFFICER, WAJIR COUNTY

MOHAMED ADAN ALI 4TH RESPONDENT

*An appeal from the Ruling of the Court of Appeal of Kenya at Nairobi
(Musinga (P), Omondi & Ngenye, JJA) dated and delivered on 24th July 2023
in Nairobi in Civil Appeal No. E008 of 2022)*

Representation:

Mr. Kioko Kilukumi SC, Mr. Paul Nyamodi & Mr. Issa Mansur for the Appellant
(Sallah & Company Advocates)

Prof. Tom Ojienda, Mr. Omwanza Ombati & Ms. Misiati for the 1st and 2nd Respondents
(*Nchogu, Omwanza & Nyasimi Advocates*)

Mr. Mahat Somane & Mr. Hassan Nura for the 3rd and 4th Respondents
(*Garane & Somane Advocates*)

REASONS FOR THE JUDGMENT OF THE COURT

(Pursuant to Rule 28(2) of the Supreme Court Rules, 2020)

A. INTRODUCTION

[1] The Constitution of Kenya, 2010, underscores the sovereignty of the people. Thus, the people may exercise their sovereign power either directly or through their democratically elected representatives. Sovereign power is exercised through elected representatives and occurs through a general election, being the second Tuesday of August every fifth year. With the promulgation of the Constitution of Kenya 2010, Kenya held its third general election on 9th August, 2022. In the said election, the appellant and the 1st respondent were among the candidates for the Gubernatorial Elections in Wajir County. The 3rd respondent, through the 4th respondent, declared the 1st and 2nd respondents as governor and deputy governor of Wajir County, respectively, having garnered 35, 533 votes. The appellant came in second with 27, 224 votes. Just like in the first and second electoral cycle, the election of the Governor for Wajir County was challenged before the courts.

[2] Taking into account the importance of expeditious settlement of electoral disputes as prescribed under Article 87(1) of the Constitution, the Court heard this petition of appeal and rendered an *ex tempore* judgment on 8th September 2023 pursuant to Rule 28(2) of the Supreme Court Rules 2020 by which the petition of appeal dated 31st July 2023 was struck out with costs to the

respondents and the reasons thereby reserved; now rendered in this judgment of the Court.

B. LITIGATION BACKGROUND

i. Proceedings in the High Court

[3] The appellant, dissatisfied with the declaration of the August 9th, 2022 general election results, lodged ***High Court election Petition No. E008 of 2022*** against the 1st to 4th respondents. He alleged that the election was tainted by numerous illegalities and irregularities that contravened the Constitution, Election Act, Election (General) Regulations and the principles laid down therein or any law relating to the conduct of elections including decisions of superior courts, leading to skewed results in favour of the 1st and 2nd respondents.

[4] He alleged intimidation and misinformation of voters; gross discrepancies in the statutory forms; improper counting, tallying and tabulation of results; failure to deploy KIEMS Kits; and inflation of vote numbers through the use of supervisor method of voter identification. He therefore sought an order for scrutiny and recount at various polling stations; that the results declared by the returning officer be set aside and fresh elections be conducted.

[5] The 1st and 2nd respondents, in their joint response, denied all the allegations made against them. In particular, they responded to the averment relating to the postponement of elections in Eldas constituency, clan dynamics, intimidation, misinformation, undue influence of voters, voter turnout and failure to deploy KIEMS kits.

[6] Likewise, the 3rd and 4th respondents jointly denied every allegation set out in the petition. They averred that the Wajir gubernatorial election process was backed by an elaborate electoral management system in compliance with electoral laws, which system included several layers of safeguards to ensure an

open, transparent, participatory and accountable process, to guarantee free and fair elections pursuant to Article 81 as read with Article 86 of the Constitution.

[7] Following the conclusion of oral witness testimonies, the court allowed the appellant's application for scrutiny in part, limiting it to twelve (12) polling stations; that it be presided over by the Deputy Registrar of that court; and the resultant reports be filed and supplied to the parties who made submissions on the same.

[8] Upon hearing the parties' arguments, the court identified three issues for determination: *(a) Whether illegalities and irregularities were committed in the Wajir Gubernatorial elections as alleged and if yes, what the effect was; (b) Whether the Wajir Gubernatorial elections were conducted substantially in accordance with the Constitution and election laws; and (c) What orders the court should issue.* The first issue was further delineated into the following sub-issues: *the supervisor mode of identification; failure to deploy KIEMS Kits; alterations in Forms 37A; rejected ballots; voter intimidation and misinformation; violence in some parts of Wajir East Constituency and disproportionately high turnout in Wajir West Constituency.*

[9] In a judgment delivered on 3rd March 2023, the court (Dulu,J.) dismissed the petition with costs, and upheld the election of the 1st and 2nd respondents as governor and deputy governor of Wajir County respectively. In respect of the first issue, the court held that: though the 3rd respondent failed to fill in Form 32A for supervisor validated voters there was no evidence of vote inflation or padding as a result of this failure; failure to deploy KIEMS Kit was not proved; the impugned alterations on Forms 37A are excusable to human error and the mere absence of countersigning did not affect the election results; the appellant did not call any evidence to demonstrate non – declaration of rejected ballots in Form 37C, in any event, rejected ballots are void and accord no advantage to any candidate; voter intimidation, misinformation and bribery spurred by the

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postponement of the Eldas election and clan dynamics was not proved; the complaint of violence in some parts of Wajir East Constituency did not interfere with distribution of election materials which were airlifted; and the allegation of disproportionately high turnout in Wajir West Constituency were unsubstantiated.

[10] As to *whether the Wajir Gubernatorial elections were conducted substantially in accordance with the Constitution and election laws*, the court held that though there was non-compliance with the legal provisions on filling Form 32A and there were counter signing alterations made on Form 37A, there was no evidence that voters in any polling station exceeded the number of registered voters. Furthermore, neither of the two irregularities appeared to confer an advantage or disadvantage on any of the candidates. Consequently, the court found that there was no non-compliance with the Constitution.

ii. Proceedings before the Court of Appeal

[11] Aggrieved by the High Court decision, the appellant moved to the Court of Appeal in ***Election Petition Appeal No. E008 of 2023***, to challenge the judgment on twenty (20) grounds. At the pre-hearing conference, it was directed that the interlocutory applications and the main appeal be heard together. When the appeal came up for hearing, the 1st and 2nd respondents notified the court that their application dated 28th April 2023 intended to dispose of the appeal at the conception stage.

[12] That application raised a preliminary objection challenging the court's jurisdiction on the basis that the notice of appeal filed on 9th March 2023, was fatally flawed and totally incompetent. They specifically contended that the notice of appeal was filed at the High Court registry in Garissa as opposed to the Court of Appeal at Nairobi; that the notice did not comply with the provisions of rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017 (*hereinafter "the Election Petition Rules"*) which requires all appeals to be initiated by way *SC Petition No. E017 of 2023*

of a notice of appeal, rule 6 (2) that directs an appeal to be lodged within 7 days of the contested decision, and rule 6(3) requiring the pointing out of the part of the judgment being contested, the basis for which the appeal is made and the grounds of appeal and reliefs sought.

[13] The 3rd and 4th respondents aligned themselves with the 1st and 2nd respondents' arguments. Additionally, they argued that a notice of appeal is a jurisdictional prerequisite that must contain sufficient information. Besides, that there can be no redemption in trying to excuse the character of the impugned notice of appeal.

[14] The appellant countered the preliminary objection. He asserted that the untimely submission of the objection beyond 7 days from the date of service of the notice or record of appeal did not abide by rule 19 of the Election Petition Rules 2017, and in any event, there was a valid notice of appeal on record.

[15] It was further argued that while it is acknowledged that the only notice of appeal is the one filed in the High Court, there exists another notice of appeal filed electronically in the Court of Appeal dated 10th March 2022, within the stipulated seven (7) days after judgment of the High Court, albeit not part of the physical record of appeal. In light of this, the appellant invoked rule 4 (2) of the Election Petition Rules urging the Court of Appeal to exercise its jurisdiction in a reasonable manner, as well as Article 159 (2) (d) of the Constitution, to grant him a life line by allowing for the filing of a supplementary record of appeal to formally include this notice of appeal.

[16] In a ruling delivered on 24th July 2023, the Court of Appeal (*Musinga (P), Omondi & Ngenye, JJA*) upheld the preliminary objection and struck out the notice of appeal with costs for offending rules 6 and 8 of the Election Petition Rules. The court determined that jurisdiction is purely a point of law that goes to the very root of the matter, and must be dispensed with first. Accordingly, the

court recognized that since the notice of appeal the very foundation of its jurisdiction was challenged, it proceeded to hear the preliminary objection and determined it.

[17] The court held that a valid notice of appeal must fulfil the stipulations outlined in rule 6(3) of the Election Petition Rules to kick off the court's jurisdiction; and that it was evident that the prescribed form of the notice of appeal subsumes what would ordinarily be a memorandum of appeal. The court observed that though the first notice of appeal was filed within the stipulated timeline, it was filed at the High Court in Garissa. Sadly, it did not conform to the format specified under rule 6(5); and sought to challenge the whole judgment which is based on fact and law, contrary to section 85A of the Elections Act. Regarding the second notice of appeal, which did not form part of the record of appeal before the court, the court found it identical to the first and thus, wanting in form and content.

[18] The court considered its discretion under rule 5 of the Election Petition Rules on the effect of non-compliance with Rule 6, and concluded that to allow the appellant to file a supplementary record introducing an amended notice of appeal would not portray a balance of interests of the parties as it would be allowing undue advantage to one party to fill in the gaps pointed out by the adversary.

C. PROCEEDINGS BEFORE THE SUPREME COURT

[19] Dissatisfied, the appellant seeks to challenge the decision of the Court of Appeal before this Court pursuant to Article 163 (4) (a) of the Constitution, sections 3A, 15A, 21 of the Supreme Court Act and all other enabling provisions of the law. The appeal is premised on ten (10) grounds, faulting the Court of Appeal Justices for:

- i. *Relying on non-existent 'Draft Court of Appeal (Election Petition) Rules 2017' (hereinafter, 'the Draft Rules') thereby violating the appellant's right to a fair hearing guaranteed under Article 50(1) of the Constitution;*
- ii. *Disregarding the gazetted and valid Court of Appeal Election Petition Rules, 2017 referred to by the appellant as published under Legal Notice No. 114 of 2017;*
- iii. *Erroneously relying on Rule 6(3) of the Draft Rules to determine the form and content of the Notice of Appeal filed by the appellant;*
- iv. *Misdirecting itself that Rule 19(2) of the Court of Appeal (Election Petition) Rules, Legal Notice No. 114 of 2017 was not applicable despite the rule expressly being a statutory bar to the respondents' objection to the record of appeal where no formal application was filed within 7 days of service, hence violating the appellant's right to equal protection and benefit of the law under Article 27(1) of the Constitution;*
- v. *Declining jurisdiction by relying on the Draft Rules drafted by the Judiciary Elections Committee in April 2017 for public participation, and which are different from the Court of Appeal (Election Petition) Rules, Legal Notice No. 114 of 2017, in so doing violating the appellant's right to access to justice under Article 48 of the Constitution;*
- vi. *Disregarding the binding directions of the Supreme Court on timely management and determination of electoral disputes in **Martha Wangari Karua v Independent Electoral Boundaries Commission & 3 Others**, SC Petition No. 3 of 2019; [2019] eKLR, thereby violating Article 163(7) of the Constitution;*
- vii. *Narrowly interpreting the provisions of Article 159 of the Constitution in holding that the Notice of Appeal did not set out the grounds of appeal and was therefore fatal, despite decisions to the contrary that want of form did not go to jurisdiction;*

- viii. *Holding that the Notice of Appeal was not in the format provided for in Rule 6(3) of the Draft Rules which decision was erroneous and per incuriam;*
- ix. *Determining the preliminary objection without reference to the Court of Appeal (Election Petition) Rules, Legal Notice No. 114 of 2017 which were the valid applicable law and by that violating the appellant's rights to a fair hearing under Article 50 (1) of the Constitution; and*
- x. *Adopting a narrow, pedantic and wrong interpretation of the requirement for the Notice of Appeal to substantially be in conformity with the form in the Schedule to the Rules, and by disregarding the fact that there was a Memorandum of Appeal setting out the grounds of appeal.*

[20] In the result, the appellant seeks the following reliefs:

1. *This appeal be admitted for hearing and be given directions for expedited hearing by the Supreme Court. If unsuccessful, the appeal be remitted back to the Court of Appeal for hearing and determination in accordance with Section 85A of the Elections Act, in any event, before 1st October 2023.*
2. *The Ruling of the Court of Appeal dated and delivered on 24th July 2023 be set aside and this Honourable Court do make an order:*
 - a) *Allowing this Petition of Appeal and reinstating the Notice and Record of Appeal in Election Appeal No. E008 of 2023.*
 - b) *Directing that Election Appeal No. E008 of 2023 be remitted back to the Court of Appeal for expeditious hearing and determination, in any event, before 1st October 2023 by a bench excluding Mr. Justice D. K. Musinga (President of the Court of Appeal), Lady Justice H. A Omondi and Lady Justice G. W. Ngenye-Macharia;*

3. *ALTERNATIVE to prayer (2) above, the Supreme Court to determine the Election Petition No. E008 of 2023 on merits and the appeal be allowed with costs to the appellant and issue:*
 - a) *A DECLARATION that the 1st and 2nd respondents were not validly elected as the County Governor and Deputy Governor and the result declared by the 4th respondent on 12th August is null and void.*
 - b) *An Order be issued setting aside the result declared by the 4th respondent on 12th August 2022 and fresh elections for Wajir County Governor to be conducted.*
4. *That the costs of this Appeal and costs of the proceedings in the Court of Appeal be awarded to the Appellant/Petitioner.*
5. *This Honourable Court make such order(s) that it may deem fit to meet the demands of justice.*

[21] In opposition, the 1st and 2nd respondents filed a joint response to the petition and an application to strike out the appeal pursuant to Article 163 (4) of the Constitution, sections 15 (1), 15B and 21(2) of the Supreme Court Act, Supreme Court Rules and the Supreme Court (General) Practice Directions, 2020, both dated 11th August 2023. The 3rd and 4th respondents filed a response to the petition dated 20th August 2023 and a replying affidavit by Adan Ali Mohamed sworn on 20th August 2023.

[22] The respondents challenge this Court's jurisdiction to hear the instant appeal under Article 163 (4) (a) of the Constitution. Alternatively, they state that the appeal is incompetent as leave to appeal/ certification has not been sought in accordance with Section 15(1) and 15B of the Supreme Court Act.

[23] The appellant filed a rejoinder to the response to petition and grounds of opposition to the application filed by the 1st and 2nd respondents, both dated 18th August 2023 urging that the Court's jurisdiction has been properly invoked. The *SC Petition No. E017 of 2023*

grounds for and against this assertion as urged by the parties are set out in detail under the parties' respective submissions captured herein.

D. PARTIES RESPECTIVE CASES

i. Appellant's Case

[24] The appellant relies on his submissions dated 18th August 2023 in support of his petition. He delineates two issues for determination, that is: *whether the Court has jurisdiction to hear and determine the appeal and whether the learned Judges violated his non-derogable right to a fair trial and access to justice.*

[25] On jurisdiction, the appellant submits that as a general rule, for an appeal to lie to the Supreme Court as of right, the issue of constitutional interpretation or application must have arisen before the superior courts below. He contends that the exception to this rule is in instances where the superior courts in exercising their constitutional mandate commit jurisdictional wrongs, which by virtue of Article 163(4)(a) of the Constitution necessitate this Court to intervene and remedy them. He buttresses his argument by citing ***Geoffrey M. Asanyo & 3 others v Attorney General***, SC Petition No. 21 of 2015; [2018] eKLR. He urges this Court to assume its inherent jurisdiction to interrogate and right the jurisdictional wrong committed by the Court of Appeal by relying on what he terms as '*non-existent rules of procedure*' or *Draft Rules* to strike out his election petition appeal.

[26] Further, the appellant submits that though this Court has shown hesitation and reluctance to interfere with the exercise of the Court of Appeal's discretion, it can intervene when there is apparent injustice in the decision sought to be appealed from, or an infringement of fundamental rights and freedoms. Relying on the decision in ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others***, SC

Petition No. 13 of 2018; [2019] eKLR the appellant contends that there was gross violation of his right to a fair trial and access to justice by the Court of Appeal's erroneous exercise of discretion. He elucidates that the Court of Appeal's reliance on non-existent rules of procedure satisfies all the four tests delineated in the aforementioned case, which are: the appellate court acted whimsically; its decision was unreasonable; violated the Constitution; and all the factors listed above collectively occasioned undue prejudice upon the appellant. Accordingly, the appellant implores the Court to exercise its special jurisdiction under Section 3 of the Supreme Court Act to cure the Court of Appeal's infractions; and remit the file to the Court of Appeal for determination, noting that the jurisdiction to determine election petition appeals will lapse on 1st October, 2023.

[27] On *whether there was violation of the appellant's non-derogable right to a fair trial and access to justice*, the appellant submits that the contents of a valid notice of appeal are stipulated under the Election Petition Rules gazetted as Legal Notice. No. 114 of 2017. He faults the Court of Appeal for relying on Draft Rules in concluding that the notices of appeal, though conceding that the appellant had indeed filed the second notice of appeal at the Court of Appeal's registry and paid for it, were deficient in form and content prescribed under rule 6 of the Draft Rules. The appellant argues that the decision, not being anchored on the appropriate laws rids it of any legitimacy to be binding on any person and renders it obsolete *ab initio*; and the learned judges are at fault for inevitably contravening their duty as dictated under Article 159 (2) (e) of the Constitution leading to blatant violation of the appellant's right to a fair trial as stipulated under Article 50 (1) of the Constitution as the decision was made *per incuriam*.

[28] Moreover, the appellant submits that the appellate court acted beyond the powers conferred to it by law, since it was barred by the seven (7) day

statutorily prescribed timeline under Rule 19 of the gazetted Election Petition Rules; and that by proceeding to strike out the notice and record of appeal it hindered the appellant's right to access justice. Furthermore, by the court subsuming both applications as an issue to be heard at the main hearing, the appellant had legitimate expectation that it would hear and determine the case on its merits, even whilst dispensing with all the interlocutory applications.

ii. 1st and 2nd respondents' case

[29] The 1st and 2nd respondents' submissions are dated 21st August 2023 and were filed on 22nd August 2023. They address the Court on two issues: *jurisdiction* and *whether the appeal is merited*.

[30] With regard to *jurisdiction*, the 1st and 2nd respondents submit that the appellant improperly opted to invoke the Court's jurisdiction as of right under Article 163(4)(a) of the Constitution, since, the impugned ruling did not involve a question of constitutional interpretation but rather, an interpretation of rule 6 of the Election Petition Rules. To that end, they urge that it was incumbent upon the appellant to apply for, and obtain, certification prior to the filing of this present petition. For this contention, the 1st and 2nd respondents contend that the appeal before this Court is bereft of jurisdictional backing and should be struck out. To buttress this submission, they rely on several decisions including ***Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 others***, SC Petition No. 32 of 2018; [2018] eKLR which underscored principles to aid in determining whether this Court's jurisdiction under Article 163(4)(a) of the Constitution has been properly invoked in an election appeal.

[31] On *whether the appeal is merited*, the 1st and 2nd respondents, citing this Court's decision in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others***, SC Application No. 2 of 2011; [2012] eKLR, affirm that notwithstanding the timeline set out under Rule 19 of SC Petition No. E017 of 2023

the Election Rules, the same cannot be interpreted to limit when jurisdictional challenges can be raised. The respondents urge the Court to rely on its decision in ***Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others***, SC Petition No. 29 of 2018; [2019] eKLR in so far as a litigant may not seek to invoke the provisions of Article 159 of the Constitution to whitewash his fundamental flaws, considering that the notice of appeal is a vital document and a jurisdictional prerequisite.

iii. 3rd and 4th respondents' case

[32] The 3rd and 4th respondents' submissions are dated 21st August 2023 and were filed on 22nd August 2023. They address the Court on three issues: *whether the Petition of Appeal falls within the scope of Article 163(4) (a) of the Constitution; whether the appellant ought to have sought leave to lodge an appeal to the Supreme Court; and whether the Court of Appeal erred in law in its decision of 24th July 2023.*

[33] Echoing the 1st and 2nd respondents' arguments, *on whether the appeal falls within the scope of Article 163 (4) (a) of the Constitution* the 3rd and 4th respondents further contend that the notice of appeal which triggered the court's jurisdiction was to be lodged in the correct court, format and served upon the parties to signal the parties of the appellant's intention to appeal. They rely on the decisions of ***Anuar Loititip v Independent Electoral & Boundaries Commission & 2 others***, SC Petition No. 18 of 2018; [2019] eKLR; and ***Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission & 4 others***; SC Petition No. 8 of 2014 [2015] eKLR to augment this submission. They argue that in this instance, the appellant neither lodged nor served the parties with a notice of appeal. Therefore, the Court of Appeal was justified to hear the preliminary objection first on the issue of interpretation of rule 6 of the Election Petition Rules 2017 rendering the appeal to be beyond the ambit of Article 163(4)(a) of the *SC Petition No. E017 of 2023*

Constitution. Thus, since the appeal does not meet the criteria of Article 163 (4) (a) of the Constitution, the alternative avenue would be to appeal under certification under Article 163 (4) (b) as read with section 15B of the Supreme Court Act.

[34] Consequently, on *whether the Court of Appeal erred in law in its decision of 24th July 2023*, the 3rd and 4th respondents maintain that the court had no option but to allow the preliminary objection as it was bound by the decision of ***Apungu Arthur Kibiria Case (supra)*** where this Court gave very specific directions regarding filing of a Notice of Appeal as per rule 6 of the Court of Appeal Rules. Therefore, they humbly submit that the Court of Appeal did not err in its ruling of 28th July 2023. Subsequently, they submit that the appellant cannot claim infringement of his right to fair hearing or access to justice because the court proceeded to determine a jurisdictional question.

E. The Judgment of the Court without Reasons of 15th July 2022

[35] The appellant's Petition of Appeal dated 31st July, 2023 against the ruling of the Court of Appeal dated 24th July, 2023 in Election Petition Appeal No. E008 of 2023; and the 1st and 2nd respondents' Notice of Motion dated 11th August, 2023 challenging this Court's jurisdiction to entertain the appeal lodged under Article 163(4)(a) of the Constitution came up for hearing before this Court on 7th September, 2023.

[36] Having considered the appeal, the notice of motion and the parties' respective submissions thereto, as advanced by their respective advocates on record, we found no justifiable reasons to interfere with the ruling of the Court of Appeal. Accordingly, the appellant's appeal was struck out with costs to the respondents.

[37] Consequently, we issued the following Orders:

- i. The Petition of Appeal dated 31st July, 2023 and filed on even date is struck out.
- ii. The detailed reasons of this ex tempore Judgment will be issued on notice.
- iii. Costs are awarded to the respondents.

[38] Pursuant to Rule 28(2) of the Supreme Court Rules 2020, we now give hereunder the reasons for these conclusions.

F. ANALYSIS AND DETERMINATION

[39] This matter turns on two broad issues:

- i. *Whether this Court has jurisdiction to entertain the appeal and if so,*
- ii. *Whether the Court of Appeal properly exercised its discretion in striking out the appellant's Notice of Appeal and Record of Appeal in the Court of Appeal.*

i. Whether the Court has jurisdiction to entertain the appeal

[40] In the age-old words of *Nyarangi JA* in the case of ***Owners of the Motor Vessel "Lillian s" v. Caltex Oil Kenya Limited*** [1989] KLR 1, without jurisdiction, a court has no power and must down tools in respect of the matter under consideration. In ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others***, SC Application No. 2 of 2011; [2012] eKLR, jurisdiction flows from the Constitution or Statute and cannot accrue from judicial craft.

[41] The appellant anchors the appeal on this Court's jurisdiction as of right, under Article 163(4)(a) of the Constitution. That being said, this is a well-trodden path and there are several parameters that must be met to satisfy whether the jurisdiction has been correctly invoked. In ***Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another***, SC Petition No. 3 of 2012; [2012] eKLR, we stated that the appellant must demonstrate to our

satisfaction how the appeal involved application or interpretation of the Constitution and the manner in which the Court of Appeal erred in determining those very questions.

[42] In *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v. Attorney- General & 2 others*, SC Petition No. 45 of 2018; [2020] eKLR, we restated the jurisprudence around Article 163(4)(a) of the Constitution by emphasizing the specialized nature of Article 163(4)(a)'s Appellate jurisdiction of this Court. That the jurisdiction vested in the Court is not just another level of appeal. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the Constitution. In essence, the appellant has to show that not only were there constitutional issues that were subject to contestation at the High Court but also that the said issues transcended through the court hierarchy.

[43] In this instance, the appellant while conceding that the constitutional issues subject of appeal did not arise from the High Court but rather at the Court of Appeal, nevertheless maintains that we have jurisdiction based on our position in the *Geoffrey Asanyo case*. In that case, we held:

“[62] ...We have no doubt that whereas the issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of this Court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates would necessitate that this Court should assume jurisdiction and interrogate those alleged wrongs. ...”

We further reiterated that this Court should only depart from the principle that issues of constitutional interpretation must rise through the Superior Courts to this Court in the clearest of cases and the exception to that principle should be carefully considered by the Court in the manner we have expressed herein.

[44] It is common ground that the issue before the Court of Appeal was a Preliminary Objection on whether there was a proper Notice of Appeal before that court. Specifically, the issue was whether the appellant’s notice of appeal was compliant with the Court of Appeal (Election Petition) Rules, 2017 under Legal Notice No. 114 of 2017. In its determination, the Court of Appeal appreciated the following:

“21. The issue that we must first determine relates to our jurisdiction to determine the preliminary objection in light of the argument by the appellant’s counsel that it has not been brought through a formal application, and is being raised too late in the day thereby offending rule 17.”

[45] Satisfied that it was imperative to determine the preliminary objection, the court went on to address the issue whether the notice of appeal as filed was competent and whether the court had jurisdiction to extend time for filing a notice of appeal in the matter. The Court of Appeal concluded that the record of appeal filed therein be struck out for offending Rules 6 and 8 of the Court of Appeal (Elections Petition) Rules, 2017.

[46] This determination is now the subject of appeal before the Court in which, there is yet another challenge on whether we have jurisdiction, as of right, under Article 163(4)(a) of the Constitution. Undoubtedly, the appellant never sought to have the appeal certified as involving a matter of general public importance as to invoke the provisions of Article 163(4)(b) of the Constitution. The appellant grounds its appeal on alleged violation of Articles 27, 50(1) and 159 of the Constitution in the context of interpreting and applying the Court of Appeal (Election Petition) Rules 2017. The respondents are adamant that the appeal merely involves the factual position of compliance with the said Rules in relation to the validity and filing of the Notice of Appeal and the Record of Appeal, with no issues of constitutional contestation and determination arising.

[47] This Court has considered its previous decisions where similar arguments were raised. In ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*** SC Petition No.13 of 2018 [2019] eKLR the Court was persuaded that it had jurisdiction to hear and determine the appeal under Article 163(4)(a) of the Constitution to the extent of the application of Article 159(2)(d) of the Constitution in determining the effect of non-compliance with the Court of Appeal (Election Petition) Rules 2017. In the same case, the Court disagreed with the contention that the appellant's right of access to justice under Article 48 and the right to fair hearing under Articles 25 and 50 of the Constitution were violated by the striking out of the Notice of Appeal and Record of Appeal.

[48] Similarly, in ***Francis Wambugu Mureithi v Owino Paul Ongili Babu & 2 others*** SC Petition No.15 of 2018 [2019] eKLR, we assumed jurisdiction in an appeal where it had been argued that the issue of Notice of Appeal to the Court of Appeal as contemplated under the said Election Petition Rules was an issue in controversy. We further interrogated to what extent, if at all, we would interfere with the exercise of discretion under Rule 5 of the Election Petition Rules, as had been done by the Court of Appeal.

[49] Taking into account our previous decisions, we are satisfied that we have jurisdiction to determine the appeal under Article 163(4)(a) as invoked by the appellant, as issues surrounding a Notice of Appeal are jurisdictional in their very nature.

ii. Whether the Court of Appeal properly exercised its discretion in striking out the appellant's Notice of Appeal and Record of Appeal in the Court of Appeal

[50] The genesis of this issue is that the appellant being aggrieved with the decision of the High Court (*Dulu, J.*) dated 3rd March, 2023 in ***Election SC Petition No. E017 of 2023***

Petition No. E008 of 2022 lodged a Notice of Appeal dated 9th March, 2023 before the High Court in Garissa. The appellant admitted as much before the Court of Appeal and also before this Court, only adding that a second Notice of Appeal was electronically filed on 10th March 2023 before the Court of Appeal but did not form part of what counsel termed as the “physical” record of appeal.

[51] The appellant put up a spirited argument that the Court of Appeal, in striking out the appeal, relied on the wrong and non-existent ‘*Draft Court of Appeal (Election Petition) Rules 2017*’ instead of the proper gazetted Election Petition Rules. What is inescapable is that the Notice of Appeal before the Court of Appeal faced several challenges. The first was on the non-compliance with Rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017 by filing the Notice at the High Court instead of the Court of Appeal Registry. The next challenge was on the contents of the notice of appeal and whether the record of appeal was complete. A further challenge was made on contravention of section 85A in purporting to appeal against the whole judgment on both facts and law. In addressing the challenges, recourse was made by the Court of Appeal to the reliefs under Rules 5 and 17 of the Election Petition Rules. In addressing these issues, the Court of Appeal took into account the corollary issue of the second notice of appeal filed before the Court of Appeal registry on 10th March 2023.

[52] Under Rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017 published in Legal Notice No. 114 of 2017 it is stipulated that a Notice of Appeal should be filed at the Court of Appeal Registry. It is on this basis that the argument before the court as aptly captured in the ruling was that:

“29. The respondent’s counsel submitted that the notice of appeal before the Court is not compliant with rule 6 of the Election Petition Rules, 2017, as the same is filed in the High Court at Garissa and, as such, this Court has no jurisdiction to entertain the appeal as there is no appeal existing. To support this

*proposition, the respondents rely on the case of **Anuar Loitiptip v IEBC & 2 others (supra)** . . .”*

[53] The record as contained in the ruling reveals the following:

*“35. The appellant’s counsel admitted that the notice of appeal found at pages 1532-1533 of the record of appeal was filed in the High Court at Garissa. He further contended that **the second notice of appeal filed on 10th March 2023 in the Court of Appeal does not form part of the record of appeal before court...**” (Emphasis ours).*

[54] The record further shows that counsel for the appellant stated that the notice of appeal before the court was a proper one, and that filing the same in the wrong court was an error. Counsel proceeded to rely on Rule 5 of the Election Petition Rules and Article 159(2)(d) of the Constitution to cure the defect, urging the court to allow him file a supplementary record so as to include the second notice of appeal dated 10th March 2023. The Court of Appeal, having considered this request, found that the notice of appeal was not salvageable. The court stated:

“42. ...Would it be unreasonable of us to then insist that there is no notice of appeal filed in the Court of Appeal, yet it is before our very own eyes? After all, isn’t it human to err, and make some error of omission? Is Rule 5 available to salvage the situation? Unfortunately, matters are not as simple as waving a wand of human error, as this second notice is similar to the first notice found in the record of appeal, completely wanting in form and content. As such there would still be no valid notice of appeal, and filing of a supplementary record of appeal would not offer any healing balm.”

The court observed that in granting a move to file a supplementary record introducing an amended notice of appeal, the same would not portray a balance

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of the interests of the parties by allowing one party undue advantage to fill in the gaps pointed out by the adversary.

[55] We have carefully followed these arguments. While the appellant focuses on the erroneous reference to the contents of the notice of appeal, the court of appeal dealt with the two issues, the primary of which was the place of filing. Counsel having conceded that the record did not contain the second notice of appeal dated 10th March 2023 and, gone a step further to seek leave to introduce a supplementary record containing the same, it is not persuasive that he would now adopt a different position in asking us to imply the electronically filed notice of appeal into the record. No attempt was made to denounce what is already on record.

[56] Moreover, we note that the Court of Appeal's powers under rule 5 of the Election Petition Rules are discretionary. The rule provides:

“5. Non-compliance with the Rules

*The effect of any failure to comply with these Rules shall be a matter for determination at the Court's **discretion** subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe timelines set by the Constitution or any other electoral law.”* (Emphasis ours)

Our hesitation to interfere with discretionary jurisdiction of the superior courts below is now settled. In ***Teachers Service Commission v Kenya National Union of Teachers & 3 others*** SC Application No. 16 of 2015 [2105] eKLR we held that the Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5(2)(b) of that Court's rules.

[57] This position was also enunciated in ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another*** SC Civil Application No. 13 of 2014 where this Court held in paragraph 21 as follows:

*“... Not all decisions of the Court of Appeal are subject to appeal before this Court. **One category of decisions we perceive as falling***

outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate Court, as that would stand in conflict with the terms of the Constitution" [emphasis supplied].

[58] Besides, in ***Law Society of Kenya v. Centre for Human Rights and Democracy & Others***, Supreme Court Petition No. 14 of 2013, the Court cautioned against a blanket invocation of Article 159 thus:

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

This is more so in the wake of strict constitutional timelines appurtenant to the litigation around electoral process. In ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others***, Supreme Court Petition No.5 of 2014, the Court underscored the inflexibility of timelines prescribed under the election laws.

[59] In light of the above, we find no reasonable basis to fault the factual finding by the Court of Appeal, that there was no valid Notice of Appeal on record and thereby striking out the Record of Appeal before it.

[60] The appellant asked us to consider remitting the matter to the Court of Appeal for determination within the 6-month period contemplated under the law. This was based on the position adopted by the appellant that the Court of Appeal had until 1st October 2023, the appeal having been filed on 1st April 2023.

[61] Rule 23 of the Court of Appeal (Election Petition) Rules, 2017 provides for the duration for hearing and determination of election petition appeals. It provides:

“An appeal filed under these Rules shall be heard and determined within six months of the date of judgment of the High Court.”

The judgment of the High Court having been delivered on 3rd March 2023, the appeal should have been heard and determined by the Court of Appeal by 2nd September 2023. The Court of Appeal having made its determination, and correctly so as we have found, the matter was effectively concluded within the timelines. At the time of the hearing before us on 7th September 2023, the timeline for the matter to be heard before the Court of Appeal had already lapsed. Respectfully, Counsel were absolutely wrong in their computation of time, as time started running on 3rd March 2023, being the date of the High Court judgment.

[62] Based on the foregoing, we find the 1st and 2nd respondents’ motion has merit and we hereby allow it as prayed. As such, the appeal herein is struck out. On costs, it is trite that they follow the event. That being the position, the respondents are awarded the costs.

G. FINAL ORDERS

[63] Consequently, we issue the following Orders:

- i. The Notice of Motion dated 15th August, 2023 and filed on even date be and is hereby allowed with costs to the 1st and 2nd respondents.***
- ii. The Petition of Appeal dated 31st July, 2023 and filed on even date is struck out with costs to the respondents.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 8th day of December, 2023.

.....
M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT OF KENYA

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE
SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true
copy of the original.**

REGISTRAR,
SUPREME COURT OF KENYA.