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Editor
Prof Jack Mwimali

Nairobi

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Odinga & another v Independent Electoral & Boundaries Commission & 2 others; Law Society of Kenya (Intended *Amicus Curiae*) [2017] KESC 35 (KLR) 884

Presidential election petition – *application to be enjoined as an interested party – application to be enjoined as an interested party in the presidential election petition – where the applicant was a presidential candidate in the election - what were the considerations for one to be enjoined as an interested party in a presidential election petition - whether being a presidential candidate in a general elections was enough consideration for one to be enjoined as an interested party in a presidential election petition – Supreme Court Rules, 2012 rules 25 and 26.*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot (Applicant) [2017] KESC 34 (KLR) 900

Presidential election petition – *application to be enjoined as an interested party – considerations to be enjoined as an interested party in a presidential election petition – whether the petitioner met the qualifications to be enjoined as an interested party in the presidential election petition - Trusted Society of Human Rights Alliance v Mumo Matemu and 5 Others [2015] eKLR: Francis Karioki Muruatetu and another v Republic & 5 others [2016] eKLR.*
Mwau v Independent Electoral and Boundaries Commission & 2 others; Maina (Interested Party) [2017] KESC 4 (KLR) 382

Presidential election petition – *disputes arising out of a presidential election – procedure applicable to filing, service and production of documents – timelines in production of documents – whether the Supreme Court was time bound in the determination of the election petition - whether the filing, serving and production of further documents subsequent to filing the petition could interfere with the court's timelines in the determination of the election petition - whether a pre-trial conference could have been used as a forum to make applications for production of further documents - Constitution of Kenya, 2010 article 140.*
Odinga v Independent Electoral and Boundaries Commission & 3 others [2013] KESC 2 (KLR) 1033

Presidential election petition – *joinder of parties in a presidential election petition – application to be enjoined as a party in an existing presidential election petition – entitlement for joinder in the petition – provision under the Supreme Court (Presidential Election Petition) Rules - court consideration of the applicant's entitlement for joinder in the petition – whether the applicant was entitled to be enjoined as a party in the presidential election petition in the circumstances – Supreme Court (Presidential Election Petition) Rules, 2013 rule 17.*
Aluochier v Independent Electoral and Boundaries Commission & 19 others [2013] KESC 16 (KLR) 1049

Presidential election petition – *joinder of parties – application by the Attorney General to be enjoined as amicus curiae – right of audience of the Attorney General in matters of public interest - authority of the Attorney General to be enjoined in suits which a government was not a party - what were the factors the Office of the Attorney General had to satisfy so as to be enjoined as amicus curiae in a suit - Constitution of Kenya, (2010) article 156; Office of the Attorney General Act, section 7.*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Attorney General (Intended *Amicus Curiae*) [2017] KESC 36 (KLR) 907

Presidential election petition – *parties to a presidential election petition - amicus curiae - court's consideration in admitting a party to the status of an amicus curiae - requirement for the applicant to be non-partisan in the petition - allegations that the applicant had previously released a biased report on the President-elect - whether the application had merit in the circumstances.*
Kuria & 5 others v Hassan & 4 others [2013] KESC 24 (KLR) 1030

Presidential election petition – *procedure for filing of documents in a presidential election petition - affidavit - affidavit evidence – time prescribed for determination of a presidential election petition – where the petitioner had filed a further affidavit after the respondents had filed their replying affidavits - limitation of time due to the strict time lines in determination of presidential election petitions – admissibility of a further affidavit or additional evidence filed without leave of court in a presidential election petition – context, nature and extent of the affidavit - where the affidavit was lengthy and introduced new issues - whether such an affidavit would be admissible in the circumstances – whether the further affidavit in a presidential election petition would have been prejudicial to the respondents and therefore occasioned a miscarriage of justice - Supreme Court Act section 31 (d), Supreme Court (Presidential Election Petition) Rules, 2013 rule 9.*
Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others [2013] KESC 1 (KLR) 1039

Presidential election petition – *public interest - obligation of conscientiousness – obligation of the court to take up matters that don't run contrary to public interest – whether a court could take up causes that ran contrary to public interest.*
Institute for Democratic Governance v Odinga & 4 others; Independent Electoral and Boundaries Commission & another (Interested Parties); Oganga (Applicant) [2017] KESC 44 (KLR) 361

Presidential election petition – *timelines for filing presidential election petition - where affidavits and annexures to the presidential election petition were filed out of time - whether the court could strike out affidavits and annexures filed out of time in a presidential election petition.*
Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] KESC 30 (KLR) 367

Scrutiny of votes – *orders for scrutiny of votes on application by any party to the petition – petitioners' allegation of election malpractices and irregularities – whether the 1st respondent had conducted the election in an impartial, neutral, efficient, accurate and accountable manner*

- Elections Act (No 24 of 2011), section 82(1); Elections (Parliamentary and County Elections) Petition Rules, 2017, rule 29.
Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] KESC 31 (KLR) 834

ELECTION LAWS

Presidential election petition – *joinder of interested parties in a presidential election petition - grounds considered for an applicant to be enjoined as an interested party - relevance and usefulness of the submissions of the intended interested party to the proceedings and the court - Supreme Court (Presidential Election Petition) Rules, 2017, rule 4(2); Supreme Court Rules, 2012, rule 25.*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aluochier (Interested Party) [2017] KESC 43 (KLR) 879

Presidential election petition – *joinder of parties in a presidential election petition - application to be enjoined as an interested party in a presidential election petition - whether the Applicant had an identifiable stake in the petition and would be prejudiced if he was not enjoined as an interested party - whether the applicant had qualified to be enjoined as an interested party.*
Mue & another v Chairperson Independent Electoral and Boundaries Commission & 2 others; Maina (Applicant) [2017] KESC 6 (KLR) 396

ELECTORAL LAW

Election petitions – *presidential election petitions - what was the role of advocates in relation to the conduct of their clients in presidential election petitions - what was the role of the media in relation to their conduct in presidential election petitions.*
Kuria & 5 others v Hassan & 5 others [2013] KESC 3 (KLR) 1065

Election petitions – *presidential election petitions - 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.*
Wafula v Odinga, Flag Bearer for Azimio La Umoja One Kenya Alliance & 5 others; Royal Media (Media Television) & 4 others (Subsequent Party) [2022] KESC 51 (KLR) 160

Elections – *election offences - undue influence - what was the meaning of undue influence in the context of an electoral malpractice - Election Offences Act, Cap 66, section 10, 14(1) and (2).*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

Elections – *role of technology in the election process - transmission of election results – whether technology was a mandatory component of Kenya's electoral transmission process – Elections Act, Cap 7, section 39, 44 and 44A.*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

Electoral offences – *fraud – ballot stuffing – claim of systematic ballot stuffing - claim that there was a discrepancy between the total votes cast for a presidential candidate vis-à-vis the votes cast*

for other positions in a general election – claim that the discrepancy amounted to proof of fraud - whether the discrepancies between the total number of votes cast for presidential candidates vis-à-vis the total number of votes cast for other elective positions by itself was an indicator of fraud – whether there was systematic ballot stuffing in the general elections of August 9, 2022 - Election Offences Act, No. 37 of 2016, section 5(n).
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*)
[2022] KESC 54 (KLR) 113

Electoral technology – *duty on IEBC to carry out an annual systems audit of election technology - whether IEBC failed to carry out an annual systems audit of the election technology to evaluate the confidentiality, integrity and availability of the election technology - Elections (Technology) Regulations, 2017, regulations 11 and 12.*
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*)
[2022] KESC 56 (KLR) 1

Electoral technology – *Kenya Integrated Electoral Management System (KIEMS) – capacity to build KIEMS – claim that the technology deployed by IEBC did not meet the standards of integrity, verifiability, security, and transparency - whether IEBC had the capacity to develop the Kenya Integrated Electoral Management System (KIEMS) on its own without procuring it from third parties - whether the procurement of the KIEMS by IEBC was within the law - whether the technology deployed by IEBC met the standards of integrity, verifiability, security, and transparency that guaranteed accurate and verifiable results - whether IEBC at the time of the elections of August 9, 2022 had visibility and control at all times of its election technology - Constitution of Kenya, 2010 article 87; Elections Offences Act, No 37 of 2016, section 5(n); Elections Act, No 24 of 2011, section 83.*
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*)
[2022] KESC 56 (KLR) 1

Independent Electoral and Boundaries Commission (IEBC) – *powers of IEBC – powers of the chairperson of IEBC – power to postpone gubernatorial, parliamentary and ward elections in a general election – where the IEBC postponed elections for various seats during the General Elections of August 9, 2022 due to mix-up of ballot papers – claim that the postponement led to low voter turnout - whether the IEBC or its chairperson had the authority to postpone gubernatorial, parliamentary and ward elections in select counties during a general election - whether postponement of gubernatorial elections in Kakamega and Mombasa counties, parliamentary elections in select constituencies and electoral wards by the IEBC resulted in voter suppression to the detriment of the petitioners – whether section 55B of the Elections Act was inconsistent with the Constitution and void to the extent that it purported to donate to IEBC power to postpone elections in the constituency, county or ward - Constitution of Kenya, 2010, articles 101, 136(2)(a), 177(1) and 180(1); Elections Act, section 55B.*
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*)
[2022] KESC 54 (KLR) 113

Joinder of parties – *presidential election petition – application to be enjoined as amicus curiae - guiding principles applicable in determining an application to be enjoined as amicus curiae – where the applicant was a presidential candidate in the presidential election - what were the guiding principles applicable in determining an application to be enjoined as amicus curiae in a presidential election petition - whether being a presidential candidate in a presidential election was enough consideration for one to be enjoined as amicus curiae in a presidential election petition - whether an application by an independent candidate to be enjoined as amicus curiae could be allowed on grounds of objectivity of the applicant - whether a party who applied to be enjoined as amicus curiae had to demonstrate an identifiable stake or a legal interest in the proceedings - Supreme Court Rules, rule 4(2) and 54.*

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Mwaura (Intended Respondent) [2017] KESC 38 (KLR) 891

Parties – *joinder application – application to be joined as amicus curiae - circumstances when a party can be admitted as amicus – principles a court should consider on an application to be enjoined as an amicus curiae - whether the Kenyan Section of the International Commission of Jurists (ICJ Kenya) could be admitted as amicus curiae in a presidential election petition on grounds that they sought to address the court on the role of the Independent Electoral and Boundaries Commission (IEBC) vis-à-vis the role of its chairperson – Supreme Court (Presidential Election Petition) Rules, 2017, rule 17A; Supreme Court Rules, 2020, rule 19(1) - Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR - Francis Karioki Muruatetu & another v Republic & 5 others [2016] eKLR.*

Odinga & another v Independent Electoral and Boundaries Commission & 9 others [2022] KESC 46 (KLR) 172

Parties to the presidential election petition – *power of the court to issue orders to third parties not enjoined in the presidential election petition - whether the Supreme Court in determining a presidential election petition 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 - Supreme Court (Presidential Election Petition) Rules 2017, Access to Information Act, The Elections (Technology) Regulations 2017 rules 17 and 18; Election (Technology) Regulations, 2017, regulation 10.*

Youth Advocacy for Africa (YAA) & 7 others v Independent Electoral and Boundaries Commission & 17 others [2022] KESC 42 (KLR) 147

Presidential election – *application to be enjoined as an interested party – application to be enjoined as an interested party in a presidential election petition – what were the considerations for one to be enjoined as an interested party in a presidential election petition - what were the considerations for one to be admitted as an interested party in Supreme Court proceedings – Supreme Court Rules, 2012 rule 25.*

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Wafula (Interested Party) [2017] KESC 41 (KLR) 921

Presidential election – *electoral process – repeat presidential election-nomination of candidates – what was the purpose of nominations in a presidential election– whether there was need to conduct fresh nominations of candidates in preparation for the repeat presidential election – what was the place of the Raila 2013 decision, and the Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others(Petition 471 of 2017) [2017] KEHC 9390 (KLR) (Ekuru Aukot Judgment) in the conduct of the fresh election.*
Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

Presidential election – *repeat presidential election – validity of a presidential election – petition challenging the validity of the President elect after a repeat election – allegations of non-compliance with the Constitution and electoral laws – allegations of various irregularities and illegalities duringthe conduct of the elections – what are the principles of free and fair elections – whether the PresidentialElection was conducted in accordance with the principles laid down in the Constitution and the written laws relating to elections – whether there were irregularities and illegalities committed in the conduct of the October 26, 2017 Presidential Election and if in the affirmative, what was theirimpact, if any, on the integrity of the election – Constitution, articles 81, 86,138.*
Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

Presidential election – *technology used in a presidential election – technology used in transmitting Forms 34A from polling stations to the IEBC Public Portal - whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security and transparency to guarantee accurate and verifiable results - whether there was interference with the uploading and transmission of Forms 34A from the polling stations to the IEBC Public Portal - whether there was a difference between Forms 34A uploaded on the IEBC Public Portal and the Forms 34A received at the National Tallying Centre, and Forms 34A issued to agents at the polling stations.*
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*) [2022] KESC 54 (KLR) 113

Presidential election petition – *application to be enjoined as amicus curiae - guiding principles applicable in determining an application to be enjoined as amicus curiae - whether an application to be enjoined as amicus curiae that addressed points of law which were addressed by other parties in the petition was valid - Supreme Court Rules, Rule 54.*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Information Communication Technology Association (ICTAK) (*Amicus Curiae*) [2017] KESC 40 (KLR) 930

Presidential election petition – *applications – applications filed out of time – whether in determining applications in the presidential election petition, the Supreme Court could determine*

an application filed out of time – Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.

Khalifa & 3 others v Independent Electoral and Boundaries Commission & 3 others
[2022] KESC 49 (KLR) 162

Presidential election petition – *constitutional threshold applicable to winning a presidential election – 50% + 1 – what was the formula used to determine whether a President-elect attained the constitutional threshold of 50% +1 - whether in making the declaration, the IEBC and its chairperson applied the correct formula - whether the rounding off of votes cast in the presidential election by the IEBC and its chairperson as a means of assessing the threshold of 50%+1 was mathematically sound, legal and constitutional - whether the declared President-elect attained 50%+1 of all the votes cast – Constitution of Kenya, 2010 article 138(4).*

Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*)
[2022] KESC 56 (KLR) 1

Presidential election petition – *constitutional threshold to be attained in order to win a presidential election – 50%+1 – what was the applicable formula to determine whether a president-elect attained the constitutional threshold of 50%+1 - whether in making the declaration, the IEBC and its chairperson applied the correct formula - whether the rounding off of votes cast in the presidential election by the IEBC and its chairperson as a means of assessing the threshold of 50%+1 was mathematically sound, legal and constitutional - whether the declared President-elect attained 50%+1 of all the votes cast – Constitution of Kenya, 2010, article 138(4).*

Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*)
[2022] KESC 54 (KLR) 113

Presidential election petition – *parties – joinder application – application to be joined as an interested party – category of persons that may be enjoined as an interested party - whether the applicant could be admitted as an interested party in the presidential election petition - Supreme Court Rules, 2020, rule 19; Supreme Court (Presidential Election Petition) Rules, 2017, rule 17A(1) and (2).*

Odinga & another v Independent Electoral and Boundaries Commission & 9 others
[2022] KESC 45 (KLR) 170

Presidential election petition – *service of election petition documents - delay in effecting service - striking out documents from the record of the court for want of service - considerations that the court would have under the circumstances - Supreme Court (Presidential Election) Rules, 2017, rule 11(1).*

Odinga & another v Independent Electoral and Boundaries Commission & 2 others
[2017] KESC 39 (KLR) 939

Presidential election petition – *service of the petition and close of pleadings - admission of documents filed and served out of time - whether the Supreme Court could retain in the court*

record documents filed and/or served out of time by the petitioner in a presidential election petition - Supreme Court (Presidential Election Petition) Rules 2017, rules 10 and 12.
Odinga & another v Independent Electoral and Boundaries Commission & 2 others
[2017] KESC 33 (KLR) 926

Presidential election petition – *technology used in a presidential election – technology used in transmitting Forms 34A from polling stations to the IEBC public portal - whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security and transparency that guaranteed accurate and verifiable results - whether there was interference with the uploading and transmission of Forms 34A from the Polling Stations to the IEBC Public Portal - whether there was a difference between Forms 34A uploaded on the IEBC Public Portal and the Forms 34A received at the National Tallying Centre, and the Forms 34A issued to agents at the Polling Stations - Constitution of Kenya, 2010 article 81(e) and 86(a); Elections Act, No 24 of 2011, section 44 and 40; Independent Electoral and Boundaries Commission Act, Act No. 9 of 2011, section 25.*
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*)
[2022] KESC 56 (KLR) 1

Presidential election petition – *timelines of a presidential election petition - applications that may be filed under or consolidated with the presidential election petition – application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results - whether an application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results warranted consolidation with the presidential election petition – Constitution of Kenya (2010) article 140; Supreme Court Act (Act No. 7 of 2011), section 24; Supreme Court (Presidential Election Petition)Rules (2017), rule 26.*
Pkosing v National Super Alliance & 12 others [2017] KESC 9 (KLR) 374

Presidential election petition – *parties to a presidential election petition – IEBC commissioners – whether IEBC commissioners could be included as respondents in their personal capacity in a presidential election petition - whether the inclusion of IEBC commissioners as respondents in a presidential election petition violated the principle that commissioners of an independent constitutional body could not be liable for any acts done in good faith in execution of the body's powers – Independent Electoral and Boundaries Commission Act (Cap 7C) section 15.*
Odinga & 4 others v Independent Electoral Boundaries Commission & 7 others
[2022] KESC 43 (KLR) 167

Presidential election petition – *parties to a presidential election petition – Office of the Attorney General – whether the Office of the Attorney General was wrongfully named as a respondent in a presidential election petition - whether the inclusion of IEBC commissioners as respondents in a presidential election petition violated the principle that commissioners of an independent constitutional body could not be liable for any acts done in good faith in execution of the body's powers – Independent Electoral and Boundaries Commission Act (Cap 7C) section 15.*
Odinga & 4 others v Independent Electoral Boundaries Commission & 7 others
[2022] KESC 43 (KLR) 167

Presidential election petitions – *applications for joinder - whether an application for joinder that did not raise a direct electoral grievance could be allowed - Supreme Court (Presidential Election Petition) Rules, 2013, cap 9B Sub Leg, rule 17.*
Aluochier v Independent Electoral and Boundaries Commission & 19 others [2013] KESC 25 (KLR) 1027

Presidential election petitions – *consolidation of presidential petitions with similar issues - petitions challenging the validity of the 2013 presidential elections - whether presidential election petitions could be consolidated in so far as the petitions were in respect of the same respondents and with regard to the validity of the Presidential Election.*
Kuria & 5 others v Hassan & 5 others [2013] KESC 26 (KLR) 1051

Presidential election petitions – *filing of further affidavits in presidential election petitions - where an application was made for the filing of further affidavits by an applicant seeking to respond to serious allegations made by other parties to the suit against them - what were the circumstances where the filing of further or other affidavits could be allowed in a presidential election petition - Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.*
Odinga & another v Independent Electoral and Boundaries Commission & 8 others [2022] KESC 48 (KLR) 178

Presidential elections – *conduct of presidential elections – constitutional threshold of a free and fair election – whether the election conducted on October 26, 2017 met the constitutional threshold of a free and fair election under article 81 of the Constitution – what are the legal consequences of not holding a Presidential election in each constituency under article 138(2) of the Constitution – whether the election held on October 26, 2017 and its results, was legitimate and credible, both in fact and in law – Constitution, articles 81 and 138(2).*
Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

Presidential elections – *electoral process - transmission of results and declaration of results - verification of results - process to be followed -whether the Court of Appeals' decision in the case of Maina Kiai provided a justification for declaring the results of the election of the President by the national returning officer without reference to Forms 34A - whether the Court of Appeal's decision relieved the Independent Electoral and Boundaries Commission from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying center and to the national tallying center - Elections Act, Cap 7, section 39(1C).*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

Presidential elections – *requirements to be met for a candidate to be declared duly elected as President - computation to determine the threshold of 50% +1- what was meant by the "votes cast" to be taken into account in the computation to determine the threshold of 50% +1 - valid versus rejected votes in presidential elections - what was the meaning of "votes", "cast" and "ballot papers"*

- what was the place of valid versus rejected votes in a presidential election - Constitution of Kenya, 2010, article 138(4); Elections Act, Cap 7, section 2.
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

Presidential elections – *validity of presidential elections - petition challenging the validity of the president elect – claim that there was non-compliance with the Constitution and electoral laws in the August 2017 presidential elections - claim that there were various irregularities and illegalities during the conduct of the elections – what were the principles of free and fair elections - Constitution of Kenya, 2010, articles 81, 86 and138; Elections Act, Cap 7, sections 39(1c), 44 and 83; Elections (General) Regulations, 2012, regulation 87(1)(b).*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

Presidential elections – *withdrawal of a presidential candidate – withdrawal before a repeat election – manner in which such withdraw should be made – what was the legal effect of the withdrawal of a candidate before election – in determining the legal effect of withdrawal by a candidate before an election, what guidance was to be drawn from the pronouncements of the Supreme Court in Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (Raila 2013) – Elections (General) Regulations, 2017, cap 7 Sub Leg, regulation 52.*
Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

Principles of elections – *legitimacy and credibility of elections – the meaning and applicability of the term 'legitimacy' and 'credibility', in the general context of a Presidential election – whether the election conducted on October 26, 2017 lacked legitimacy and credibility.*
Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

Scrutiny – *recount – application for scrutiny and recount - what criteria should courts employ in determining applications for scrutiny and recount in election results - 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 - Elections Act, 2011, sections 39 and 44; Supreme Court Act, 2011, sections 12, 23, and 26; Supreme Court (Presidential Election Petition) Rules 2017, Access to Information Act, The Elections (Technology) Regulations 2017 rule 17 and 18; Election (Technology) Regulations, 2017, regulation 10.*
Youth Advocacy for Africa (YAA) & 7 others v Independent Electoral and Boundaries Commission & 17 others [2022] KESC 42 (KLR) 147

Validity of an election – *electoral irregularities and illegalities - voter suppression – claims that the decision by IEBC to postpone gubernatorial, parliamentary and ward elections in some areas was voter suppression - what did the court consider in determining a claim of voter suppression - 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 - Constitution of Kenya 2010, article 38(3)(b); Elections Act, No 24 of 2011, section 55B.

Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*) [2022] KESC 56 (KLR) 1

ELECTORAL LAWS – *presidential election petition – scrutiny of votes - principles applicable to the grant of orders of scrutiny of votes - circumstances under which the court would grant orders of scrutiny of votes.*

Mue & another v Chairperson of the Independent Electoral and Boundaries Commission & 3 others [2017] KESC 5 (KLR) 393

JURISDICTION

Jurisdiction of the Supreme Court – *exclusive original jurisdiction of the Supreme Court– jurisdiction to determine matters pertaining to a presidential election – whether the Supreme Court could determine an issue touching on the constitutionality of any law integral to the determination of a cause before it, although pending before another Court – whether the Court would, notwithstanding thefact that a matter is pending on appeal, proceed to determine the issue – Constitution, articles 140(3) & 163(3).*

Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

Jurisdiction of the Supreme Court – *jurisdiction in presidential election petitions - whether the Supreme Court could expunge internal correspondences between members of the Independent Electoral and Boundaries Commission from the record of the court in a presidential election petition.*

Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] KESC 28 (KLR) 364

Jurisdiction of the Supreme Court – *jurisdiction to determine matters pending before the High Court - whether the Supreme Court could adjudicate an issue which was still the subject of judicial determination at the High Court.*

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

Jurisdiction of the Supreme Court – *where the summons to appear had been issued in the course of the presidential election petition – claim that the Supreme Court did not have jurisdiction to hear the case since the petition had been determined - whether the court had jurisdiction to hear the case arising from the summons where the presidential election petition had already been concluded.*

Odinga v Independent Electoral & Boundaries Commission & 3 others [2013] KESC 8 (KLR) 943

Supreme Court of Kenya – *original and exclusive jurisdiction – special jurisdiction of the Supreme Court to hear and determine a presidential election petition - where the jurisdiction was not boundless as it was limited in time and scope - whether it only related to legal, factual and evidentiary questions relevant to the determination of the validity of a presidential election - political question - role of the court in a fundamentally political-cum-constitutional process - principles that guided the court in its attempt to resolve the electoral question - whether the Supreme Court had jurisdiction to preside over the presidential election petition - Constitution of Kenya, 2070, articles 740, 163(3)(a), Supreme Court Act, (Act No 7 of 2011).*
Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others
[2013] KESC 6 (KLR) 950

LAW OF EVIDENCE

Admissibility of evidence – *admissibility of affidavit evidence – supporting affidavit – claim that a supporting affidavit was inadmissible as it contained hearsay - 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.*
Odinga & another v Independent Electoral and Boundaries Commission & 8 others
[2022] KESC 47 (KLR) 164

Admissibility of evidence- admissibility of illegally obtained evidence – *admissibility of illegally obtained evidence under common law vis a vis constitutional law - whether memos obtained unlawfully could be admitted in court as evidence - whether illegally obtained evidence was admissible - what was the probative value of illegally obtained evidence?.*
Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others
[2017] KESC 45 (KLR) 340

Affidavit evidence – *where a deponent had filed and withdrawn an affidavit - whether a court of law could examine affidavit evidence that had been withdrawn by the deponent.*
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*)
[2022] KESC 56 (KLR) 1

Affidavits – *further affidavits - application to file further affidavits in the presidential election petition - whether one could file further affidavits in the presidential election petition - what were the circumstances where the filing of further or other affidavits could be allowed in a presidential election petition - Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.*
Odinga & another v Independent Electoral and Boundaries Commission & 8 others
[2022] KESC 48 (KLR) 178

Burden of proof – *burden of proof in election petitions - which party bore the burden of proof in an election petition – what was the burden and standard of proof applicable to claims of election irregularities and illegalities; data specific claims and election offences - Odinga & 5*

others v Independent Electoral and boundaries Commission & 4 others (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment).
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*) [2022] KESC 56 (KLR) 1

Burden of proof – *burden of proof in election petitions - who bore the burden of proof in election petitions – which party bore the burden of proof to prove electoral offences.*
Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*) [2022] KESC 54 (KLR) 113

Burden of proof – *standard of proof - burden and standard of proof in an electoral cause - party on whom the burden of proof lay - the standard to which the burden was to be discharged - whether proof was on a balance of probability or proof beyond reasonable doubt - where the evidential burden kept shifting depending on the circumstances - threshold to be met by a petitioner in an electoral cause.*
Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] KESC 6 (KLR) 950

LAW OF EVIDENCE– BURDEN AND STANDARD OF PROOF – *burden and standard of proof in presidential election petitions – nature of burden and standard of proof - what amounted to and who bore the burden of proof in presidential election petitions – what were the circumstances under which the evidential burden of proof shifted – what was the standard of proof in election petitions - what was the distinction between the legal burden and the evidentiary burden of proof in election petitions - Evidence Act, Cap 80, section 107.*
Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

LEGAL PRECEDENT – *stare decisis – binding (ratio decidendi) and persuasive precedents (obiter dicta) – nature of observations in a judgment which are not an issue raised or pleaded by the parties to the disputein question – whether the Courts are bound by such observations – extent to which such observations would be of persuasive value – whether the observations in Raila 2013 were of binding authority – whether it was necessary for the Court to make a clarification of the meaning of the said paragraphs, in view of the contradictory interpretations attendant upon them.*
Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

STATUTES

Amendment of statutes-retrospective application of statutes – *what was the effect of the Election Laws (Amendment) Act, 2017 on the conduct of the Presidential election held on October 26, 2017 – was section 83 of the Elections Act (as amended) unconstitutional – Elections Act, cap 7, section 83 (as amended).*
Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

Constitutionality of statutes – *constitutionality of section 83 of the Elections Act as amended – where the section had two limbs – compliance with the law on elections, and irregularities that may affect the result of the election – where the amendment made the two limbs in the provision disjunctive – whether the section as amended was unconstitutional – Elections Act, cap 7, section 83.*

Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) [2017] KESC 54 (KLR) 181

Constitutionality of statutes – *power to verify and tally the results of the presidential elections - regulation 87(3) of the Elections (General) Regulations –whether regulation 87(3) of the Elections (General) Regulations was unconstitutional, to the extent that it vested the power of verification and tallying in the Chairperson of IEBC.*

Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*) [2022] KESC 56 (KLR) 1

Constitutionality of statutes – *regulation 87(3) of the Elections (General) Regulations – power to verify and tally the results of the presidential elections - section 55B of the Elections Act - statutory provisions providing for the postponement of elections in the constituency, county or ward level - whether regulation 87(3) of the Elections (General) Regulations was unconstitutional, to the extent that it purported to vest the power of verification and tallying in the chairperson of IEBC - whether section 55B of the Elections Act was inconsistent with the Constitution and void to the extent that it purported to donate to IEBC power to postpone elections in the constituency, county or ward - Elections Act , No. 24 of 2011, section 55B; Elections (General) Regulations, regulation 87(3).*

Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (*Amicus Curiae*) [2022] KESC 54 (KLR) 113

Interpretation of statutes – *cannons of statutory interpretation - interpretation of section 83 of the Elections Act - where section 83 had two limbs - compliance with the law on elections and irregularities that may affect the result of the election - what was the proper interpretation of section 83 and whether the two limbs in the provision were conjunctive or disjunctive in interpretation - Elections Act, Cap 7, section 83.*

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

WORDS AND PHRASES

Vote – *definition of vote - expression of one's preference or option in a meeting or election by ballot, show of hands or other type of communication - Black's Law Dictionary.*

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

Vote – *definition of vote – opinion expressed, resolution or decision carried, by voting - Dictionary of Modern Legal Usage.*

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (*Amicus Curiae*) [2017] KESC 42 (KLR) 399

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 56 (KLR) (Election Petitions) (26 September 2022) (Judgment)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 56 (KLR)

Law of Evidence *– burden of proof – burden of proof in election petitions - which party bore the burden of proof in an election petition – what was the burden and standard of proof applicable to claims of election irregularities and illegalities; data specific claims and election offences - Odinga & 5 others v Independent Electoral and boundaries Commission & 4 others (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment)*

Electoral Law *– electoral technology - Kenya Integrated Electoral Management System (KIEMS) – capacity to build KIEMS – claim that the technology deployed by IEBC did not meet the standards of integrity, verifiability, security, and transparency - whether IEBC had the capacity to develop the Kenya Integrated Electoral Management System (KIEMS) on its own without procuring it from third parties - whether the procurement of the KIEMS by IEBC was within the law - whether the technology deployed by IEBC met the standards of integrity, verifiability, security, and transparency that guaranteed accurate and verifiable results - whether IEBC at the time of the elections of August 9, 2022 had visibility and control at all times of its election technology - Constitution of Kenya, 2010 article 87; Elections Offences Act, No 37 of 2016, section 5(n); Elections Act, No 24 of 2011, section 83.*

Electoral Law *– presidential election petition – technology used in a presidential election – technology used in transmitting Forms 34A from polling stations to the IEBC public portal - whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security and transparency that guaranteed accurate and verifiable results - whether there was interference with the uploading and transmission of Forms 34A from the Polling Stations to the IEBC Public Portal - whether there was a difference between Forms 34A uploaded on the IEBC Public Portal and the Forms 34A received at the National Tallying Centre, and the Forms 34A issued to agents at the Polling Stations - Constitution of Kenya, 2010 article 81(e) and 86(a); Elections Act, No 24 of 2011, section 44 and 40; Independent Electoral and Boundaries Commission Act, Act No. 9 of 2011, section 25.*

Electoral Law *– electoral technology – duty on IEBC to carry out an annual systems audit of election technology - whether IEBC failed to carry out an annual systems audit of the election technology to evaluate the confidentiality, integrity and availability of the election technology - Elections (Technology) Regulations, 2017, regulations 11 and 12.*

Constitutional Law *– Independent Electoral and Boundaries Commission – powers of the IEBC – powers of the IEBC vis-à-vis the powers of the chairperson of the IEBC – role of verifying and tallying of*

votes as received from polling stations countrywide - whether the role of verifying and tallying of votes as received from polling stations countrywide was vested in the IEBC as a corporate entity - whether the role of verifying and tallying of votes as received from polling stations countrywide could be undertaken by the chairperson of the IEBC to the exclusion of other IEBC Commissioners – Constitution of Kenya, articles 138(3)(c) and (10); Elections (General) Regulations 2012, regulation 87(3); Independent Electoral and Boundaries Commission Act, No 9 of 2011, section 11A(a).

Electoral Law *– presidential election petition – constitutional threshold applicable to winning a presidential election – 50% + 1 – what was the formula used to determine whether a President-elect attained the constitutional threshold of 50% +1 - whether in making the declaration, the IEBC and its chairperson applied the correct formula - whether the rounding off of votes cast in the presidential election by the IEBC and its chairperson as a means of assessing the threshold of 50%+1 was mathematically sound, legal and constitutional - whether the declared President-elect attained 50%+1 of all the votes cast – Constitution of Kenya, 2010 article 138(4).*

Constitutional Law *– Independent Electoral and Boundaries Commission (IEBC)– mandate of the IEBC – mandate to postpone elections - postponement of gubernatorial, parliamentary and ward elections - whether IEBC had the requisite constitutional and legal authority to postpone gubernatorial, parliamentary and ward elections - what threshold had to be met for the IEBC to take the drastic step of postponing elections - Constitution of Kenya, 2010 articles 101, 136(2)(a), 177(1) and 180(1); Elections Act, section 55B.*

Electoral Law *– validity of an election - electoral irregularities and illegalities - voter suppression – claims that the decision by IEBC to postpone gubernatorial, parliamentary and ward elections in some areas was voter suppression - what did the court consider in determining a claim of voter suppression - 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 - Constitution of Kenya 2010, article 38(3)(b); Elections Act, No 24 of 2011, section 55B.*

Statutes *– constitutionality of statutes – power to verify and tally the results of the presidential elections - regulation 87(3) of the Elections (General) Regulations –whether regulation 87(3) of the Elections (General) Regulations was unconstitutional, to the extent that it vested the power of verification and tallying in the Chairperson of IEBC.*

Advocates *– duty of advocates to the court – duty to be truthful – duty not to swear falsehoods - what duty did an advocate owe the court – whether counsel were permitted to swear affidavits on behalf of their clients in contentious matters – whether counsel abused the process of the court by swearing an affidavit to facts that they were not privy to - Penal Code, CAP 63, sections 113 and 114.*

Law of Evidence *– affidavit evidence – where a deponent had filed and withdrawn an affidavit - whether a court of law could examine affidavit evidence that had been withdrawn by the deponent.*

Brief facts

On August 9, 2022 Kenya held the third general election under the Constitution of Kenya, 2010 (Constitution). Transmission of the results of the general election was done via the Kenya Integrated Electoral Management System (KIEMS); a technology used in the biometric voter registration, and, on the election day, for voter identification as well as the transmission of election results from polling stations to the National Tallying Centre.

On August 15, 2022, the chairperson of the Independent Electoral and Boundaries Commission (IEBC) (4th respondent) declared the 1st respondent, William Samoei Ruto, the Presidential Candidate for the United Democratic Alliance Party, (1st respondent) the president elect with 7,176,141 votes (50.49% of presidential votes cast) and the 1st petitioner, Raila Amollo Odinga as the runner's up with 6,942,930 votes (48.85% of presidential votes cast).

Aggrieved by the results and the process by which the results were obtained and declared, the 1st petitioners, Raila Odinga and Martha Karua, who were the presidential and deputy presidential candidates respectively of the Azimio La Umoja Coalition of parties filed the instant petition challenging the declared result of that presidential election (the election). Alongside the 1st petitioners were a group of 6 other petitioners that also challenged the result of the presidential election; in total they filed 9 presidential election petitions.

The 1st, 3rd and 4th petitioners in the consolidated petition, challenged the technology used by IEBC during the 2022 General Election. They pleaded that the manner in which technology was deployed and utilized fell short of the prescribed constitutional and statutory standards. As regards the audit of the Register of Voters, they urged that IEBC, pursuant to its Elections Operations Plan, committed itself to conducting an audit of the Register of Voters by March 31, 2022. To the contrary, they alleged, it only publicly availed the audit report on its website on August 2, 2022, 7 days to the election.

In response, IEBC submitted that the electoral system met the constitutional threshold; that all necessary information was accessed only by authorized persons; the information was accurate, complete and protected from malicious modification either by authorized or unauthorized persons; it maintained an audit trail on activities related to information and the information was available and could be authenticated through the use of various security features.

The 1st petitioners further alleged that the results of the presidential election were staged. They contended that a person who had access to the Result Transition System (RTS), intercepted, detained or stored Forms 34A temporarily to convert or manipulate them before uploading them on IEBC's public portal.

To rebut the allegation, IEBC and its chairperson denied staging and unauthorized intrusion of the RTS. In that regard, they urged that every image of Forms 34A was uploaded immediately after the transmitted result form was received as evinced by the time stamp.

The petitioners also challenged the authority and the decision of the IEBC or its chairperson to postpone the 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. They contended that the IEBC had no jurisdiction to postpone elections in those areas. They further contended that section 55B of the Elections Act was inconsistent with the Constitution and void to the extent that it purported to donate to IEBC power to postpone elections in the constituency, county or ward contrary to the Constitution. They contended that the postponement undermined the conduct of free, fair and credible elections by depriving the voters an opportunity to vote for all the candidates on the date stipulated by the Constitution. The 1st and 3rd petitioners also believed that elections were deliberately postponed in Kakamega and Mombasa counties. It was alleged that those areas were considered to be 1st petitioner's strongholds, and as such, the postponement of elections worked to his disadvantage and handed a benefit to the 1st respondent.

Those assertions were denied by IEBC and its chairperson. They however, admitted that they experienced confusion with the printed ballot papers and explained that they only discovered the mix-up on the eve of the election when the ballot papers were being distributed to the polling stations; that as a practice, ballot papers could only be opened on the eve of the election day to avoid any mischief; and that by the time the mix-up was discovered, it was logistically impossible to print and replace the ballots papers in time for the election.

The petitioners also contested the formula used by the IEBC or its chairperson to declare that the 1st respondent had obtained the threshold of 50% + 1 of the votes cast in the presidential election. In particular, they challenged the rounding off. They contended that the rounding off of votes cast in a presidential election as a means of assessing the threshold under article 138(4) of the Constitution killed and birthed voters, which was illegal and unconstitutional.

Lastly the petitioners challenged the results of the presidential election on account of the opaque nature of the verification exercise at the National Tallying Center. On August 15, 2022 as the public waited for the chairperson of the IEBC to declare the final result, Kenyans found themselves watching a split screen scenario on their television sets. On one part of the screen was the chairperson, readying himself to declare the result of the presidential election; on the other part of the screen were the 5th to 8th respondents (the 4 commissioners) on the lawns of the Serena Hotel-Nairobi, from where they announced that they would not "own" the results that were soon to be declared by their chairperson. The 4 commissioners termed the results "opaque" due to the manner in which the chairperson had been conducting the verification and tallying exercise. They contended that by rejecting IEBC's results on grounds of opaqueness of the verification and tallying process, they called into question, the credibility of the entire election. They further submitted that being in the majority out of the seven-member Commission, their view should prevail and the election should be nullified. It was the petitioners' argument, therefore, that a dysfunctional Commission could not deliver a credible election.

On September 5, 2024 the Supreme Court made a determination on the validity of the presidential election and the reasons for its decisions were delivered on September 26, 2024.

Issues

i. Which party bore the burden of proof in an election petition?

ii. What was the standard of proof in proving:
   a. election irregularities and illegalities;
   b. data specific claims; and
   c. election offences.

iii. Whether the technology deployed by IEBC in the 2022 General Elections met the standards of integrity, verifiability, security, and transparency that guaranteed accurate and verifiable results.

iv. Whether IEBC had the capacity to develop systems that register and digitally identify voters such as the Kenya Integrated Electoral Management System (KIEMS) on its own without procuring it from third parties.

v. Whether the procurement of the KIEMS by IEBC was within the law.

vi. Whether IEBC at the time of the elections of August 9, 2022 had visibility and control at all times of its election technology.

vii. Whether IEBC failed to carry out an annual systems audit of the election technology to evaluate the confidentiality, integrity and availability of the election technology pursuant to regulations 11 and 12 of the Elections (Technology) Regulations, 2017.

viii. Whether there was interference with the uploading and transmission of Forms 34A from the polling station to IEBC public portal.

ix. Whether there was a difference between Forms 34A uploaded on IEBC's public portal, the Forms 34A received at the National Tallying Centre, and Forms 34A issued to the agents at the polling stations.

x. Whether advocates were at liberty to swear an affidavit on behalf of others to facts that they were not privy to.

xi. Whether a court of law could examine affidavit evidence that had been withdrawn by the deponent.

xii. Whether IEBC had the requisite constitutional and legal authority to postpone gubernatorial, parliamentary and ward elections.

xiii. What threshold had to be met for the IEBC to take the drastic step of postponing elections?

xiv. What did the court consider in determining a claim of voter suppression?

xv. 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.

xvi. Whether there were unexplainable discrepancies between the votes cast for presidential candidates and other elective positions.

xvii. Whether IEBC carried out the verification, tallying, and declaration of results in accordance with article 138(3)(c) and 138(10) of the Constitution.

xviii. Whether regulation 87(3) of the Elections (General) Regulations, 2012 was unconstitutional to the extent that it vested the power of verifying and tallying presidential election results, as received at the NTC, solely on the chairperson of the IEBC to the exclusion of other members of the Commission.

xix. Whether the petitioners proved to the requisite standard that the chairperson of the Commission excluded the four Commissioners from the tallying and verification process.

xx. Whether the results from twenty-seven disputed constituencies were tallied and verified.

xxi. Whether there were irregularities and illegalities of such magnitude as to affect the final result of the presidential election.

xxii. What constituted electoral irregularities and illegalities?

xxiii. Whether there was a special mechanism in place, to allow for special voting for election officials and observers, patients admitted in hospitals, older members of society, members of the defence and security forces on duty and other persons by reason of a special need, as contemplated under regulation 19 of the Elections (General) Regulations 2012.

Relevant provisions of the Law

Constitution of Kenya

Article *138* - Procedure at presidential election

(3) In a presidential election—

(c) after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

(4) A candidate shall be declared elected as President if the candidate receives—

(a) more than half of all the votes cast in the election; and

(b) at least twenty-five per cent of the votes cast in each of more than half of the counties.

...

(10) 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.

Elections (General) Regulations

Regulation 87 - Returns of persons elected

(3)Upon receipt of Form 34A from the constituency returning officers under sub regulation (1), the Chairperson of the Commission shall—

(a) verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre;

(b) tally and complete Form 34C;

(c) announce the results for each of the presidential candidates for each County;

(d) sign and date the forms and make available a copy to any candidate or the national chief agent present;

(e) publicly declare the results of the election of the president in accordance with Articles 138(4) and 138(10) of the Constitution;

(f) issue a certificate to the person elected president in Form 34D set out in the Schedule; and

(g) deliver a written notification of the results to the Chief Justice and the incumbent President within seven days of the declaration; Provided that the Chairperson of the Commission may declare a candidate elected as the President before all the Constituencies have delivered their results if in the opinion of the Commission the results that have not been received will not make a difference with regards to the winner on the basis of Article 138(4)(a) and (b) of the Constitution; and Kenya Subsidiary Legislation, 201 7 379 (h) in the case of the other elections, whether or not forming part of a multiple elect ion, publish a notice in the Gazette, which may form part of a composite notice, showing the name or names of the person or persons elected.

Held

1. The Constitution explicitly protected political rights, including the right to vote; stipulated principles of the electoral system; established the Independent Electoral and Boundaries Commission (IEBC) as the body vested with the mandate of conducting and supervising elections; and vested courts, including the Supreme Court, with the duty of resolving post-election disputes. The constitutional framework was reinforced by an array of legislation whose overall objective was to guarantee fairness, credibility and legitimacy of the electoral process.
2. Despite efforts to reform the electoral process, some of the reactions from segments of the electorate that followed the declaration of the presidential election result on August 15, 2022, remained as a clear indication that IEBC was yet to gain universal public confidence and trust, with regard to its internal management of IEBC and of elections. However, election related disputes were an intrinsic part of the electoral process. The credibility, integrity and legitimacy of that process was ultimately determined by the courts. In respect of a presidential election, that duty was reposed by the Constitution in the Supreme Court.
3. Lack of trust in the electoral system led to the introduction of election technology via section 44 of the Elections Act. Section 44 enjoined the Independent Electoral and Boundaries Commission (IEBC) to adopt an integrated electronic electoral system that enabled biometric voter registration, electronic voter identification and electronic transmission of results. However, electronic transmission was limited to a presidential election. IEBC developed technology known as Kenya Integrated Electoral Management System (KIEMS) making Kenya's election process a hybrid one, embracing both technology and manual processes.

4. The IEBC was the body constitutionally mandated to conduct elections in Kenya. Elections were considered free and fair when they were held in consonance with the general principles for the electoral system as articulated in article 81(e) of the Constitution as read with section 25 of the Independent Electoral and Boundaries Commission Act (IEBC Act) that was, if they were, conducted by secret ballot, free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.
5. The outcome of a case depended on the strength, accuracy and reliability of evidence. In an adversarial court system, the courts were blind in the sense that they did not carry out any investigative roles or gather evidence on behalf of the parties before them. They depended on and determined disputes from what parties presented. Cases were won or lost on the evidence placed before the court.
6. A petitioner who sought the nullification of elections for alleged non-conformity with the Constitution or the law or on the basis of irregularities and illegalities, had the duty to proffer cogent and credible evidence to prove those grounds to the satisfaction of the court. Once the court was convinced that the petitioner had discharged that burden, then the evidentiary burden shifted to the respondent (who in most election-related cases was IEBC), to present evidence by way of rebuttal of the assertion.
7. The intermediate standard of proof in election petitions lay in a middle ground between the threshold of proof on a balance of probability in civil cases and beyond reasonable doubt in criminal trials, save for two instances; where allegations of criminal or quasi-criminal nature were made; and where there was 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 was beyond reasonable doubt. Despite there being different standards of proof in other jurisdictions across the globe, there was no justification to depart from the test applied in the Kenyan jurisdiction. There were therefore only two categories of proof in relation to election-related petitions in Kenya: the application of the criminal standard of proof of beyond reasonable doubt and the intermediate standard of proof.
8. The electoral system was designed to handle voter registration of over 22 million voters with unique biometric details. Further, in all the 46,231 polling stations KIEMS kits were mapped to the specific geographical area of the polling stations and to specific presiding officers. It was also designed to be as secure as possible to prevent infiltration. The public portal, on the other hand, was designed to handle numerous visits to the website to access the transmitted Forms 34A without causing it to crash. Such a system by design could not be expected to be a simple one in the ordinary sense. Its features were not configured for ordinary everyday use by everyone without suitable training. There had been no specific complaint by any voter, agent or member of the public over their inability to use or frustrations in the use of the technology.

9. The IEBC had rolled out an elaborate training program aimed at building capacity and competence of its staff members and candidates' agents on the Kenya Integrated Elections Management System (KIEMS) . It also conducted voter education and sensitization activities across the country targeting stakeholders including political parties, civil society and Government agencies through print and electronic media, in fulfilment of the provisions of article 88(4)(g) of the Constitution as read with section 40 of the Elections Act.

10. The KIEMS was initially created as four different systems operated separately during the 2013 General Election, but since 2017 the said system had been fully integrated. There had been a gradual but sustained advancement in election technology from pre-2007 and 2013 elections.

11. Technology no matter how advanced, was bound to fail at one point or another, leading to a bad user experience. Hardware breaks, software bugs and connectivity loss, among many challenges in automation. Imperfections in the process were inevitable. Some imperfections could have far-reaching ramifications, which in turn could lead to nullification of an election while others may not reach that level or degree of significance. The nullification of the Presidential Election of 2017 was partly based on that reality.

12. Whereas KIEMS kits failed in 235 polling stations in Kibwezi West Constituency and parts of Kakamega County, 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled. The failure of the KIEMS kits in the identified polling stations could not be taken as a yardstick of the performance of KIEMS kits in the whole country. All affected voters who could have complained were not disenfranchised as they were able to exercise their democratic right to vote manually.

13. By dint of section 44(4) of the Elections Act, IEBC was to, in an open and transparent manner, procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections. The two limbs to the provision were the open and transparent procurement of the technology and the timelines within which to put it in place. The IEBC advertised an open international tender for the supply, delivery, installation, testing, commissioning, support and maintenance of the KIEMS, hardware equipment and accessories. At the close of the tender period, it received bids from five firms and upon evaluation, Smartmatic was successful and was awarded the tender thereto. A contract between IEBC and the firm was concluded on November 25, 2021. The award of contract was contested before the Public Procurement Administrative Review Board, the High Court and eventually the Court of Appeal with the ultimate result that the award was upheld. It was not open for any party or even the Supreme Court to revisit that tender in the circumstances.

14. Whereas homegrown solutions were preffered, IEBC did not have the capacity to develop such a system and therefore it procured such a system. Although computer hardware, software, and other related services were essential for election operations, an elections body would not have the capacity to avail for itself most of those complex services that

underpinned elections—from voter registration and election management systems to results transmission devices. Those were procured from private vendors. Once procured, installed and operationalized, the systems could be managed by staff of the election body. IEBC did not abdicate its role in the procurement of the technology used in the last General Election or in the conduct of the presidential election. It complied with section 44 of the Elections Act and with the procurement procedures under regulation 4 (1) of the Elections (Technology) Regulations, 2017. The procurement of the system was within the law, as confirmed by the concurrent decisions of the Public Procurement Administrative Review Board, the High Court and the Court of Appeal.

15. The IEBC granted a team comprising of agents of all the petitioners supervised access to the server for interrogation for the entire duration of the exercise. IEBC in compliance with the orders of the court provided its password policy, password matrix, system users and levels of access, workflow chats of the system, architecture, diagram, tallying, transmission and posing of the portals as well as the system architecture. It only declined to provide the owners of system administration's passwords as they considered doing so would expose the names and identities of the system administrator posing a threat to their security. That position was understandable. The petitioners, through their agents, were not handicapped in any way during the scrutiny exercise and they had access to all material relevant to the scrutiny and the petitions before the court. Any other access would not have been of use to the court or the petitioners.

16. The IEBC had visibility of the system and its technical members of staff, who conducted the scrutiny had control of the electoral system at all times. The petitioners did not present any evidence that met the requisite standard of proof to show that there was access to the system by unauthorized persons. Similarly, the report of the Registrar of the Supreme Court (Registrar's report) did not reveal any security breaches of the Result Transmission System (RTS) by any unauthorized person(s).

17. The IEBC engaged the firm of Serianu Limited in July 2022 to conduct the annual audit of its election technology systems. There was public testing of the kits on June 9, 2022, being sixty days before the election and a similar simulation carried out on July 15, 2022. The petitioners made allegations that they had been unable to prove and to which IEBC had been able to respond by demonstrating that it followed the law as regards auditing of the electoral system pursuant to regulations 11 and 12 of the Elections (Technology) Regulations, 2017. The court was not satisfied that the technology deployed by IEBC failed the standard of article 86(a) of the Constitution on integrity, verifiability, security and transparency.

18. From the Registrar's report, parties reviewed the transmission of Forms 34A from the KIEMS kit to the online public portal and were satisfied that once the presiding officer took a picture of Form 34A, the KIEMS kits would, at that point, scan the Form into PDF which would then be transmitted to a storage server. At the storage server, the Form was processed by an application to ascertain compliance with security features. Once that was

confirmed, Form 34A was then published on the online public portal. But if it lacked the security features, it was dropped and information of the anomaly was duly recorded.

19. Forms 34A as transmitted from the polling stations were handwritten by the presiding officers. The KIEMS kit had an inbuilt scan application that enabled the scanning of forms into PDF before transmission to the receiving server. That categorical finding settled the issue of alleged image conversion. The system in terms of its configuration, design and disposition would not allow the intrusion and interference in the manner as alleged by the petitioners' side. The 1st, 2nd, 3rd and 4th petitioners' illustration of how a document which was handwritten and with signatures, was scanned and uploaded through the KIEMS – then uploaded on an external platform – where it was converted into another format, amended, then converted back into PDF format to finally be re-uploaded onto IEBC's portal, was not believable. The scrutiny exercise put that postulation beyond argument.

20. Any alteration of the Forms 34A as transmitted would have required the person to have information on the voter turnout. One could not purport to alter the votes of a polling station by increasing the number of votes in favour of one candidate without, first establishing the exact number of voters that turned out to vote. To alter votes in the manner alleged by the petitioners would require the man or machine in the middle to have had agents in all the 11,000 polling stations, where it was alleged that Forms 34A were held in abeyance for manipulation, before being uploaded with finality to IEBC's online public portal within 8 minutes. That was almost a technological impossibility. The claims of access to the RTS to interfere with Forms 34A, and that 11,000 Forms 34A were affected by staging were not proved and remained just but mere allegations.

21. According to the Registrar's report, there were no records of file deletion or removals that were discovered. There was no suspicious activity involved. Scrutiny of the original Forms 34A revealed that the forms were exactly the same as those on the public portal and the certified copies presented to the Supreme Court under Section 12 of the Supreme Court Act. There was no evidence of interception; no sign of interference was detected.

22. The allegation that the integrity of the public portal was compromised was disproved by evidence of consistent attributes securing the system such as unique time stamps, uniform PDF conversions at the polling stations, correct polling station mapping and consistent KIEMS reporting from verification to transmission of results. The KIEMS kits were configured to transmit the results into the IEBC server, with all the tablets being used for specific polling stations. It was easy, with that configuration to trace where the Forms 34A were transmitted from. Equally, the network was secured with external and internal perimeter firewalls only authorising transmission of the Forms 34A through the network and no other information. The results of the Forms 34A were also encrypted before transmission over a VPN provided by the three mobile network operators. The RTS was configured on a VPN and the SIM cards locked to a specific polling station. The server was

also configured to accept results only from authorized and properly mapped KIEMS kits. The petitioners failed to produce evidence to the contrary.

23. The KIEMS kits were capable of detecting the legitimacy of the forms as they would take images using the specific markings identifying the Forms 34A and ensuring that only legitimate forms were transmitted. There was integrity of the process by adding a third layer of firewalls that filtered all incoming and outgoing data while restricting any third party or unauthorized access. The allegation that IEBC, its officials and strangers used a tool to tamper with the Forms 34A before converting them to the PDF format that eventually appeared on the public portal was sufficiently explained as an impossibility. The allegation was dismissed. The petitioners had failed to discharge the legal burden of proof so as to shift it to IEBC.

24. There was no credible evidence to support the 1st petitioner's claim that Forms 34A presented to agents differed from those uploaded to the public portal. The Registrar's report confirmed the authenticity of the original forms in the sampled polling stations. There were no significant differences between the Forms 34A uploaded on the public portal and the physical Forms 34A delivered to the National Tallying Center (NTC) that would have affected the overall outcome of the presidential election.

25. The affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's report confirmed evidence to the contrary. All the Forms 34A attached to those affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the public portal. The purported evidence sworn in the affidavits was not only inadmissible, but was also unacceptable. It had been established that none of the agents on whose behalf the forms were being presented swore any affidavit; that there was nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two had gone ahead to depone on matters that were not within their knowledge. The two were advocates of the High Court and were on record as representing the 1st petitioner in the petition.

26. The court could not countenance that type of conduct on the part of counsel who were officers of the court. Affidavits filed in court had to deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel were not permitted to swear affidavits on behalf of their clients in contentious matters, as was the case in the presidential election petition, because they ran the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.

27. Sections 113 and 114 of the Penal Code made swearing falsehoods a criminal offence. It was an offence to present misleading or fabricated evidence in any judicial proceedings. One of the most serious losses an advocate may ever suffer was the loss of trust of judges for a long time. Such conduct amounted to interference with the proper administration of justice. Further, it put counsel in jeopardy of being found in contempt of court.

28. An advocate, consequently, bore the obligation to promote the cause of justice, and the due functioning of the constitutionally established judicial process ensuring that the judicial system functioned efficiently, effectively and in a respectable manner. In that context, advocates bore the ethical duty of telling the truth in court, while desisting from any negative conduct, such as dishonesty or discourtesy. The overriding duty of the advocate before the court was to promote the interests of justice, and of motions established for the delivery and sustenance of the cause of justice.
29. The court dismissed the contents of the affidavit of John Mark Githongo, which could contain forgeries, for not meeting the evidential threshold. It contained no more than hearsay evidence. No admissible evidence was presented to prove the allegation that Forms 34A were fraudulently altered by a group situated in Karen under the direction of persons named in the affidavit and video clip attached to it. His two affidavits amount to double hearsay which was incapable of being proved at each layer.
30. Paragraph 13 of the affidavit of Githongo of August 21, 2022 claimed that the young self-confessed hacker confirmed that his team was also able to manipulate the gubernatorial results in some key counties, as well as those for the presidential election. Governors' results were not transmitted electronically, in the same manner as those of presidential candidates. That statement alone should have been sufficient to cast serious doubts on the credibility of that witness. It was improper for Githongo to accept such evidence and to present it to the Supreme Court as the linchpin for the nullification of the results of the presidential election, and even worse, go ahead to swear that those facts were, to his knowledge, true.
31. Although John Githongo withdrew his earlier averments, that did not prevent the court from examining the same. His affidavit together with those of Celestine Anyango, Arnold Oginga and Benson Wesonga were the anchors upon which the 1st petitioner's case was predicated.
32. The original Forms 34A were authenticated by their unique security features, including UV sensitive security features; micro-text with the words 'Independent Electoral and Boundaries Commission', tapered serialization, anti-copy features and water mark that enhanced the security of the information management environment therefore eliminating and protecting the system against the possibility of interference by any unauthorized third party. The physical and original Forms 34A were the same as those on the online public portal. The Forms 34A were carbonated to ensure that only one form was filled by the presiding officers and acted as a measure to help authenticate the results at the polling stations before transmission.
33. Expert opinion, as a general rule was not binding on the court. It was only an opinion. In reaching its determination, the court was entitled to consider other relevant facts and the evidence as a whole. The forensic reports could not be used as evidence and basis that the Forms 34A were tampered with.

34. The name 'Jose Camargo' was not on the Form 34A or any election material. However the two KIEMS kits had the same serial number as alleged but that they had different IP addresses from the two different polling stations, and therefore, had distinct identifiers. Similarity in serial numbers could only be attributed to a manufacturer's fault. The reasons for the irregularity were plausible. It had not been established that those minor infractions and errors were of a magnitude that would lead to a different result from that declared by IEBC. There was no difference between Forms 34A uploaded on IEBC's public portal, those received at the NTC, and those issued to the candidates' agents at the polling stations.
35. The postponement of the 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 (the postponement) was occasioned by the wrong pictures and details of the candidates on the ballot papers. The postponement did not affect the presidential or other elections which went on as scheduled. The postponement did not go without protestation from some of the candidates and parties.
36. Article 38(3)(b) of the Constitution guaranteed every adult citizen the right, without unreasonable restrictions, to vote by secret ballot in any election. Voting in periodic genuine elections was a well-established right according to international human rights law. The decision to postpone an election and prevent citizens, albeit temporarily, from exercising their regular right to vote was a weighty choice which should be made only in a very limited and exceptional set of circumstances.
37. The circumstances would include major crises such as civil wars, natural or humanitarian disasters, the prevalence of a deadly pandemic and technical delays related to logistical issues. There could also be certain inevitable constraints such as fire incidents, bad weather, insecurity or violence.
38. Election postponement could have far-reaching ramifications in a country's democratic process and economic activities. It disrupted voters plans, schedules and activities, which in turn affected the voter and the candidates financially, emotionally and psychologically. It could lead to electoral apathy as citizens tended to lose interest in voting when they felt that it may be a waste of their time. That would then impact on the turnout among registered voters. There was also economic loss associated with postponement of election, in addition to loss of reputation of a nation in the international community. The citizens, political parties and candidates were the main victims of election postponement. The latter two categories invested heavily in elections by campaigning, deployment of agents in the polling stations and generally spent huge sums of money to monitor the elections.
39. Many voters travelled long distances to ensure that they were present at their polling units to participate in the voting process. Many others closed their businesses in order to make the journeys. The postponement of the election would also have an impact on foreign observers, media outlets, security agencies, employers and employees, as well as students. Although in

the instant case it was IEBC that postponed the election, it would have been bound to incur extra costs to deploy personnel and materials for the election but the printers offered to print fresh ballot papers at no extra expense. In addition, its credibility would be damaged by the postponement.

40. For the claim that the postponement led to voter suppression to succeed, the petitioners had to demonstrate, first, that IEBC had no authority under the Constitution or in law to postpone the elections under any circumstance and secondly, that the postponement was deliberately calculated to suppress voter turnout so as to affect the result by reducing the 1st petitioner's overall votes in order to benefit the 1st respondent.

41. The IEBC under the Constitution had a wide mandate in so far as the conduct and supervision of elections to any elective body or office was concerned. In the discharge of its general functions and exercise of its powers pursuant to articles 88 and 252 of the Constitution, IEBC could perform any functions and exercise any powers prescribed by legislation, in addition to those conferred by the Constitution itself. On the basis of section 55B(1) of the Elections Act that gave the IEBC the power to postpone elections, IEBC had the requisite constitutional and legal authority to postpone elections in the counties, constituencies and wards in question.

42. Voter suppression was generally recognized as a political strategy which took many forms but whose practical effect was ultimately to reduce voting by deliberately discouraging or preventing targeted groups of people from exercising their right to vote. The ultimate aim of that scheme was to influence the outcome of an election in favour of a preferred candidate. Suppression of votes could range from the seemingly harmless requirements, like strict voter identification rules. If, for instance a registered voter could not be identified by the KIEMS kit it could amount to suppression if the election officials were to turn away the voter, instead of resorting to the voters' manual register and if that was on a scale that was likely to lead to systemic disenfranchisement.

43. Though the very purpose of voter registration was to ensure that every adult person who qualified to vote in an election was registered as a voter, voter registration could be used as a tool for suppressing votes of some communities by not availing registration facilities in time or at all to those communities.

44. Under article 88(4) of the Constitution, IEBC was not only responsible for the continuous registration of voters but also for the regular revision of the voters' roll. This latter role was critical in cleaning up the voters roll by removing from the roll voters who had died or become ineligible to vote for other reasons or updating it with newly registered voters or those who had transferred their votes to other stations. Yet that process could be turned into a tool of mass disenfranchisement, purging eligible voters from rolls for illegitimate reasons or by design retaining deceased voters. A single purge could stop many people from voting. Often, voters would only learn they have been erroneously purged when they showed up at the polls on election day and when it was too late to correct the error, considering that

not every voter utilized the window before election to verify their details in the roll. The very essence of voter suppression, to disenfranchise voters, therefore went against the letter and spirit of article 38 of the Constitution which guaranteed every citizen the right to make political choices based on universal suffrage.

45. The Constitution enjoined IEBC in article 86 of the Constitution to ensure that, whatever voting method was used in an election, the system had to be simple, accurate, verifiable, secure, accountable and transparent; that the votes cast were counted, tabulated and the results announced promptly. Voting had to be as easy and accessible as possible and Kenya's nascent democracy would work best when all eligible voters could participate and have their voices heard in the ballot.

46. It was the petitioners' burden to demonstrate that as a result of the postponement of elections a particular number of voters or a specific group of people were unable to cast their ballots. That required presentation of empirical evidence. The petitioners had not only failed to present any such evidence, but have also not shown that the postponement was actuated by malice or bad faith or that it was influenced by irrelevant factors and considerations.

47. However, from the explanation tendered by IEBC, the postponement was occasioned by a genuine mistake, attributed to the printers, who were based abroad, in Athens, Greece. That fact and the discovery having been made only on the eve of the election, placed the situation out of hand. Though the mix-up could have been avoided had the members and staff of IEBC been more diligent when they went to inspect the templates in Athens. In that delegation too, were representatives of political parties and other groups. A mistake of that nature could have been avoided if IEBC exercised due diligence by counter checking and verifying the correctness of every detail in all the templates before approval of the printing. That was a basic standard operating procedure in printing especially of such a magnitude.

48. However, despite that infraction or lack of due diligence on the part of IEBC, there was absence of any empirical data, to persuade the court that the postponement of elections was meant to suppress voter turnout. The data presented by the petitioners which was countered by IEBC with data from neighbouring counties could not form a basis upon which the court could conclude, as a matter of fact or evidence, that the postponement affected voter turnout as a consequence of which the 1st petitioner, alone, as a presidential candidate suffered a disadvantage. At any rate, the nature of the ballot being an individual decision and secret, there may be other variables to which the turnout in the named units could be attributed. The general election recorded one of the lowest turnouts since the reintroduction of multi-party political system, some 30 years ago. If there was a low voter turnout, it affected all the six categories of candidates and its explanation, lay elsewhere but certainly not a calculated suppression.

49. There was no nexus between the postponement of elections and voter turnout in the affected units. Voter turnout in the neighbouring counties was no different from the two counties in question. For instance, the voter turnout for Kakamega, Vihiga and Bungoma Counties was

60.29%, 60.13% and 63.51% respectively. Similarly, the voter turnout in Mombasa County compared to Kilifi County was shown to be 43.76% against 49.03%. The claim of voter suppression was a red herring; it had nothing to do with the question under review, and was rejected. There was no proof that the postponement resulted in voter suppression to the detriment of the 1st petitioner.

50. Ballot stuffing, which included illegal addition of extra ballots, was a type of electoral fraud aimed at swinging the results of an election towards a particular direction. Not a single document had been presented by the 1st or 3rd petitioner to prove systematic ballot stuffing. A figure of 33,208 votes relied on in the claim was based on unproven hypothesis, that since the number of votes cast for President was higher than those for the other positions then, without more, it had to follow that there was fraud committed in the form of ballot stuffing.

51. Under the complementary mechanism, the presiding officers could only use the printed register in case the KIEMS kits completely failed. There was no requirement for recourse to the printed register, whether for purposes of voter identification or for crossing out the name after identification.

52. The mere crossing out of the name from the voters' register did not in itself address the issue of votes cast as the voter turnout was sufficient to determine the number of votes cast for whatever position. From the functionality of the KIEMS kit, it was possible to tell how many people were identified at any given polling station.

53. Fraud being a serious criminal offence its proof required a higher standard, beyond reasonable doubt. Under Section 5(n) of the Election Offences Act, it was an offence for a person to vote more than once in any election. There were categories of voters who only voted for the President and no other candidate in an election. Those were prisoners and Kenyans in the diaspora. There were also an insignificant number of stray votes, whose combined effect did not meet the threshold in section 83 of the Elections Act to demonstrate that there was systematic stuffing of ballots in favour of the 1st respondent so as to justify nullification of the election.

54. A general election in Kenya comprised six different and separate elections held concurrently on the same day with voting being by secret ballot. It was impossible to predetermine the voter turnout or voters' candidate preferences in each election. None of the parties had flagged anything so significant that would have affected the outcome of the presidential election vis á vis the other five elections held on that day.

55. The starting point of constitutional interpretation was the text itself. As long as the text was clear and unambiguous, courts of law had to remain faithful to the natural and literal meaning of the words used in the Constitution. Care should always be taken to avoid textual absurdity. The Constitution was a living document that was always speaking.

56. The broad powers vested in the IEBC and typified in section 11A(a) of IEBC Act ought to be understood as being vested in the collective of the chairperson and members of IEBC. IEBC had to meet, act and make decisions collectively in discharging those mandates. It would

be wrong to interpret the Constitution and statutory scheme regulating the operations of IEBC, as having vested sole authority on the chairperson, to the exclusion of IEBC commissioners. Each of the members of IEBC was a constitutional office holder in their own right. It was not constitutionally sound to expect that the chairperson of the IEBC could override, veto or ignore the other commissioners when discharging mandates vested in the IEBC. In case a responsibility was exclusively vested in the chairperson, article 138(10) of the Constitution expressly and unambiguously provided so.

57. The responsibility of tallying and verifying the results of a presidential election at the NTC, vested in IEBC as a collective entity (article 138(3)(c) of the Constitution); while that of declaring the result, vests exclusively in the chairperson, (article 138(10)). The collective of IEBC had to be viewed in the context of its extant roles during the preparation for, and actual conduct of a general election. IEBC may at one time, be the chairperson and the requisite number of other commissioners. At another time, it may be the foregoing, and staff of IEBC. Yet at other times, IEBC may comprise of the chairperson, the requisite number of other commissioners, staff of IEBC and agents of IEBC, including but not limited to, presiding officers, and returning officers.

58. The chairperson, the members of IEBC and the secretariat (employees) were envisaged to undertake the mandate to tally and verify election results. Pursuant to the terms of section 11A(b) of the IEBC Act, IEBC had a full-fledged secretariat headed by the Chief Executive Officer which was responsible for performing the day-to-day administrative functions of IEBC and implement the policies and strategies formulated by IEBC. That acknowledged the reality that IEBC commissioners on their own could not undertake the huge enterprise of elections administration and management and other mandates vested in IEBC.

59. While the staff of IEBC, undertook the day-to-day administrative functions, they remained under the oversight of IEBC (chairperson and other commissioners). Given that the oversight mandate with respect to the tallying and verification was vested in IEBC, the chairperson could not exclude any member or members of IEBC from the execution of those twin constitutional and statutory mandates as they were vested in IEBC as a collective.

60. Nowhere in the Constitution, was the chairperson of IEBC granted special or extraordinary powers with regards to the tallying or verification of results to be exercised by him or her alone without regard to the rest of IEBC commissioners. Nor did the law give the chairperson of IEBC a veto over the rest of IEBC commissioners. IEBC chairperson's status in relation to the other commissioners was as a first among equals, a *primus inter pares*.

61. The argument that the IEBC had an executive chairperson went against the constitutional scheme that sought to build a strong collegiate institution. Consequently, to the extent that regulation 87(3) of the Elections (General) Regulations, 2012 purported to vest the power of verifying and tallying presidential election results, as received at the NTC, solely on the chairperson to the exclusion of other members of IEBC, the same was contrary to and inconsistent with the provisions of the Constitution.

62. All the four commissioners were involved in activities relating to the processing of results. In particular, they did not controvert the evidence that they announced results from several constituencies upon the conclusion of the tallying and verification of the results. The four commissioners actively participated in the verification and tallying exercise, from the beginning, up-to and until just before the declaration of the result by the chairperson. They took turns announcing the results as verified and tallied and were present and active during the actual verification and tallying at the NTC. An example was Justus Nyang'aya, who on one occasion stood on the podium to announce to the public, an adjustment that had been occasioned by errors of tabulation.

63. Apart from the eleventh-hour denunciation of the verification and tallying process by the four commissioners, and their averments regarding the conduct of the chairperson, the four commissioners did not place before the Supreme 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. There was a serious malaise in the governance of an institution entrusted with one of the monumental tasks of midwifing our democracy.

64. The Supreme Court could not nullify an election on the basis of a last-minute boardroom rupture (the details of which remained scanty and contradictory) between the chairperson of IEBC and some of its members. In the absence of any evidence of violation of the Constitution and electoral laws, the Supreme Court could not upset an election in which the people had 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. The dysfunction at IEBC impugned the state of its corporate governance but did not affect the conduct of the election itself.

65. The results from the twenty contested constituencies were tallied and verified. The only process that was not undertaken was the announcement of the results for those constituencies. It was not disputed that the results from those constituencies were included in the final tally declared by the chairperson.

66. The case made by the petitioners contesting whether the declared President-elect attained 50%+1 of all the votes cast concerned a data-specific threshold enunciated under article 138(4) of the Constitution without the attainment of which, there could be no declaration.

67. Votes cast for the purpose of ascertaining the constitutional threshold under article 138(4) of the Constitution, 50% +1, referred only to valid votes cast, and did not include ballot papers or votes cast but were later rejected for non-compliance with the terms of the governing law and regulations. Rejected votes could not be taken into account when calculating whether a presidential candidate attained 50% +1 of votes cast in accordance with article 138 (4) of the Constitution.

68. In the case of data-specific electoral requirements the party bearing the legal burden of proof had to discharge it beyond any reasonable doubt. The assertion by the petitioners that the percentage of voter turnout was predicated on the uncorrected percentage given by the chairperson of IEBC, was negated by the evidence adduced to prove the correction. The petitioners based their percentage of voter turnout on the total number of registered voters while the chairperson of IEBC made reference, in the press briefing, to the number of registered voters who were identified through the KIEMS kits, progressively.

69. The petitioners did not provide a watertight case to warrant the setting aside of the results of the presidential election on the basis of not having met the threshold provided under article 138(4)(a) of the Constitution.

70. The formula predicated on the number of voters identified through the KIEMS kits progressively and used by IEBC and its chairperson to generate a percentage of 64.76% was correct.

71. The chairperson of IEBC applied the formula in article 138(4) of the Constitution, which was:

Total votes cast (less rejected votes)/2 = 50%+1 vote.

Given the numbers that were presented to us by IEBC and its chairperson, that would translate to:

(14,213,137/2) + 1 = 7,106,569

72. 7,106, 569 was less than 7,176,141 which represented the number of votes received by the IEBC. The declared President-elect attained 50%+1 of all the valid votes cast in accordance with article 138(4) of the Constitution.

73. For the petitioners to succeed and overturn the results declared by the chairperson of IEBC, it was their burden to satisfy the court, first, that there were irregularities and illegalities; and secondly that the proven irregularities and illegalities were of such overwhelming nature that it was likely to affect the actual result, or the integrity of the presidential election.

74. The term illegalities referred to breaches of the substance of specific law and irregularities as the violation of specific regulations and administrative arrangements.

75. The irregularity on the parallel use of Forms 34A had not been proved and failed. There were instances of failure of the KIEMS kits in certain polling stations. In those instances, the regulations required voting time to be extended to compensate the lost time. The petitioners had not attached any material evidence or at all in support of their claims,

which in any case were rebutted by IEBC's explanation that there were mechanisms in place to deal with the failed kits. Where technology failed, IEBC was empowered to employ complementary mechanism. IEBC's assertion that it did so was not controverted. As for time lost, IEBC's returning officers presented uncontroverted evidence to the effect that time lost was recovered and compensated by proportionate time extensions.

76. The claims of interference in the supply and delivery of ballot papers, register of voters, statutory election result declaration forms were merely, general statements not backed by cogent and credible evidence.

77. Though certain agents of *Azimio La Umoja* One Kenya Coalition Party swore affidavits stating specific stations and incidences of harassment, no further evidence such as a report to the police and the exact nature and manner of harassment were disclosed.

78. The petitioners did not show with specificity which election officials out of the 500,000 were not allowed to vote and in what circumstances. Likewise, no specifics of patients in hospitals, older members of society, members of the defence and security forces on duty, who did not vote on account of their situation were supplied. That ground had not met the requisite standard of proof and failed.

79. No mechanism had been put in place to allow for special voting as contemplated under regulation 90 of the Elections (General) Regulations 2012. IEBC did not indicate whether it had published notices on the manner and procedure of the conduct of special voting as required by the Regulations. There was specific and a deserving reason to make provision for special voting by the categories of people named in the regulations who by reason of any special need, including disability, were unable to access a polling station. There was specific and a deserving reason to make provision for special voting by the categories of people named in regulation 90, who by reason of any special need, including disability, were unable to access a polling station. IEBC was expected to actualize the intentions expressed in regulation 90.

80. Once an election offence had been alleged, the evidence in support thereof had to be specific, satisfactory, definitive, cogent and certain. It was only when the election court was satisfied that the burden and standard of proof had been satisfied that it could proceed under the above provision. General allegations did not meet the threshold to warrant the invocation section 87 of the Elections Act. By the same token, there was no evidence of violation or breach of any electoral law or regulations by the chairperson in the management of the August 9, 2022 presidential election.

81. The Supreme Court could only make the following orders when determining the validity of a presidential election petition under article 140 Constitution:

    a. in the event the court determined that the election of the President-elect was invalid, it had to make an order nullifying the election. Consequently, it also had to make an order directing IEBC to hold a fresh election within sixty days after the determination.

b. Should the court determine that the election of the president-elect was valid, it was to issue a declaration to that effect. The court would then as a matter of course, make an order dismissing the petition, with or without costs as the case may be.

c. The court could however make recommendations or observations, or structural interdicts besides giving advisory opinion under article 163(6) of the Constitution.

82. **[*Obiter*]** There was institutional dysfunction undermining the optimal functioning of IEBC. There were legal, policy and institutional reforms that were urgently required to address the glaring shortcomings within IEBC. The court made the following recommendations on the IEBC:

a. On corporate governance issues

   i. Parliament should consider enhancing the statutory and regulatory framework on the separate policy and administrative remit of IEBC.

   ii. IEBC ought to effect formal internal guidelines that clearly delineate the policy, strategy and oversight responsibility of the chairperson and IEBC Commissioners; and develop institutionalized guidelines on how to manage the separation of administrative and policy domains.

   iii. The roles of the chairperson, commissioners, and the chief executive officer, other staff and third parties should be clearly set out in both the legislative and administrative edicts as stipulated above.

b. On election technology.

   i. To avoid suspicion from stakeholders, unless where and when it was absolutely necessary, access to the servers supporting the transmission and storage of Forms 34A, 34B and 34C should be restricted to IEBC staff during the election period.

   ii. IEBC should ensure that the servers supporting the elections and those serving their internal administrative work were distinct and separate. That would then allow the court, should the need arise, to carry out forensic imaging of the same without compromising and/or infringing any third-party agreements.

c. On statutory forms.

   i. IEBC may consider simplifying and restructuring the Form 34A and include a column that accounts for stray ballots. In addition, it may consider having only one section for total valid votes. The independent body may also find it prudent to thoroughly train its returning officers as to what constituted valid votes per the Supreme Court's decision.

   ii. IEBC ought to put in place specific mechanisms to allow for special voting as contemplated under regulation 90 of the Elections (General) Regulations 2012.

d. On Constitutional reforms, the court noted the need to extend the constitutional timeline, within which to hear and determine a presidential election petition. The court underscored the need to extend the fourteen-day limit, for purposes of efficient case management by the court, and also, to afford the parties sufficient time to ventilate their cases.

e. On conduct of the proceedings before the Supreme Court, the court was constrained to advert to some of the guidelines of conduct that the court set out at the commencement of the hearing. Ground rule 3 required parties to conduct themselves with decorum to preserve the dignity of the court and the proceedings while bearing in mind the provisions of section 28 of the Supreme Court Act. In that regard, discussing the merits of the case by the parties outside the court was not permitted. Unfortunately, the court's caution went unheeded. Some counsel and parties had used inappropriate and insulting language against the court even before the issuance of the detailed judgment. It ought to be appreciated by all, that given the adversarial nature of Kenya's legal system, a determination of any matter by a court of law could never be in favour of both sides of the contending parties. While a party or its counsel could understandably be aggrieved by a decision of the court, it did not help or take away such grief by resorting to insults or vitriolic attacks on courts.

f. While freedom of speech was one of the fundamental principles upon which every democratic society was built, the exercise of those freedoms carried with it duties and responsibilities. Within the same norms which proclaimed those freedoms, were also restrictions on the extent of their enjoyment. The court shall remain faithful to the oath of office and shall defend the Constitution with a view to upholding the dignity and the respect for the Judiciary and the judicial system of Kenya. The court shall dispense justice without any fear. The Supreme Court did so to protect the institution not only for the present but also for the future: judges served their term and leave but the institution of the judiciary was there to serve today and for posterity.

Petition dismissed.

Orders

i. *The Presidential Election Petition No. E005 of 2022, as consolidated with Presidential Election Petition Nos. E001, E002, E003, E004, E007 and E008 of 2022 was dismissed.*

ii. *The election of the 1st respondent as President-elect was valid under article 140(3) of the Constitution.*

iii. *Regulation 87(3) of the Elections (General) Regulations, 2012 was declared unconstitutional to the extent that it purported to vest the power of verifying and tallying presidential election results, as received at the National Tallying Centre, solely on the chairperson to the exclusion of other members of the IEBC.*

iv. *Each party was to bear their costs.*

v. *Sums deposited as security for costs were to be released to the petitioners.*

Citations

Cases

Kenya

1. *Attorney-General & 2 others v Ndii & 79 others; Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021; [2022] KESC 8 (KLR) (Consolidated)) — Mentioned
2. *Independent Electoral & Boundaries Commission v Kiai & 4 others* (Civil Appeal 105 of 2017; [2017] KECA 477 (KLR); [2017] 2 KLR 1136) — Explained
3. *Kisya Investment Limited & others v Kenya Finance Corporation Ltd* (Civil Case No 3504 of 1993) — Explained
4. *Munya v Kithinji & 2 others* ((Petition 2B of 2014) [2014] KESC 38 (KLR)) — Explained
5. *Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties)* ((Election Petition 2 & 4 of 2017) [2017] KESC 54 (KLR)) — Mentioned
6. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 5 (KLR)) — Mentioned
7. *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)) — Explained
8. *Republic v Ahmad Abolfathi Mohammed & another* (Petition 39 of 2018; [2019] KESC 48 (KLR)) — Explained
9. *United Democratic Alliance Party v Kenya Human Rights Commission & 8 others* (Civil Application E288 of 2022; [2022] KECA 813 (KLR)) — Explained

Texts

1. Human Rights Watch (2019), *DR Congo: Voter Suppression, Violence* Human Rights Watch
2. Independent Review Commission on the General Elections (IREC) (2008), *Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December , 2007 (The Kriegler Report)* Independent Review Commission on the General Elections (IREC)

Statutes

Kenya

1. Advocates Act (cap 16) sections 15(4); 55; 60(1) - (Interpreted)
2. Anti–Corruption and Economic Crimes Act, 2003 (Act No 3 of 2003) section 46 - (Interpreted)
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 19; rule 3 - (Interpreted)
4. Constitution of Kenya articles 38, 73, 81, 86, 88(4)(g); 101; 136(2); 138; 140(1); 163; 177(1); 180(1); 248; 252; 259; 250(1) - (Interpreted)

5. Data Protection Act, 2019 (Act No 24 of 2019) In general - (Cited)
6. Election (Technology) Regulations, 2017 (Act No 24 of 2011 Sub Leg) regulations 4(1); 11; 12; 17- (Interpreted)
7. Election Offences Act, 2016 (Act No 37 of 2016) sections 5(g)(n); 6; 13; 17 - (Interpreted)
8. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 19, 61(4); 69(1)(d); 70; 75(6); 77(1); 87(3); 90- (Interpreted)
9. Elections Act, 2011 (Act No 24 of 2011) sections 6A, 8A(1)(6); 38; 39; 40; 44; 55B(1)(b); 84; 87- (Interpreted)
10. Evidence Act (cap 80) sections 2, 107, 109, 110 - (Interpreted)
11. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) sections 4, 5, 6, 11A(a) - (Interpreted)
12. Penal Code (cap 63) sections 113, 114 - (Interpreted)
13. Public Officer Ethics Act, 2003 (Act No 4 of 2003) sections 9, 10, 12, 16 - (Interpreted)
14. Public Procurement and Asset Disposal Act, 2015 (Act No 3 of 2015) In general - (Cited)
15. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 23(1) - (Interpreted)
16. Supreme Court Act, 2011 (cap 9B) sections 12, 28 - (Interpreted)

International Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966
2. Universal Declaration of Human Rights (UDHR), 1948

September 26, 2022, the Court delivered the following Judgment:

A Intoduction

1. Every five years, millions of Kenyans cast a ballot for a presidential candidate and five other elective positions. From our history, it is almost inevitable in the course of electoral competition that disputes will arise at all these levels. This calls for effective electoral dispute resolution mechanisms because, again from our past, such disputes may lead to either overt or covert social conflict. Therefore, Kenya'squest for enhancement of democratic governance through electoral reforms has been long and is well documented. The paramount goal of these reform initiatives has been to secure the peoples' right of franchise and the integrity of the electoral process. It is in this context that the *Constitution* sets out values, principles, and rules which embody standards aimed at ensuring that elections reflect the will of the people. Towards this end, the *Constitution* explicitly protects political rights, including the right to vote; stipulates principles of the electoral system; establishes the Independent Electoral and Boundaries Commission (IEBC) as the body vested with the

mandate of conducting and supervising elections; and vests courts, including the Supreme Court, with the duty of resolving post-election disputes.

2. The above constitutional framework is reinforced by an array of legislation whose overall objective is to guarantee fairness, credibility and legitimacy of the electoral process. The standards and norms stipulated in the *Constitution* and electoral laws are deliberately detailed. They prescribe the system of registration by eligible citizens as voters; how they cast the votes and how the votes are counted. Beyond voting and counting of votes, the laws regulate the mode of transmission of results to the tallying centres, verification, tallying and declaration of the final results.

3. Despite efforts to reform the electoral process as aforesaid, some of the reactions from segments of the electorate that followed the declaration of the presidential election result on August 15, 2022, remains as a clear indication that IEBC is yet to gain universal public confidence and trust, with regard to its internal management of the Commission and of elections. At the heart of this consolidated Presidential Election Petition (Consolidated Petition), are contestations around one question; whether IEBC complied with the constitutional and legal standards in the conduct of the presidential election held on August 9, 2022. However, sight must not be lost of the fact that election related disputes are an intrinsic part of the electoral process. The credibility, integrity and legitimacy of that process is ultimately determined by the courts. In respect of a presidential election, this duty is reposed by the *Constitution* in the Supreme Court.

4. To contextualize the controversy in this petition, the following brief factual basis is essential.

B. Background

5. There cannot be any doubt that this [2022] presidential election was a close race between the two top contenders, premised on the following declaration of August 15, 2022 by Wafula Chebukati, the Chairperson of IEBC:

Candidate	Votes	Percentage
Raila Odinga	6,942,930	48.85
William Ruto	7,176,141	50.49
David Waihiga	31,987	0.23
George Wajackoyah	61,969	0.44

From these results, the Chairperson of IEBC, being satisfied that the terms of article 138(4) of the *Constitution* had been met, declared William Samoei Ruto, (the 1st respondent) as the President-elect and Rigathi Gachagua, (the 2nd respondent) as the Deputy President-elect. Subsequently, the Chairperson issued Gazette Notice No 9773 of August 16, 2022 to formalize the declaration.

6. It is the foregoing declaration that precipitated a total of nine presidential election petitions to this court namely:

   i. Presidential Election Petition No E001 of 2022 - *John Njoroge Kamau v Wafula Chebukati & 3 others*.

   ii. Presidential Election Petition No E002 of 2022 - *Youth Advocacy Africa & another v IEBC & 12 others*.

   iii. Presidential Election Petition No E003 of 2022 - *Khelef Khalifa & 3 Others v IEBC & 3 others*.

   iv. Presidential Election Petition No E004 of 2022 - *David Kariuki Ngari v IEBC & 9 others*.

   v. Presidential Election Petition No E005 of 2022 - *Raila Amolo Odinga & another v IEBC & 8 others*.

   vi. Presidential Election Petition No E006 of 2022 - *Moses Kuria & others v Hon Raila Amolo Odinga & 4 others*.

   vii. Presidential Election Petition No E007 of 2022 - *Okiya Omtatah Okoiti & others v IEBC & 8 others*.

   viii. Presidential Election Petition No E008 of 2022 - *Juliah Nyokabi Chege & 2 others v IEBC & 3 others*.

   ix. Presidential Election Petition No E009 of 2022 - *Reuben Kigame Lichete v The Independent Electoral & Boundaries Commission (IEBC) & another*.

Interlocutory Applications

7. While the petitions were pending the court's directions, some of the parties filed a total of twenty-three (23) interlocutory applications seeking a raft of orders, including notices of preliminary objection to strike out some of the petitions. Upon the court's consideration of these applications and objections, it struck out Presidential Election Petition Nos E006 and E009 of 2022 for failure to meet the constitutional requisites under article 140(1) of the *Constitution*. The court, in response to applications for joinder as *amici*, admitted the Law

Society of Kenya (LSK), the Kenyan section of the International Commission of Jurists (ICJ-Kenya Chapter), John Walubengo, Dr Joseph Sevilla and Martin Mirero as amici curiae. On its own motion, the court consolidated the remaining seven (7) petitions and designated Presidential Election Petition No E005 of 2022 (With Raila Odinga and Martha Karua as the 1st petitioner) as the lead file.

8. Further, pursuant to applications made by the 1st, 3rd and 4th petitioners, the court on August 30, 2022, partially granted the applications and ordered an ICT scrutiny, inspection and recount of ballots in specified polling stations under the supervision of the Registrar of the Court. At the end of that said exercise, the Registrar prepared and submitted to the court, the ICT Scrutiny and Inspection, Tallying and Recount Report dated September 1, 2022 (the Registrar's Report), to which further reference will be made later. Having considered the pleadings and written submissions by all the parties involved, 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?

9. In view of the strict timelines within which the court must hear and determine the petition, the consolidated petition proceeded for hearing by way of written submissions and oral arguments between August 31, 2022 and September 2, 2022. On September 5, 2022 pursuant to rule 23(1) of the *Supreme Court (Presidential Election Petition) Rules, 2017*, , the court delivered its judgment and by unanimity of its members, dismissed the consolidated petitions. It reserved the detailed reasons for that decision for September 26, 2022, being twenty-one days from the date of the judgment. Consequently, the subsequent details are the reasons for each of the framed issues.

C. Determination of Issues

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

10. As noted earlier in the introduction, lack of trust in the electoral system has endured in this country for a long time. This led to the introduction of election technology following recommendations made by the *Independent Review Commission on the General Election held on the December 27, 2007* (the *Kriegler Commission Report*), whose history needs no repeating in this judgment. The *Report* recommended *inter alia* integration of technology into Kenya's electoral processes for registration, identification of voters and transmission of results. These were later enacted into law as section 44 of the *Elections Act*, No 24 of 2011. By this provision, IEBC is enjoined to adopt an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. However, electronic transmission is limited to a presidential election. The section also requires IEBC to develop a policy on the progressive use of technology in the electoral process, and to ensure that the technology employed is simple, accurate, verifiable, secure, accountable and transparent. Finally, IEBC is required to transparently procure and put in place the technology necessary for the conduct of a general election, at least one hundred and twenty days before such elections; and to test, verify and deploy it at least sixty days before a general election. As a consequence, IEBC developed a technology known as Kenya Integrated Electoral Management System (KIEMS) making Kenya's election process a hybrid one, embracing both technology and manual processes.

11. The 1st, 3rd, 4th and 7th petitioners challenged the technology used by IEBC during the 2022 General Election. They contend that the manner in which technology was deployed and utilized, fell short of the prescribed standards under article 86 of the *Constitution* and section

44 of the *Elections Act*, because in their judgment it was not simple, accurate, verifiable, secure, accountable and transparent.

12. As regards the audit of the Register of Voters, they urged that IEBC, pursuant to section 8A (1) and (6) of the *Elections Act* and its Elections Operations Plan, committed to conduct an audit of the Register of Voters by March 31, 2022, only for it to avail the Audit Report on its website on August 2, 2022, 7 days to the election, which date, the petitioners contended, was too late to enable any meaningful engagement by stakeholders.

13. The petitioners equally stated that the auditors identified serious gaps and risks to the electoral process including; numerous cases of change of voting stations without knowledge or approval of the affected voters; grant of voter update privileges in IEBC's Integrated Database Management System (IDMS) to 14 user accounts unrelated to voter registration; reduction of the accountability of user activities in the Register of Voters; presence of eleven (11) active generic accounts on the Automated Biometric Identification System (ABIS) and two ABIS users with the same log in identification; risk of unauthorized system users; and change of particulars or deactivation of voters in the system. The risk was further allegedly compounded due to IEBC's failure to set up access re-certification and user activity review process; and to respond to requests by auditors for crucial information, some of which were only shared on the eve of the audit reporting.

14. On the simplicity of technology deployed during the 2022 General Election, the 7th petitioner specifically contended that the KIEMS kits failed the test of simplicity as they were not user friendly to the ordinary citizens without expert knowledge; that the failure of KIEMS kits in some polling stations, coupled with the fact that members of the public were not able to examine the transmission of the results from the system, affected the transparency of the process; and that most of the technologies deployed in election management were foreign owned and susceptible to manipulation by third parties without the knowledge of voters.

15. The petitioners further asserted that IEBC was expected to procure and put in place the necessary technology for the conduct of the General Election at least one hundred and twenty (120) days before the election; and ensure consultation with the relevant agencies, institutions and stakeholders. They claimed that IEBC violated this constitutional duty by delegating the design, implementation and use of the KIEMS component of the election to a foreign company, Smartmatic International Holding BV (Smartmatic), to an extent that IEBC's staff and the public did not have visibility of the KIEMS component, thereby abdicating its role of conducting the elections to Smartmatic. The petitioners also held the view that IEBC vigorously rejected any attempt to subject Smartmatic's activities to accountability and transparency in terms of the safeguards provided for under regulations 61(4)(a), 69(1)(d), 69(1)(e)(iii) and 75(6) of the *Elections (General) Regulations, 2012*.

According to the petitioners therefore, it was Smartmatic's opaque activities, that made it difficult to ascertain voter turnout and verify accuracy of transmission of the images of Forms 34A.

16. It was also contended that IEBC failed to engage a professional reputable firm to conduct annual systems audit of the election technology to evaluate the confidentiality, integrity and availability of the said technology pursuant to regulations 11 and 12 of the *Elections (Technology) Regulations, 2017*.

17. In response to these claims, IEBC and its Chairperson maintained that they adopted a hybrid system where the first phase relied on technology for purposes of biometric registration and voter identification during voting to avoid double voting and electronic transmission of results, while the second phase consisted of manual counting, recording, tallying, transmitting (partly) and verification of the votes cast. It was also contended that the continuous reinforcement of the electoral process and system had ensured a considerable degree of certainty and outcome of IEBC's activities.

18. IEBC submitted that all necessary information in its electoral system was accessed only by authorized persons; and that the information was accurate, complete and protected from malicious modification either by authorized or unauthorized persons. It also maintained an audit trail on activities related to technological information; and the said information was available and could be authenticated through the use of various security features.

19. It was IEBC's further contention that it engaged KPMG–a reputable audit firm–on April 7, 2022 to conduct an audit of the Register of Voters, which exercise was completed when the latter submitted its Report on June 18, 2022. Thereafter, IEBC issued a briefing on the Report on June 20, 2022 summarizing the thematic areas therein and disclosing its findings as well as actions taken to remedy the issues identified. It was asserted that IEBC could not publicly publish the full final Audit Report as doing so would compromise the integrity and security of the election technology system and violate the provisions of the *Data Protection Act, 2019*, which imposes a duty to protect the data of Kenyan registered voters.

20. IEBC furthermore urged that it complied with regulations 11 and 12 of the *Election (Technology) Regulations, 2017* by engaging the firm of Serianu Limited in July 2022 to conduct the annual audit of its election technology system. The scope of the audit entailed Biometric Voter Registration Systems Tests, Biometric Voter Identification Tests, Result Transmission System Tests, Web Portal for publishing the Election results online (IEBC Website) Test and Candidate Registration System Test. Proof of the audit was in the form of a Certificate of Compliance which was annexed to the affidavits of the Chairperson of IEBC and that of Michael Ouma, IEBC's Director in charge of Information and Communications Technology (ICT).

21. It was also submitted that complementary mechanisms were adopted in relation to voter identification and result transmission. IEBC further stated that it had issued guidelines on the details of what should happen, in the event of failure to transmit results from a polling station. It also submitted that voters were identified using printed registers in 229 polling stations, and only 6 polling stations experienced voting challenges due to violence. In effect, a total of 86,889 voters were identified manually in the subject polling stations that had a total of 114,916 registered voters.

22. IEBC explained that prior to the deployment of the KIEMS kits, it undertook a series of tests on the KIEMS system including public testing on June 9, 2022 being 60 days before the election and a similar simulation was carried out on July 15, 2022. IEBC was thereafter satisfied that the KIEMS kits deployed were efficient since they were successfully used to verify biometric data of millions of voters from May 4, 2022 to June 2, 2022 as required by section 6A of the *Elections Act*, and on polling day. The system thus effectively transmitted the Presidential results from the polling stations to the online Public Portal on the polling day.

23. Regarding capacity building, IEBC maintained that it developed a robust training manual and schedule aimed at capacity building of IEBC staff and candidates' agents on all the polling processes. Pertaining to the security of the KIEMS system, it was deponed that some of the security parameters included: configuration of pre-determined tablets to enable round the clock automated monitoring; the entire network spectrum was secured with twin high level perimeter firewalls; robust database management solution with all recommended security options including pre-encryption of results before transmission and having transmission over a secure Virtual Private Network (VPN); and deployment of a fourth-tier security measure, granular role-based access control and user management for the entire results transmission system, among others. All these measures were introduced to ensure integrity in the process. There was thus no evidence to demonstrate any compromise, intrusion or unauthorized access of the system by any person; and as such, IEBC argued, that the allegations as framed in the consolidated Petition were ambiguous, unsubstantiated and baseless. Besides, IEBC urged, KIEMS could not allow more voters than those provided for in the specific polling station and could therefore, not transmit more votes cast than the number of registered voters.

24. On their part and in answer to the allegations by the petitioners, the 1st and 2nd respondents urged that even if there was failure of technology, the same did not vitiate the result of the presidential election. Moreover, they contended that IEBC had established complementary mechanisms to facilitate the identification of voters in the event of the failure of some KIEMS Kits as guided by the Court of Appeal in *United Democratic Alliance Party v Kenya Human Rights Commission & 8 others* Civil Application No E288 of 2022 (United

Democratic Alliance Party case). The 1st respondent specifically, deponed that the low voter turnout in Kakamega and Makueni Counties attributed to failure of the KIEMS kits by the petitioners, was self-serving, speculative and hypothetical. This was because other neighbouring Counties to Kakamega and Makueni where there was no failure of KIEMS kits had comparable voter turnouts. Further, the respondents argued that in general, the voter turnout in 2022 was lower than that of 2017 General Election. In conclusion, IEBC and the 1st and 2nd respondents prayed that in view of the foregoing, the court ought to find that the electoral system, deployed during the 2022 Presidential Election met both constitutional and legislative thresholds.

i. Analysis of Evidence

25. Needless to state, IEBC is the body constitutionally mandated to conduct elections in Kenya. Elections are considered free and fair when they are held in consonance with the general principles for the electoral system as articulated in article 81(e) of the *Constitution* as read with section 25 of the *Independent Electoral and Boundaries Commission Act*, No 9 of 2011 (IEBC Act) that is, if they are, conducted by secret ballot, free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

26. At every election, IEBC is thus required by article 86 of *the Constitution* to ensure that:

> "...
>
> (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
>
> (b) the votes cast are counted, tabulated and the result announced promptly by the Presiding Officer at each polling station;
>
> (c) the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer; and
>
> (d) appropriate structures and mechanisms to eliminate electoral malpractices are put in place including the safekeeping of electoral materials."

27. The question, whether or not the 2022 Presidential Election passed constitutional and legal muster, can only be answered upon consideration and with reference to the threshold of the burden and standard of proof borne by the petitioners. It is ultimately therefore, a question of evidence tendered by the petitioners.

28. The law of evidence complements the existing civil and criminal substantive and procedural laws in this country. The outcome of a case depends on the strength, accuracy and reliability of evidence. In an adversarial court system like ours, the courts and judges are 'blind', in the sense that they do not carry out any investigative roles or gather evidence on behalf of the parties before them. They depend on and determine disputes from what parties present. Consequently, cases are won or lost on the evidence placed before the court.

section 2 of the *Evidence Act*, declares that the statute:

> "(1) ... shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator." [Emphasis added].

Specific on the burden of proof, section 107 of the *Evidence Act* states as follows:

> "(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

29. On proof of peculiar and particular facts, section 109 of the *Evidence Act* requires that:

> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

30. And finally, section 110 provides that:

> "The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

31. This court first pronounced itself on these twin issues of burden and standard of proof in a Presidential Petition in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, SC Petition Nos 5, 3 & 4 of 2013 (consolidated); [2013] eKLR (Raila 2013); and reiterated them in its decisions in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 1 of 2017; [2017] eKLR (Raila 2017) and *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others*, SC Petition Nos 2 & 4 of 2017 (consolidated); [2017] eKLR (Harun Mwau case).

32. Suffice to stress that the court has been consistent that a petitioner who seeks the nullification of elections for alleged non-conformity with the *Constitution* or the law or on the basis of irregularities and illegalities, has the duty to proffer cogent and credible evidence to prove those grounds to the satisfaction of the court. Once the court is convinced that the petitioner has discharged that burden, then the evidentiary burden shifts to the respondent (who in most election-related cases is IEBC), to present evidence by way of rebuttal of the assertion.

33. In this context, we reiterate the words of this court as stated in *Raila 2013* as follows:

> " [196] Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.
>
> [197] While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting."

34. As to the standard of proof, the court's position rests with its decisions in *Raila 2013*, *Raila 2017* and the *Harun Mwau* in which it adopted the intermediate standard striking a middle ground between the threshold of proof on a balance of probability in civil cases and beyond reasonable doubt in criminal trials, 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. We are alive to the fact that different standards have been adopted in other jurisdictions across the globe, as demonstrated in the amici briefs in this Petition on behalf of LSK and ICJ-Kenya Chapter but we find no justification and we are not prepared at this point in time to depart from the test now firmly laid and applied in this jurisdiction. We can,

in that regard, only reiterate, by way of emphasis, the observation made at paragraph 153 by the court in *Raila 2017* that–

> " We recognize that some have criticized this standard of proof as unreasonable. However, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as *sui generis*. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not."

There are therefore only two categories of proof in relation to election-related Petitions in this country: the application of the criminal standard of proof of beyond reasonable doubt, as explained and the intermediate standard of proof.

35. With the foregoing clarification, we now turn to the issue under review; whether the Technology deployed by IEBC met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results. There are also two related audit exercises that the petitioners have challenged; the systems audit under regulations 11 and 12 of the *Elections (Technology) Regulations, 2017* and the audit of the Register of Voters under section 8A of the *Elections Act*. Bearing in mind always what we have said in the preceding paragraphs about the burden and standard of proof, the starting point is what the law sets as the yardstick of use of technology in electoral processes, and that is section 44 of the *Elections Act*. It provides as follows:

> " 44. Use of technology
>
> 1. Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.
>
> 2. The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.
>
> 3. The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.
>
> 4. The Commission shall, in an open and transparent manner—
>
> a. procure and put in place the technology necessary for the conduct of a General

Election at least one hundred and twenty days before such elections; and

b. test, verify and deploy such technology at least sixty days before a General Election.

c. The Commission shall, in consultation with the relevant agencies, institutions and stakeholders, make regulations for the better carrying into effect the provisions of this section."

36. For the reason that one of the complaints against IEBC is that it failed to engage a professional reputable firm to conduct an audit of the Register of Voters, it is apposite to also set out section 8A of the *Elections Act* which provides for audit of the Register of Voters as follows:

> " 8A. Audit of the Register of Voters
>
> (1) The Commission may, at least six months before a General Election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—
>
> a. verifying the accuracy of the Register;
>
> b. recommending mechanisms of enhancing the accuracy of the Register; and
>
> c. updating the register.
>
> ...
>
> (6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate."

37. There are divergent positions presented by both sides to the present dispute on the issue at hand. On the one hand, the petitioners have argued that the requirements of section 8A of the *Elections Act* were not met, while on the other, IEBC maintained that, on April 7, 2022, it did engage the firm of KPMG to carry out an audit of the Register of Voters. This exercise was completed and a Report submitted to IEBC on June 16, 2022.

38. IEBC, however conceded that KPMG in its Report, 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, 2022, it embarked on remedial measures aimed at implementing the recommendations ahead of publication of the final Report. Some of the remedial measures it undertook included committing to reviewing in the medium term, its 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. In addition, IEBC committed to conducting periodic comparison of the Register of Voters with data held by relevant Government agencies.

39. IEBC further confirmed that, by 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. Moreover, it suspended five (5) of its employees for their involvement in this infraction and referred the matter to the Office of the Director of Public Prosecutions 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 pursuant to section 8A of the *Elections Act*, and availed copies to political parties and any interested party.

40. The petitioner's submissions as supported by the sworn affidavits, regarding the integrity of the Register of Voters, were enough in our view, to shift the evidentiary burden of rebuttal to IEBC. IEBC undertook this burden, by giving a detailed explanation of the remedial measures it had instituted, to address the shortcomings as highlighted in paragraphs 38 and 39 above. Consequently, in the absence of evidence to the contrary, we find merit in IEBC's explanation. We further take note that, while the Audit Report was released to the public seven days before the 9th August election, the Register of Voters was used at the election as a medium for identification of voters without any apparent anomalies. Likewise, IEBC successfully deployed a Biometric Voter Register (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.

41. Furthermore and in compliance with section 6A of the *Elections Act*, IEBC opened the Register of Voters for verification of biometric data by members of the public for a period of 30 days from May 4, 2022 to June 2, 2022. Thereafter, the Register was revised to address issues arising from the verification exercise. KPMG then audited the Register and we are satisfied that the inconsistencies and inaccuracies identified during the Audit were successfully addressed.

42. In the context of simplicity of the technology deployed, we note that the electoral system is designed to handle voter registration of over 22 million voters with unique biometric details. Further, in all the 46,231 polling stations KIEMS kits are mapped to the specific geographical area of the polling stations and to specific presiding officers. It is also designed to be as secure as possible to prevent infiltration. The Public Portal, on the other hand, is designed to handle numerous visits to the website to access the transmitted Forms 34A without causing it to crash. Such a system by design cannot be expected to be a simple one in the ordinary sense. Its features are not configured for ordinary everyday use by everyone without suitable training. In any event, there has been no specific complaint by any voter, agent or member of the public over their inability to use or frustrations in the use of this technology.

43. It is, clearly for this reason that IEBC, rolled out an elaborate training program aimed at building capacity and competence of its staff members and candidates' agents on the KIEMS system. It also conducted voter education and sensitization activities across the country targeting stakeholders including political parties, civil society and Government agencies through print and electronic media, in fulfillment of the provisions of article 88(4)(g) of the *Constitution* as read with section 40 of the *Elections Act*. That was the evidence of its Chairperson, which was never rebutted.

44. Guided by section 44 (2) of the *Elections Act* which requires IEBC to

> "... develop a policy on the progressive use of technology in the electoral process",

we note that the KIEMS system was initially created as four different systems operated separately during the 2013 General Election, but since 2017 the said system has been fully integrated. Generally therefore, there is consensus that there has been a gradual but sustained advancement in election technology from pre-2007 and 2013 elections.

45. Technology, like all human inventions, no matter how advanced, is bound to fail at one point or another, leading to a bad user experience. Hardware breaks, software gets bugs, and connectivity disappears, among many challenges in automation. It is perhaps this realization that led the court in *Raila 2013*, *Raila 2017* and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Petition No 2B of 2014; [2014] eKLR (Gatirau Munya case) to state that it is a global truism that no conduct of any election can be perfect. Similar reflections may have informed the insertion of section 44A to the *Elections Act* directing IEBC to avail, alongside the use of technology required by section 44, a complementary mechanism in the event of technical failure. section 44A provides as follows:

> " Notwithstanding the provisions of section 44, the Commission shall put in place a complementary mechanism for identification of voters that is simple, accurate,

> verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of article 38 of the *Constitution*."

We restate our position that the practical realities of election administration are such that imperfections in the process are inevitable. Some imperfections may have far-reaching ramifications, which in turn may lead to nullification of an election while others may not reach that level or degree of significance. The nullification of the presidential election of 2017 was partly based on this reality.

46. The petitioners claimed and IEBC admitted that KIEMS kits failed in certain polling stations. But the latter, guided by the law and the decision of the Court of Appeal in *United Democratic Alliance Party* case, explained that the complementary mechanisms that it had put in place took two forms; where a voter could not be identified using their biometric data, the presiding officers were to use the alphanumeric search in the presence of agents and once found, the voter was to fill Form 32A. The second complementary system took the form of a printout of the Register of Voters which was used where the KIEMS kits failed completely with no possibility of repair or replacement. Once the details of the voter were confirmed manually, the presiding officer would then allow the voter to cast his/her vote.

47. Whereas, it is not in dispute that the KIEMS kits failed in 235 polling stations in Kibwezi West Constituency and parts of Kakamega County, 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled. As such, the failure of the KIEMS kits in the identified polling stations cannot be taken as a yardstick of the performance of KIEMS kits in the whole country. In any case, all affected voters who could have complained were not disenfranchised as they were able to exercise their democratic right to vote manually.

48. In addition to the above, by dint of section 44(4) aforesaid, IEBC must in an open and transparent manner, procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections. The two limbs to this provision are the open and transparent procurement of the technology and the timelines within which to put it in place. According to Michael Ouma, in his affidavit evidence, on April 14, 2021, IEBC advertised an open international tender for the supply, delivery, installation, testing, commissioning, support and maintenance of the KIEMS, hardware equipment and accessories. At the close of the tender period, it received bids from five firms and upon evaluation, Smartmatic was successful and was awarded the tender thereto. A contract between IEBC and the firm was concluded on November 25, 2021. This award of contract was contested before the Public Procurement Administrative Review Board, the High Court and eventually the Court of Appeal with the ultimate result that the award was upheld. It is not open for any party or even this court to revisit that tender in the circumstances.

49. We have also considered the affidavit by the Chairperson of IEBC wherein he categorically averred that IEBC did not have and was not expected to have the capacity to set up and design the technology of that magnitude by itself; that it relied on suitably qualified bidders to design and provide the technology that would deliver the support required. He however clarified that IEBC remained in charge of all decisions as to the deployment and use of the technology supplied by Smartmatic; that it had full visibility of the technology developed and supplied including the KIEMS kits; and that the provisions of section 44 (4) (a) and (b) of the *Elections Act*, as well as those of regulation 4 (1) of the *Elections (Technology) Regulations, 2017* were fully complied with. The latter provides that:

> "4.
>
> Procurement
>
> (1) Based on the requirements analysis conducted under regulation 3 (1) and the solution design and feasibility report conducted under regulation 3(2), the Commission shall develop specifications for the procurement of new or updated election technology, in accordance with the *Public Procurement and Asset Disposal Act, 2015* (No 33 of 2015) and its regulations."

50. Even as we prefer homegrown solutions and that we develop our own systems, the law recognizes and we reiterate our finding above, that IEBC may not have the capacity to develop such a system and therefore directs that it procures such a system. This is in recognition of the fact that although computer hardware, software, and other related services are essential for election operations, it is doubtful that an elections body would have the capacity to avail for itself most of these complex services that underpin elections—from voter registration and election management systems to results transmission devices. In many known instances these are procured from private vendors. Once procured, installed and operationalized, the systems can be managed by staff of the election body.

51. Considering the affidavit evidence of IEBC in this respect, we find, contrary to the assertion by the petitioners, that IEBC did not abdicate its role in the procurement of the technology used in the last General Election or in the conduct of the Presidential Election. It complied with section 44 of the *Elections Act* and with the procurement procedures under regulation 4 (1) of the *Elections (Technology) Regulations, 2017*. We are further satisfied, from what we have said earlier, that the procurement of the system was within the law, as confirmed by the concurrent decisions of the Public Procurement Administrative Review Board, the High Court and the Court of Appeal.

52. Did IEBC at the time of the elections of August 9, 2022 have visibility and control at all times of its election technology? The answer is found in the Registrar's Report to the effect that IEBC granted the team, comprising agents of all the petitioners, supervised access to the server for interrogation for the entire duration of the exercise; that IEBC in compliance with the orders of the court provided its password policy, password matrix, system users and levels of access, workflow chats of the system, architecture, diagram, tallying, transmission and posing of the portals as well as the system architecture. It only declined to provide the owners of system administration's passwords as they considered doing so would expose the names and identities of the system administrator posing a threat to their security. That position is understandable and we have no doubt that the petitioners, through their agents, were not handicapped in any way during the scrutiny exercise and they had access to all material relevant to the scrutiny and the petitions before us. Any other access would not have been of use to us or themselves.

53. To our minds therefore, and in the absence of evidence to the contrary, it is safe to conclude on this aspect of the dispute that IEBC had visibility of the system and that its technical members of staff, who conducted the scrutiny had control of the electoral system at all times. We further find that no evidence at all, meeting the requisite standard of proof, was presented by the petitioners to show that there was access to the system by unauthorized persons. Similarly, the Registrar's Report did not reveal any security breaches of the Result Transmission System (RTS) by any unauthorized person(s).

54. Due to the nature of the complaint by the petitioners that IEBC failed to carry out an annual systems audit of the election technology to evaluate the confidentiality, integrity and availability of the election technology pursuant to regulations 11 and 12 of the *Elections (Technology) Regulations*, 2017, it is vital to reproduce below the terms of these regulations.

> " 11. The Commission shall conduct annual audits of the election technology, or as may be required, to —
>
> a. guarantee data integrity;
>
> b. ensure that the technology functions effectively as specified; and
>
> c. ensure that the internal controls of the technology are effective.
>
> 12.

(1) The Commission shall engage a professional reputable firm to conduct a systems audit of the election technology annually.

(2) The Commission shall conduct the systems audit to evaluate the confidentiality, integrity and availability of the election technology by assessing—

(a) the security access to the system;

(b) the vulnerability of the system configurations;

(c) the accuracy and the completeness of the data; and

(d) any other mechanisms that may be determined by the Commission.

(3) Where the Commission engages a professional reputable firm under sub regulation (1), the firm shall present its audit findings to the Commission, which findings shall be incorporated into a report as set out in regulation 13."

55. The petitioners do not dispute the assertion by IEBC that it engaged the firm of Serianu Limited in July, 2022 to conduct the annual audit of its election technology systems. This was proved by a certificate of compliance issued on August 3, 2022 and annexed to the affidavits of the Chairperson of IEBC and Michael Ouma. We also note that Michael Ouma deponed, without being controverted by the petitioners, that prior to the deployment of the KIEMS kits, IEBC undertook a series of tests on the KIEMS system; that there was public testing of the kits on June 9, 2022, being sixty (60) days before the election; and a similar simulation carried out on July 15, 2022. In the result, the petitioners made allegations that they have been unable to prove, and to which IEBC has been able to respond by demonstrating that it followed the law as regards auditing of the electoral system pursuant to regulations 11 and 12 of the *Elections (Technology) Regulations*, 2017.

56. Ultimately on this issue, upon considering all the pleadings, submissions and the Registrar's Report which fully examined IEBC's RTS and flowing from our findings above, we are not persuaded by the allegation that the technology deployed by IEBC failed the standard of article 86(a) of the *Constitution* on integrity, verifiability, security and transparency.

ii. Findings and Conclusion

57. In concluding on this issue, we reiterate the court's findings in the judgment delivered on September 5, 2022 as follows:

    a. Whereas it is true that the KIEMS kits failed in 235 polling stations, 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled. This happened successfully in Kibwezi West Constituency and parts of Kakamega County.

    b. While the Audit Report was released to the public seven days before the 9th August election, the Register of Voters was used at the election without any apparent anomalies. No prejudice was shown to have been occasioned to any voter or party.

    c. Smartmatic was procured to provide the necessary technological infrastructure as IEBC did not have the capacity to do so. No credible evidence meeting the requisite standard of proof of access to the system by unauthorized persons was adduced by the petitioners.

    d. The Scrutiny Report prepared by the Registrar of this Court did not reveal any security breaches of IEBC's RTS.

    e. IEBC successfully deployed a Biometric Voter Register (BVR) system which captures 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.

    f. In compliance with section 6A of the *Elections Act* IEBC opened the Register of Voters for inspection and verification of biometric data by members of the public for a period of 30 days. Thereafter, the Register was revised to address issues arising from the verification exercise. KPMG then audited the Register and we are satisfied that the inconsistencies and inaccuracies identified during the Audit were successfully addressed.

2. Whether there was interference with the uploading and transmission of Forms 34A from the polling station to IEBC Public Portal

58. The 1st petitioner contended that the technology deployed and utilized by IEBC during the last General Election fell below the prescribed standards under article 86 of the *Constitution* and section 44 of the *Elections Act*. In particular, they asserted that the KIEMS technology failed to encompass the five main principles of confidentiality, integrity, availability, non-repudiation and authenticity, which ensure that the constitutional standard of a secure and

transparent electoral system is met. Therefore, according to them, the result yielded and declared for the Presidential Election by IEBC was unverifiable, inaccurate and invalid.

59. The 1st and 3rd petitioners, in the above context, believed that Forms 34A submitted through the RTS from the polling stations to the National Tallying Centre (NTC) were manipulated. By way of illustration, they alleged that at the point of procurement of the KIEMS kits, IEBC had indicated that the presidential election results contained in Forms 34A and completed at the polling stations would be transmitted to the NTC by a compressed colour photo image which complied with the Joint Photo Experts Group (JPEG) standard. However, the Forms 34A on IEBC's online Public Portal were not only in black and white but also in the Portable Document Format (PDF) despite being captured in JPEG format by the KIEMS kits. They claimed that the process of converting an image to another form altered the substance and undermined the purpose and integrity of the transmission process; that the new version of the document was no longer a true likeness of the image of the original Forms 34A which were uploaded at the polling station. To these petitioners, the only reasonable inference to be drawn from this state of affairs was that the process of conversion of the files from JPEG to PDF, whether automated or manual by human intervention, was predisposed to manipulation either through replacement of whole files or amendment of sections thereof.

60. The 3rd petitioner, relying on the averments by Manyara Muchui Anthony, argued that those alterations were definitely effected because the RTS lacked a transport layer security to insulate Forms 34A, exposing the Forms to open and easy access by domains that apply cookie data manipulation to websites. In addition, they urged that IEBC used the ubuntu operating software which is a free open-source software that can be subject to external manipulation.

61. The 1st petitioner on their part claimed that the RTS was liable to manipulation through 'man in the middle attack' or 'machine in the middle attack'.

In other words, they contended that an authorized or an unauthorized person(s) could intercept and manipulate data before the same finally became visible to the public on IEBC's online portal. To prove the vulnerability of the system, Benson Wesonga, on their behalf, went on to allege that on August 11, 2022, IEBC dumped over 11,000 Forms 34A onto its online Public Portal between 1101 and 1109 hours. This, according to the 1st petitioner suggested that the system was designed to allow 'staging' where any person with access to the RTS could detain the Forms for a while in order to make changes to them before releasing them to the intended destination, that is, the Public Portal.

62. They cited amongst other instances where this occurred as Kagera Primary School, St. Martin's School Kibagare, Borut Primary School, Mugumo Primary School and Thumaita Primary School polling stations whose versions of Form 34A on IEBC's online Public Portal were believed to have been manipulated. Moreover, they urged that there were differences

between the physical copies of Forms 34A and the Forms 34A uploaded on IEBC's Public Portal, where the 1st petitioner's votes were reduced in favour of the 1st respondent and gave 41 polling stations in Bomet, Kiambu and Kakamega Counties as examples of this. For this claim, the 1st petitioner relied on the affidavit evidence of Celestine Anyango Opiyo and John Mark Githongo. What is more, Benson Wesonga deposed that there were glaring disparities between the results entered in Forms 34B and 34C which, in his view was further evidence of alteration of the results in Forms 34A to conform to a specific outcome.

63. Equally, Prof Walter Richard Mebane, a Professor of political science and statistics, deponed that he undertook an e-forensics analysis of the 2022 Presidential Election based on data retrieved from IEBC's Public Portal, according to which, there was not only electoral fraud in the 2022 Presidential Election but that the fraud involved was greater than that committed in 2017. Those findings, are contained in a report, "E-forensics Analysis of the Kenya 2022 Presidential Election" annexed to his affidavit.

64. In the 1st petitioner's opinion, IEBC had thus deliberately set the RTS to be vulnerable for a pre-determined purpose and outcome, considering the choice of Smartmatic, a company allegedly mired in controversy over its election management technology in places like Venezuela, Philippines, and the USA. As far as they were concerned, IEBC had also intentionally hired Jose Gregorio Camargo Castellos, Joel Gustavo Rodriguez Garcia, and Salvador Javier Sosa Suarez to facilitate the irregularities and illegalities which compromised the integrity of the electoral system.

65. The 3rd petitioner, for their part, alleged that there was corroborated evidence that manifested manipulation of the Forms by the fact that Forms 34B were designed in a way that the agents and Returning Officers' signature page was always separate and stood-alone, making it easy to manipulate figures in Forms 34A without the need to recall agents and the Returning Officer to sign afresh. Further, that a review of Forms 34B availed by IEBC from Nakuru, Kiambu, Samburu, Kisumu, Meru, Kakamega and Mombasa Counties revealed that the 1st respondent's votes were inflated by 180,000 votes. And that, since Forms 34B are intended to mirror the results in Forms 34A from polling stations, it was absurd and statistically abnormal that errors in the transposition of results would be in the thousands and only in favour of one candidate, to wit, the 1st respondent.

66. Furthermore, they claimed that as at 11.02 am on August 10, 2022, a day after polling, there were over 75,000 KIEMS kits that were yet to transmit data related to the electronic identification of votes (EVI), yet all tablets closed successfully. This data ought to have been transmitted to the NTC when voting closed on August 9, 2022, they asserted. Instead, an email from Mr Wachanga Mugo, IEBC's ICT support coordinator, showed that there were 687 kits still reading as open, suggesting that the kits in question were still being actively used to transmit manipulated and unauthorized data from polling stations. This, in their

opinion explained why the Chairperson declared results that were inconsistent with his own declaration of voter turnout of 65.4% confirming that the results transmission and management system for Forms 34A, 34B and 34C was compromised hence his inability to accurately relay reliable and accountable results.

67. The 1st petitioner also alleged that, on August 12, 2022 in the evening at the NTC, a bag containing a laptop belonging to Koech Geoffrey Kipngosos, an agent of UDA Party, was left unattended at the verification auditorium. The same was confiscated by officers from the Directorate of Criminal Investigation (DCI) who conducted an onsite forensic image of the laptop to determine what it was being used for. Apparently, there was a consensus among the parties that no agent would be permitted to use a laptop in the verification auditorium. The petitioners claimed that a forensic analysis of the said laptop showed that it was connected to an external IP that does not belong to IEBC; and that Forms 34A were being stored temporarily in this external IP, downloaded and then re-uploaded to IEBC's portal through an application for sharing data.

68. The 1st petitioner claimed in addition that the KIEMS kits were able to transmit Forms from other unrecognized polling stations despite an assurance from IEBC in a communique dated June 10, 2022, that each KIEMS kit would be able to send only one Form 34A that is uniquely geo-fenced and tied to the KIEMS kit by a unique QR code.

69. Through the further affidavit of Benson Wesonga, the 1st petitioner thus produced alleged transaction logs from an IEBC server to prove that access had been granted to users with permission to read, write, modify or edit as well as to delete documents. As a result, they averred that users accessed IEBC's system, either through IEBC's local network or remotely, and proceeded to manipulate records by uploading Forms 34A from the polling stations onto the server; that IEBC's server infrastructure and the entire electoral process was not secure but susceptible to manipulation; and that the log statements showed that certain unauthorized or authorized operations were being carried out before, during and even after the polling day, bringing into sharp focus, the integrity of the entire process. Besides, they alleged that documents in the electronic document management platform that allowed for audit trail and document retention were altered or deleted; and therefore, the document retention policy of IEBC was not adhered to before and after the polling process.

70. Justus Nyang'aya, the 7th respondent and a Commissioner at IEBC, supporting the 1st petitioner's case in this regard, claimed that Gudino Omor was able to access IEBC's server using a username ID shown as 'O', where through such access, he was able to pull down the results from the Forms 34A uploaded from the polling stations; and that through his log-in credentials, Omor was able to upload fresh results. He deponed that Omor was active on the server from June 1, 2022 and remained active beyond the election day. He attached logs as proof of the said Omor's access to the server, yet IEBC never gave any access rights to the

said Omor. Over and above access to the server by Omor, Nyang'aya claimed that 377 other people also accessed IEBC servers. Some of these people included staff of IEBC, Abdidahir Maalim, Moses Sunkuli and Gideon Balang.

71. Disputing these claims, the 1st respondent described the alleged staging, alteration and dumping of 11,000 Forms 34A within eight minutes between 1101 and 1109 hours as a false narrative supported by falsified logs; that the logs presented contained glaring inconsistencies which indicated that the data was not genuinely sourced from IEBC's server as alleged; and that the entries were comparable to a report of alleged interference with the 2017 election that had been shared by Prof Makau Mutua, a spokesperson of the Raila Odinga Presidential Campaign Secretariat on his twitter platform.

72. In addition and in support of the 1st respondent's position, Eric Mulei Kitetu prepared a report comparing the data on the logs and noted the apparent similar entries with the report shared by Prof. Makau Mutua. He pointed out some of the similarities to include an entry of the date showing the year as 2017 instead of 2022. He also took issue with the dates and times indicated in the screenshots as August 17, 2022 at 2315 hours. He deponed also that his attempt to log into IEBC's platform with a view of establishing the security regime, and the source of the screenshots of logs presented established that a log-in attempt had been made and a screenshot taken that was later edited by adding data to form the six screenshots produced by the 1st petitioner. He also set out other inconsistencies in the entries including the texts, spacing, time stamp and the naming regime which varied from that on IEBC's server.

73. Furthermore, the 1st respondent claimed that, if there was failure of technology, it could not vitiate the result of the elections as declared by the Chairperson of IEBC in light of the availability of a complementary mechanism. He denied knowledge of the alleged hacking or infiltration of IEBC systems to manipulate the election result.

74. IEBC and its Chairperson, on their part, strongly denied that there was manipulation, interference or compromise of the RTS. They were clear that the system was incorruptible and impossible to manipulate. To them, what the 1st petitioner produced to demonstrate manipulation was doctored and photo shopped documents as well as false oral evidence. Relying on the affidavit evidence of Martin Nyaga, they maintained that the Forms used to declare the result were scrutinized in the presence of IEBC, and the parties' agents; and that the originals were all authentic and un-doctored. IEBC further claimed that it produced in Court the certified Forms used in the declaration of the final Presidential Election result to dispel the false narrative advanced by the 1st petitioner on manipulation of its system.

75. IEBC and its Chairperson equally denied the authenticity of the logs presented as evidence in Justus Nyanga'ya's affidavit and maintained that IEBC's RTS was safe, secure and

could not easily be accessed by unauthorized persons; that IEBC could detect, thwart and monitor external and internal threats to prevent security breaches; and it could also detect compromised machines thereby preventing attackers posing a threat to the system.

76. Hilda Kavonga also swore an affidavit in which she denied Justus Nyang'aya's claim that Moses Sunkuli, Gideon Balang or Abdidahir Maalim unlawfully accessed the RTS. She maintained that only Presiding Officers in the polling stations across the country had access to the RTS through the KIEMS kits, which access only involved transmission of Forms 34A onto IEBC's portal. Once transmitted, the Presiding Officers had no other rights, for example to remove or delete forms from the system. She went on to explain that Gudino Omor was the technical lead for the Smartmatic team, who provided support on the technology supplied by Smartmatic; that his role was limited to accessing only the infrastructure deployed by Smartmatic which did not involve access to the RTS. It was the case of IEBC and its Chairperson therefore that no foreigner, whether a service provider or otherwise, had access to the RTS.

77. Further, IEBC outlined the measures it had taken to protect the RTS. These included configuring firewalls; providing its sites with digital certificates and secure socket layer certificates to enable anyone accessing its website to do so securely; placing an access control mechanism in place; and doing a penetration test on its computer systems with an aim of evaluating its security. IEBC also evinced its commitment to ensure the system was secure by conducting a stress and loading test to examine the performance of RTS. It stated, it implemented network business continuity to ensure that its operations continued in case of downtime. It caused to be certified and audited its election technology and also ensured that there were digital signatures on the Forms 34A to provide additional security features to prevent tampering.

78. IEBC argued that claims of staging and unauthorized intrusion of the RTS were therefore without any foundation and false. According to IEBC, all Forms 34A were immediately uploaded on IEBC portal upon receipt of the transmitted result. They would be verified and only accepted upon confirmation of the additional features of a digital signature and a date and time stamp to signify the actual date and precise time when the image was captured and uploaded on the system. For purposes of transparency and accountability, all Forms 34A were available to the public at all times. On the other hand, the original Forms 34A were authenticated by the security features on the Forms that included UV sensitivity security marks, like IEBC logo; microtext with the words 'Independent Electoral and Boundaries Commission; tapered serialization; anti-copy features; and, watermark. All these assertions were made by IEBC in a bid to vehemently dispel the allegations made by the 1st petitioner.

79. IEBC also set out in detail, the security parameters in the KIEMS kits system and information management environment. It stated in that regard that only authorized pre-

determined KIEMS kits were configured to be able to relay or transmit results into IEBC servers, and therefore, all the tablets used were polling station specific. This meant that the information could be traced from the source, with the KIEMS system being continuously monitored; the entire network spectrum was secured with twin (external and internal) high-level perimeter firewalls which filtered all the information and only defined and authorized transmission would be permitted through these filters; that IEBC had also deployed a robust database management solution with recommended security options all availed including pre-encryption of results before transmission; and having the transmission over a secure VPN sourced from Mobile Network Operators (MNOs). In addition, the database was set up in clusters to assure its availability.

80. In addition, IEBC described how it had deployed a fourth-tier security measure, a granular role-based access control, and user management for the entire RTS application, which meant that only authorised users could access the system through issue of credentials, none of which was biometric; the permitted users had distinct but interdependent roles at different levels. With this arrangement it was not possible for one to perform an end-to- end operation in the system, particularly considering that no password was issued to any of the alleged unauthorized users of the system. That political parties were only given API access to the portal; that even though IEBC had outsourced the network provision services from MNOs, it ensured the establishment of technical safeguards to guarantee the integrity of the process. It introduced the use of unique specialised SIM cards configured on secured APN for the result transmission of the KIEMS kits; Static Internet Protocol addresses for use in specific gadgets where the SIM cards could only be used within IEBC's Access Point Network; the use of specialised SIM cards MSISDN which did not allow any duplication and was disabled for any SIM card cloning; the SIM cards being disabled for voice or text messaging; and, a unique Internet Mobile Subscriber Identity (IMSI) with a unique identifying number within the network which is the primary identifier of the subscriber.

81. IEBC went on to explain that all the SIM cards supplied and used in the process of transmission were placed under constant monitoring. Periodic reports would be generated confirming that the cards were active throughout the election period and capable of transmitting data. No intrusion or compromise was noted in the system as the electronic transmission system was configured in a way that enabled it to detect a SIM card which was not in the list of those assigned by the MNOs. Furthermore, the SIM cards in the KIEMS kits transmitted the results in the form of HTTP (Hyper Text Transfer Protocol) packets encrypted with SSL (Secure Socket Layer) technology, which is a concealed protocol used by the internet to define how messages are formatted. It was IEBC's case in that context that the link is meant to secure all the data with a code not availed to any of the MNOs, meaning they only transmitted the data and monitored the continuous flow of such data through the respective networks and nothing more.

82. In addition to the above, it was pointed out that the election results were transmitted wirelessly across the 3G & 4G networks installed and secured by IEBC which had full control to its access. All access left a clear trail and event logs that would capture log-on and log-off data according to time and user name. In support of this process, the MNOs also generated and provided call data records that were forwarded to IEBC at intervals. This feedback mechanism showed that transmission of data did not stop at any time and neither was there intrusion by any strange and unidentified number.

83. Through these monitoring and control tools, the MNOs generated and provided Call Data Records (CDRs) which were forwarded to IEBC at intervals. Michael Ouma in his affidavit further demonstrated that the CDRs showed no stoppage in transmission of data or intrusion by any strange unidentified number; that the CDRs contain useful but critical information like the serial number of each SIM card, the SIM cards calling number (MSISDN), SIM static and active internet Protocol addresses, the Internet data volume generated by the SIM card, the time of last connection and the specific type of network, whether 2G, 3G or 4G.

84. To enhance the security of the system and integrity of the transmission, IEBC put in place cyber security procedures introducing a third layer of firewalls that filtered all incoming and outgoing data while restricting any third party or unauthorized access. The firewalls had an inbuilt report back and alert mechanism in case of any unauthorized attempted access or unusual activity in the system and were continuously being monitored for such attempts to intrude.

85. From the affidavit of Moses Sunkuli, IEBC submitted that the RTS had a digital security authentication that validated the authenticity of the Forms 34A. Upon opening the online portal, it was ascertained that all Forms uploaded were only Forms 34A, the polling station codes on them matched those on the Forms, and the KIEMS kits serial numbers and the time stamp being the date and the time to the mini second when the image was transmitted were evident. There was further authentication of Forms 34A through a digital electronic signature where the Forms uploaded upon opening using the adobe acrobat program, would show a signature panel on the periphery of the Form; that upon clicking on the signature panel, the signature details would appear and the same would indicate whether the Form 34A had been modified or not, from the moment it was uploaded, and that if any Form was tampered with, the system would indicate on the signature panel that the Form had been tampered with.

86. In conclusion, IEBC and its Chairperson maintained that, in view of these measures and safeguards, the allegations of compromise or intrusion by third parties were made without

any factual or technical basis and were merely aimed at misleading the public and to garner sympathy from the court.

i. Analysis of evidence

87. The claim of dumping of 11,000 forms as alleged by the 1st petitioner remained central at the hearing of the petition. The manner in which it was described to us, suggested that there was 'staging' which implied there were other users who had been granted access to the system and who had the ability to intercept and withhold Forms 34A, manipulate them by changing the results before dumping them onto IEBC's portal.

88. Learned Senior Counsel, Mr Murgor attempted to give a graphic description of how this would happen. He submitted that the presiding officers would take a picture of the Forms 34A with the KIEMS kit, save the forms in PDF form, but before the Forms 34A would reach IEBC's Public Portal, they would be intercepted midway, downloaded and converted into the CVS system (comma separated values), which is an editable document format from the original PDF form. It is this format, according to counsel, that would enable the third party to change the results. Upon being asked by the court to clarify the reference to CVS, counsel sought to withdraw the submissions on the reference to CVS and clarified that he meant PDF and not CVS. We note however that the reference to JPEG remained on record.

89. The question to be asked is, how was this possible? How was a coloured JPEG form converted to PDF? How was it possible to intercept Forms 34A midway, falsify the numbers by the so-called 'man in the middle' or 'machine in the middle', upload the Forms with falsified figures and send them to IEBC's portal?

90. Were these claims established by evidence meeting the threshold set out earlier? From the 1st and 3rd petitioners' interlocutory applications to access information, devices and documents in the custody of IEBC and for scrutiny, it appears to us that, according to those petitioners, that is where the evidence would be found. Their applications were granted in the following terms:

    1. IEBC to provide to the applicants copies of its technology system, security policy comprising but not limited to password policy, password matrix, owners of the system administration password(s), system users and levels of access, and workflow charts for identification, tallying, transmission and posting of portals and any APIs that had been integrated and the list of human interface and controls for such intervention subject however to any security related issues thereof.

    2. IEBC be compelled to give the applicants supervised access to any server(s) at the National Tallying Centre for storing and transmitting voting information and

which are forensically imaged to capture a copy of the Form 34C which is the total votes cast.

3. IEBC shall provide the applicants with certified copies of penetration tests conducted on IEBC election technology system ..."

91. We have alluded earlier to the ICT scrutiny exercise and access presided over by the Registrar of this Court. The 1st and 2nd petitioners as well as the 3rd and 4th petitioners were represented in the exercise by agents, mostly advocates and ICT experts, who appended their names and affixed their signatures to the Report. From the Report, parties reviewed the transmission of Forms 34A from the KIEMS kit to the online Public Portal, and were satisfied that once the Presiding Officer took a picture of Form 34A, the KIEMS kits would, at that point, scan the Form into PDF which would then be transmitted to a storage server. At the storage server, the Form is processed by an application to ascertain compliance with security features. Once this is confirmed, Form 34A is then published on the online Public Portal. But if it lacks these security features, it is dropped and information of the anomaly is duly recorded.

92. It is also a common factor that Forms 34A as transmitted from the polling stations were handwritten by the presiding officers. IEBC clarified as we have stated elsewhere in this Judgment, that the KIEMS kit has an inbuilt scan application that enables the scanning of Forms into PDF before transmission to the receiving server. This categorical finding settles the issue of alleged image conversion. The totality of evidence by IEBC in rebuttal thus leaves us in no doubt that the system in terms of its configuration, design and disposition would not allow the intrusion and interference in the manner as alleged by the petitioners' side. The 1st, 2nd, 3rd and 4th petitioners, illustration of how a document which is handwritten and with signatures, is scanned and uploaded through the KIEMS – then uploaded on an external platform – where it is converted into another format, amended, then converted back into PDF format to finally be re-uploaded onto IEBC's portal, is therefore not believable. The scrutiny exercise put this postulation beyond argument.

93. Similarly, any alteration of the Forms 34A as transmitted would have required the person to have information on the voter turnout. Expressed differently, one cannot purport to alter the votes of a polling station by increasing the number of votes in favour of one candidate without, first establishing the exact number of voters that turned out to vote. To alter votes in the manner alleged by the petitioners would require the 'man or machine in the middle' to have had agents in all the 11,000 polling stations, where it is alleged that Forms 34A were held in abeyance for manipulation, before being uploaded with finality to IEBC's online Public Portal within 8 minutes. That is almost a technological impossibility. The claims of access to the RTS to interfere with Forms 34A, and that 11,000 Forms 34A were affected by staging were not proved and remained just but mere allegations.

94. Furthermore, according to the Registrar's Report, the 1st petitioner's agents wanted to know, particularly, whether there were suspicious users who logged into the system on August 12, 2022; the particulars of the users who logged-in recently; and whether there was deletion or alteration of any file from the server. The logs from August 8, 2022 to August 29, 2022 were retrieved and sampled for user root during the election period. There was also a general review of the server audit logs and the users' administrative privileges (*sudo users*). The findings in the Report on these issues were that:

> " A review of the access logs did not show the users who logged in on August 12, 2022 or any suspicious activity on user activity.
>
> Information on the system users was also retrieved and shared and it was noted that the users with the user names 'vito' 'ogudino' and 'provisio' accessed the system on the dates between July 20, 2022 and July 28, 2022. It is however noted that from the logs retrieved between 8th-August 29, 2022, there was no suspicious activity by the said users.
>
> It was also noted that there were no records of file deletion or removals that were discovered.
>
> A review of the general server audit logs also showed that there was no suspicious activity involved."

95. In addition, upon scrutiny of the original Forms 34A from the contested polling stations which were allegedly intercepted, the Registrar's Report revealed that the forms were exactly the same as those on the Public Portal and the certified copies presented to this court under section 12 of the *Supreme Court Act*. Where then are we to find the evidence of interception? We found none where the petitioners led us to and indeed a scrutiny of the RTS server as confirmed by the Registrar's Report was conclusive that no sign of interference was detected.

96. Apart from the fact that IEBC has provided detailed measures and safeguards to the RTS, the scrutiny exercise also confirmed that the allegations of intrusion and penetration of the system by foreigners on 8th, 9th, 11th, 14th and August 16, 2022 which was before, during and after the date of the General Election, were not proven.

97. Some of the logs presented as evidence of staging and dumping when reviewed were also found to be either from logs arising from the 2017 Presidential Election or were from unknown and unauthenticated sources. The evidence of John Mark Githongo was particularly startling. His affidavit, which he subsequently purported to withdraw, was the fulcrum of the 1st petitioner's case. It gave the impression that there was direct incriminating evidence from a hacker detailing how he and others were tasked to intercept and manipulate

Forms 34A transmitted from the KIEMS kit and thereafter transmit the altered Forms to IEBC portal. Once IEBC responded to those averments, it became apparent that the particulars of the entries in question emanated from the 2017 Presidential Election. Prof Makau Mutua who was named as the source of the 2017 logs did not deny the assertion and Githongo's attempt to recant or explain away issues pointing to forgery did not help matters as the initial logs had been produced under oath.

98. In the same breath, the evidence of Benson Wesonga also turned out to be no different. The specific allegation that on August 10, 2022, IEBC dumped 11,000 Forms into the Public Portal between 1101 and 1109 hours fell flat on its face when the result transmission server was scrutinized, in the presence of agents including one, George Njoroge, an IT specialist for the Azimio La Umoja One Kenya Coalition Party. No such evidence was apparent and it turned out that this evidence was predicated on no more than speculation.

99. According to the Registrar's Report, IEBC actually provided a live demonstration for the agents of the parties during the scrutiny exercise for all to understand the RTS. It was also clarified by Mr. Nkarichia, Advocate for IEBC before the Court and confirmed by the Registrar's Report, that there were no deletions or alterations or any history of such deletions or alterations on the logs.

100. Amici John Walubengo, Dr Joseph Sevila and Martin Mirero impressed upon us the importance of understanding the RTS application workflow and the management of the thousands of Forms 34A transmitted through the RTS from the polling station to the NTC and how they are organized and presented to the online Public Portal, and the access levels and how each user at the Backoffice interacted with the data centre infrastructure. As suggested by John Walubengo, Dr. Joseph Sevila and Martin Mirero as amici, Mr. Nyaga of IEBC was able to demonstrate during scrutiny, the process of transmission of the Forms 34A from the KIEMS kits to the Public Portal; that once the Presiding Officer at a polling station scanned the Form 34A, the Form was relayed through the RTS to a Backoffice application that receives and processes the information. It is from the Backoffice that the Forms are then transmitted to the Public Portal as received.

101. Amici also contended that one of the ways through which IEBC proves its system is not compromised is by providing appropriate server logs that record digital services happening on the computer system. It was their submission that in presenting server logs as digital evidence, which is a critical component in digital forensic science, this places the court in a position to determine the credibility of the digital evidence before it. This we did, and we reiterate that from the scrutiny exercise, that IEBC provided the logs during the review of the server audit logs where no suspicious activities were discovered, answering this submission in the affirmative.

102. Furthermore, according to the Registrar's Report, IEBC identified the main server used for the elections, with the agents present agreeing to proceed with supervised access on the server. Again, the 1st petitioner's agent, George Njoroge, was present, as were other agents during demonstration of IEBC system architecture, storage and transmission information. IEBC identified 'the main server' holding Form 34C which was scrutinized through supervised access. As we have earlier pointed out, once the KIEMS kits scan the Forms 34A into PDF, the Forms 34A are transmitted to a storage server. The exercise verified that at all times of transmission, only one server is involved in the result transmission. However, the Report also disclosed that, though there is only one physical server, the same server hosts several small virtual servers whose functions are not related to elections. But this alone did not compromise transmission of results. We affirm that it is by an order of this court that supervised access to the main transmission server was granted and not to other servers, which were irrelevant in the results transmission process. We are satisfied that IEBC provided access to this server during scrutiny and we have explained the result of that access.

103. This now takes us to the evidence of Celestine Anyango Opiyo, an Advocate who purported in her affidavit to produce documents on behalf of unnamed agents. We propose to deal with her evidence while addressing Issue No (iii) but suffice it to say here that her evidence was, upon analysis and in its totality, most wanting in value and did not point to any staging of Forms 34A as alleged. That also must be said of the evidence of Justus Nyang'aya who, we have in the preceding paragraphs noted, attached logs that were of no probative value and were unhelpful to the petitioners. All other allegations on hacking, staging, dumping, penetration and infiltration do not require our attention as there was no evidence produced to show how that happened, and we have said as much. In the absence of evidence to prove interference with RTS, we are of the view that there was no hacking of the system in any form.

104. In addition, the 1st petitioner claimed that IEBC had hired Jose Gregorio Camargo Castellos, Joel Gustavo Rodriguez Garcia, and Salvador Javier Sosa Suarez to facilitate the irregularities and illegalities which compromised the integrity of the electoral system. We were convinced otherwise. We find that the role of the Venezuelans was technical in nature as they were part of the team from Smartmatic tasked to provide support on the technology. Their role was limited to only accessing the infrastructure deployed by Smartmatic. We are persuaded that this did not in any way grant them any access to the RTS as no such evidence was revealed during the ICT scrutiny exercise. Furthermore, no evidence was adduced to link them with the uploading of any documents in the RTS or doing anything unlawful on the system. It is evident that any unauthorized access to the system would leave a trail of logs and none were found. The logs from the scrutiny exercise demonstrated this fact.

105. Regarding the allegation that the integrity of the Public Portal was compromised, we are persuaded that this was disproved by evidence of consistent attributes securing the system such as unique time stamps, uniform PDF conversions at the polling stations, correct polling station mapping and consistent KIEMS reporting from verification to transmission of results. It has been shown, to our satisfaction that the KIEMS kits were configured to transmit the results into IEBC server, with all the tablets being used for specific polling stations. It was easy, with this configuration to trace where the Forms 34A were transmitted from. Equally, the network was secured with external and internal perimeter firewalls only authorising transmission of the Forms 34A through the network and no other information. The results of the Forms 34A were also encrypted before transmission over a VPN provided by the three mobile network operators.

106. It is therefore clear, and we do so find that the RTS was configured on a VPN and the SIM cards locked to a specific polling station. The server was also configured to accept results only from authorized and properly mapped KIEMS kits. In our view, the petitioners failed to produce evidence to the contrary.

107. Evidence before this court also shows that the KIEMS kits were capable of detecting the legitimacy of the Forms as they would take images using the specific markings identifying the Forms 34A and ensuring that only legitimate Forms were transmitted. We are also persuaded that there was integrity of the process by adding a third layer of firewalls that filtered all incoming and outgoing data while restricting any third party or unauthorized access. The allegation that IEBC, its officials and strangers used a tool to tamper with the Forms 34A before converting them to the PDF format that eventually appeared on the Public Portal was sufficiently explained as an impossibility. Accordingly, we dismiss this allegation and the consequence is that the petitioners have failed to discharge the legal burden of proof so as to shift it to IEBC.

ii. Findings and Conclusion

108. We therefore reiterate our findings in the judgment delivered on September 5, 2022 as follows:

    a. No credible evidence was presented to prove that anyone accessed the RTS to intercept, detain or store Forms 34A temporarily before they were uploaded onto the Public Portal. The allegation that 11,000 Forms 34A were affected by staging was similarly not proved.

    b. The allegation that IEBC, its officials and strangers used a tool to tamper with the Forms 34A before converting them to the PDF that eventually appeared on the Public Portal was sufficiently explained when IEBC demonstrated how KIEMS

captured and transmitted the image of Form 34A. Accordingly we dismiss the allegation.

c. During the ICT scrutiny it turned out that the transmission logs produced in the affidavit of Justus Nyang'aya were of no probative value.

d. The Registrar's Report shows that the original Forms 34A from the contested polling stations which were allegedly intercepted were exactly the same as those on the Public Portal and the certified copies presented to this court under section 12 of the *Supreme Court Act*.

e. Regarding the allegation that the integrity of the Public Portal was compromised, this was disproved by evidence of consistent attributes such as unique time stamps, uniform PDF conversions at the polling stations, correct polling station mapping and consistent KIEMS reporting from verification to transmission of results.

f. The RTS was configured on a Virtual Platform Network (VPN) and the SIM cards locked to a specific polling station. The server was also configured to accept results only from authorized and properly mapped KIEMS kit. In our view, the petitioners failed to produce credible evidence to the contrary.

g. A review of some of the logs presented as evidence of staging showed that they were either from logs arising from the 2017 Presidential Election or were outright forgeries. In our considered view, there was no evidence of a man or machine in the middle server configured to IEBC's VPN network; and no evidence was produced to show that the Chairperson of IEBC and staff were part of the alleged conspiracy to stage the transmission process.

3. Whether there was a difference between Forms 34A uploaded on IEBC's Public Portal, the Forms 34A received at the National Tallying Centre, and Forms 34A issued to the Agents at the polling stations

109. On this issue, the 1st petitioner's case was two pronged. First, that IEBC and its Chairperson fraudulently ordered the firm printing the ballot papers, Inform Lykos Hellas SA, to print a parallel set of Forms 34A. The first Form was marked "1 of 2" while the second Form 34A was marked "2 of 2" at the bottom of the Forms.

In addition, they declined to order for the printing of the requisite Forms 34B contending that the Forms 34B would be self-generated from the KIEMS kits after close of polling. The petitioners submitted that in response to their letter dated July 27, 2022 questioning the decisions aforestated, IEBC and its Chairperson invited all Presidential Election stakeholders to a consultative meeting. It was agreed that IEBC would print the Forms 34B and not use the Form 34A booklet 2 of 2, which would be sealed in a tamper proof envelope. IEBC issued

guidelines reflecting the terms of the consent, which were gazetted *vide* Gazette Notice No 9280 of August 2, 2022.

110. Secondly, it was their case that there was a systematic pattern of criminal and fraudulent interference with the electronically transmitted results in Forms 34A in IEBC's portal after declaration of results at the polling stations. The effect of this, they alleged, is that votes were being deducted from the 1st petitioner and added to the 1st respondent without there being a change in the total vote count in order to camouflage the alterations. In that regard, they pointed to 41 polling stations in Bomet, Kiambu and Kakamega Counties where the alterations were allegedly done. Relying on the affidavits of Celestine Anyango Opiyo, they urged that there were startling differences between the physical copies of Forms 34A and the ones uploaded onto IEBC's portal. Relying further on the affidavit of Arnold Ochieng Oginga, they gave a tabulation of the affected Counties and specific polling stations in Baringo, Nairobi, Vihiga, Mombasa, Kajiado, Bomet, Kakamega, Narok, Bungoma, Busia, Siaya, Kisumu, Homabay, Migori, Kisii, Nyamira, Muranga, Marsabit, Turkana, Samburu, Trans Nzoia, Nandi, Kericho, Embu, West Pokot, Nakuru and Diaspora where the Forms 34A issued to the agents at the polling stations were allegedly different from what was uploaded to the Public Portal.

111. They also contended that, from the 41 Forms analysed, it was evident that there was a premeditated scheme to deduct and/or rob votes from the 1st petitioner in favour of the 1st respondent. It was also contended that the serial numbers on the altered Forms 34A on IEBC's portal remained the same but the contents were different from the Forms 34A issued to their agents at polling stations. They added that the manipulation of the transmitted results could only be done by somebody with opportunity to access IEBC's portal, coupled with the capability to interfere with the results remotely and electronically. They asserted that out of the 41 sampled Forms, the total number of votes reduced from the 1st petitioner and added to the 1st respondent was 2, 793 votes. They used the 41 polling stations as a basis to argue that the same pointed to a widespread pattern that would significantly alter the results of the Presidential Election in general.

112. Furthermore, they claimed that they had been monitoring the Public Portal since August 15, 2022 and noted abnormal activities such as, transmitted results Forms which were missing from IEBC's portal yet at the time when the impugned results were declared, the Chairperson of IEBC had stated that he was declaring results contained in the portal.

113. They also argued that several results declaration Forms did not have the security features as stated in the affidavits of Martha Karua, Dr Nyangasi Oduwo and Saitabao Kanchory; that the Forms 34A did not have the anti-copy features or IEBC logs at the bottom left corner of the Form; that the Forms at the NTC did not show at the foot/tail end as 1 of 2 or 2 of 2 and; that some of the Forms did not have the security features as set out in the tender

document or as demonstrated by the service provider during the inspection visit. It was therefore their claim that in the absence of the physical distinction between the two Forms, it was not possible to ascertain which sets of Forms were used at the polling station calling into question the integrity of the transmission process.

114. The 1st petitioner also stated that IEBC was continuously deleting and uploading Forms 34A and Forms 34B containing different results from what they had initially posted and which were used as a basis for result declaration. Relying on the averments by Arnold Ochieng Oginga they produced computer print outs of the timestamps of the portal status of transmission and display of results.

115. On contamination and tampering with Forms 34A, the petitioners' case was supported by the evidence of Martin Papa and Susan Wambugu who are both forensic document examiners. The two are said to have examined hundreds of Forms from various Constituencies and filed a report thereon. The report shows that contrary to the guidelines issued in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others*, Civil Appeal No 105 of 2017; [2017] eKLR (Maina Kiai), the result transmitted to the Public Portal was not the result contemplated in article 138(3)(c) of the *Constitution*. Consequently, they believed that there was interference with election materials contrary to regulation 17 of the *Elections (Technology) Regulations, 2017* and that the Forms purportedly uploaded on the Public Portal from polling stations were of questionable credibility and integrity.

116. The 1st and 2nd respondents, on the other hand, argued in response that there was no variance or discrepancy between the Forms 34A issued to the candidate's agents, those electronically transmitted by the KIEMS kits and those published on IEBC's portal. They specifically averred that there was no variance or discrepancy between Forms 34A issued to their agents and those posted on IEBC's website and therefore the authenticity of the Forms 34A alluded to in the Petition was questionable.

117. It was their further assertion that it would have taken enormous logistical mobilization, running to several days to execute the sort of fraud alleged. This would in addition require IEBC to alter the Forms given to agents in polling stations while getting the agents to sign on new originals to complete the fraud. They relied on the affidavit sworn by Veronica Nduati which faulted the evidence of Susan Wambugu as perjury and containing matters outside the deponent's knowledge; further that the petitioners' case was predicated upon counterfeit documents, fake Forms 34A and what she referred to as a 'bogus' document examiner.

118. Silas Kiptoo Kibii, one of UDA's agents, swore an affidavit and deponed that he examined the affidavit sworn by Susan Wambugu and the attached document titled "Forensic Document Examiner's Report" from the DCI which includes various Forms 34A in 90 polling stations

which for the purposes of the purported forensic audit were copies, not originals. He made the following observations:

(a) the allegation that entries were made by the same authors in the 90 polling stations was baseless for there is no legal requirement that all the agents must fill the forms in their own handwriting while witnessing the Form 34A so long as they append their signatures; and

(b) that the report made incomprehensible conclusions and findings and lacked certainty while proffering personal opinions that are of no probative value. Consequently, in his view, the report was not a forensic analysis in the true sense of that term.

119. The conclusions in the Forensic Document Examiner's Report were that some of the Forms 34A had entries made by the same author. According to the 1st and 2nd respondents, none of those whose signatures were being questioned, that is, presiding officers, their deputies, agents or observers, had rejected them or denied having signed the same. It is for these reasons that the 1st and 2nd respondents prayed for a finding that the report by Susan Wambugu be declared to be of no probative value on the issues it sought to speak to.

120. John Macharia Wangui, another UDA agent at Kabete Vetlab Primary School polling station 9 of 12 in Kitisuru Ward, Westlands Constituency Nairobi County swore that, as an agent, he observed and took note of the tallying exercise and upon completion, all the agents at the polling station were each issued with a copy of the duly signed Form 34A and he instantly submitted a copy to his party electronically. He asserted that the Form 34A produced in the affidavit of Arnold Ochieng Oginga was not the true copy of the Form 34A that he obtained from the Presiding Officer and was certainly not the copy he submitted to the UDA party.

He annexed the copy he submitted to the party and which he contended was similar to the Form uploaded on IEBC Public Portal.

121. IEBC and its Chairperson on their part denied that there was any manipulation of the Forms 34A or that the physical Forms 34A were different from the Forms 34A transmitted to the NTC. They submitted that the electoral process and system met the standards established in the *Constitution* and the law. Additionally, they submitted that the 1st petitioner had failed to discharge the burden to the required standard to prove that there was tampering of the Forms 34A.

122. Both Moses Ledama Sunkuli, Acting Director, Voter Registration and Electoral Operations, in his affidavit in response to Arnold Oginga as well as Andrew Maina, Returning Officer Gatundu North Constituency, Kiambu County in his affidavit in response to Celestine Opiyo, deponed that at all the polling stations, party agents were issued with carbonated

copies of Forms 34A which appeared like "pencil" copies of the original and were not coloured. They also asserted that the copies of Forms 34A were issued to the Chief Agents at the NTC, which copies had a running head or banner with the word "copy" appearing repeatedly to indicate the document was a copy. It is for these reasons that they both contended that the Forms 34A annexed to the affidavits of Celestine Opiyo and Arnold Oginga as evidence of Forms received from their party agents were not carbon copies and also lacked the two aforestated features. They contended that the annexures were copies of Forms downloaded from IEBC's portal and which were subsequently doctored and manipulated to create a desired but false narrative.

123. In further answer to Arnold Oginga's assertions, Moses Sunkuli confirmed that IEBC verified all Forms 34A from all polling stations in all Constituencies before announcing the results, save for 6 polling stations which were affected by violence and were not included in the final tally of Form 34C. He went a step further and pointed out discrepancies in the Forms 34A annexed to Arnold Oginga's affidavit. Specifically, he pointed to page 46 of the annexures which contained a Form 34A that appeared to have been paper punched for purposes of filing. He contended that this was evidence of forgery as IEBC did not avail paper punches at any of its polling stations. As for Ngaina polling station of Tiaty Constituency, he argued that Arnold Oginga wrongfully asserted that the Form was sent by an Azimio agent, yet there were no agents present for any of the candidates at that polling station.

124. In addition to these affidavits, IEBC relied on several affidavits sworn by its Constituency Returning Officers as well as the Presiding Officers in the polling stations highlighted by the 1st petitioner. They included the affidavit sworn by David Huho Kimani, Presiding Officer, Kawaida Primary School polling station 1 of 6, Kiambaa Constituency, Kiambu County on August 25, 2022. On the allegation that some agents produced Forms 34A not matching the ones on IEBC Public Portal, he deponed that he duly filled the Form 34A of his station in the presence of the agents for political parties and forwarded the same to the Constituency Tallying Centre (CTC). He denied that the Form produced by Arnold Oginga was prepared by him and instead asserted that the Forms 34A appearing on IEBC's Public Portal were the same as the physical Forms submitted to the NTC.

125. These averments were echoed by Judith Ndaara, Presiding Officer, Kawaida Nursery School polling station 1 of 5, in Cianda Ward, Kiambaa Constituency, Kiambu County, Kelvin Mungai Mworia, Presiding Officer, Kawaida Nursery School, polling station 2 of 5, Cianda Ward, Kiambaa Constituency, Kiambu County; John Otieno Owino, Presiding Officer, Vetlab Primary School polling station 2 of 12 Kitisuru Ward; Collins Barasa Ndamwe, Presiding Officer Kabete Vetlab Primary School polling station 7 of 12; Kachepkai Pkiyeny Meshack, Presiding Officer, Oronto Craze Primary polling station 1 of 1, Tiroko Ward, Tiaty Constituency, Baringo County; and Kaptisia Samuel, Presiding Officer, Kapedo

Primary School polling station 1 of 1,Tirioko Ward, Tiaty Constituency, Baringo County in their separate affidavits. They too reiterated that the Forms 34A appearing on IEBC Public Portal were the same as the physical Forms submitted to the NTC. The only logical explanation, in their opinion for the difference in content, was that the 1st petitioner's Forms were forgeries and doctored. Lastly, that the purported agents of the 1st petitioner must have been engaged in the manipulation of the Forms that they presented to Court.

i. Analysis of Evidence

126. On this issue, the 1st petitioner's case was that there was deliberate manipulation and tampering with Forms 34A as demonstrated in their affidavits to the effect that votes were being deducted from the 1st petitioner and added to the 1st respondent. The respondents in answer, have urged the point that none of the Forms 34A transmitted to IEBC's Public Portal was interfered with or manipulated. They also urged by way of several witness affidavits that the Forms 34A signed at the polling stations and issued to the agents were identical to the Forms on IEBC's Public Portal and delivered to the NTC. They all asserted that in any event, going by the *Maina Kiai* case, IEBC used the original physical Forms 34A to tally, verify and declare the presidential election results.

127. The court in its ruling delivered on August 30, 2022, granted the following orders on scrutiny:

> " Having noted the above, we hereby grant the following orders:
>
> ...
>
> 5. That the ballot boxes for the following polling stations be opened for inspection, scrutiny and recount: Nandi Hills and Sinendeti Primary School 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; Jarok, Gathanji and Kiheo Primary School Polling in Nyandarua County;
>
> 6. That the Error Forms signed by the Chairperson of IEBC during the tally and verification exercise at the National Tallying Centre between 10th to 15th August 2022 be provided to the applicants.
>
> 7. That IEBC should provide certified copies of Forms 32A and 34C Book 2 used in the impugned election subject to the

applicants providing to IEBC specific contested polling stations for compliance thereof.

8. That the above exercise shall be conducted within 48 hours of these orders that is from 2 pm on Tuesday, 30th August to 2 pm on Thursday, September 1, 2022.

9. Each Party shall be represented by two agents during the exercises above and they shall at times be under the supervision of the Registrar of the court and her staff. The Registrar shall file her report by 5 pm on September 1, 2022 and avail copies to all parties.

10. Any party is at liberty to submit on the report before conclusion of the hearing as shall be directed by the President of this Court."

128. The Registrar's Report confirmed that in compliance with order 5 of the ruling, (above), scrutiny was conducted on the ballot boxes from 47 polling stations. A further scrutiny was carried out in respect of 41 polling stations pursuant to order 7 (above). The Report noted that the alleged polling station called Tinderet Conmo in Nandi County did not exist although the 1st petitioner alleged infractions in that polling station.

129. On the outcome of the scrutiny and verification of votes cast and garnered by each of the Presidential candidates per polling station, save for four polling stations, the Report indicates that there was no variance between results as captured in Form 34A and recount.

130. The four polling stations were as follows; Chepkutum Primary School 2 of 3, where one vote for the 1st petitioner was counted for the 1st respondent. In Kapsuser Primary School 2 of 3 there was a computation error noted on the total valid votes cast, but the votes in respect of each candidate remained the same. In Sinderet Primary School 1 of 2, the ballot box did not contain Form 34A. However, the recount of votes matched what was captured in Form 34C. In Nandi Hills Primary School 2 of 4 there was an error in the votes indicated on Form 34A where the 1st petitioner received one vote less.

131. Before we make our determination whether there were significant differences between Forms 34A uploaded on the Public Portal and the physical Forms 34A delivered to the NTC and the Forms 34A issued to party agents, we need to examine the evidence presented by IEBC in rebuttal.

132. Like in the previous grounds, IEBC and its Chairperson maintained that they placed sufficient safeguards to ensure that both the RTS and the KIEMS kits were secure enough to prevent any intrusion by unauthorized third parties. It explained the nature of the copies of the Forms issued to the agents vis-à-vis those appearing on IEBC Public Portal.

We also take note of the evidence produced by IEBC in the form of numerous affidavits by the Constituency Returning Officers and Presiding Officers dismissing the petitioners' contention that the Forms 34A appearing on IEBC's Public Portal were different from the physical Forms submitted to the NTC.

133. Further, we have considered the 1st and 2nd respondents' witness affidavit sworn by John Macharia Wangui, their agent at Kabete Vetlab Primary School polling station 9 of 12 in Kitisuru Ward, Westlands Constituency Nairobi County who corroborated the evidence of IEBC's witnesses. Finally, there is the affidavit of Eric Atuma sworn on August 26, 2022 filed by counsel for the 1st and 2nd respondents, who deponed that he was the ODM/Azimio agent at the St. Martin's School Kibarage polling station 2 of 7 in Kitisuru Ward, Westlands Constituency, Nairobi County; that as the agent who was present and signed the Form 34A at the polling station, the Form 34A annexed to Arnold Oginga's affidavit and purported to be from his polling station was not the electronic copy that he submitted to the ODM/Azimio party. He produced the true copy that he submitted to the party and which he pointed out was in consonance with what was published on IEBC's Public Portal.

134. In light of all the aforementioned affidavits, and the totality of the evidence, we find no credible evidence to support the 1st petitioner's claim that Forms 34A presented to agents differed from those uploaded to the Public Portal. The Report by the Registrar's Report confirmed the authenticity of the original Forms in the sampled polling stations. There were no significant differences between the Forms 34A uploaded on the Public Portal and the physical Forms 34A delivered to the NTC that would have affected the overall outcome of the Presidential Election.

135. The affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's Report confirmed evidence to the contrary. All the Forms 34A attached to those affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the Public Portal. The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective affidavits was not only inadmissible, but was also unacceptable. It has been established that none of the agents on whose behalf the Forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two had gone ahead to depone on matters that were not within their knowledge. It is worth noting that the two are Advocates of the High Court and are on record as representing the 1st petitioner in the petition before us.

136. This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and

as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.

137. In stating so, we echo the words of Ringera, J in *Kisya Investment Limited & others v Kenya Finance Corporation Ltd* HCCC No 3504 of 1993 (Unreported) that:

> " It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.
>
> Besides that, the counsel's affidavit is defective for the reason that it offends the proviso (to) order XVIII rule 3 (1) (now order 19 rule 3 of the *Civil Procedure Rules* failing to disclose who the sources of his information are and the grounds of his belief."

138. We must also remind counsel who appear before this court, or indeed before any other court, or tribunal of the provisions of sections 113 and 114 of the *Penal Code*, cap 63 laws of Kenya, that swearing to falsehoods is a criminal offence, and that it is also an offence to present misleading or fabricated evidence in any judicial proceedings. section 114 of the *Penal Code* states that:

> " Any person who swears falsely or makes a false affirmation or declaration before any person authorised to administer an oath or a declaration upon a matter of public concern, and at such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour."

139. One of the most serious losses an advocate may ever suffer is the loss of trust of Judges for a long time. Such conduct amounts to interference with the proper administration of justice. Further, it puts counsel in jeopardy of being found in contempt of court. This court in the case of *Republic v Ahmad Abolfathi Mohammed & Another*, SC Petition No 39 of 2018; [2019] eKLR underscored the vital role that advocates play in assisting the court to effectively carry out its duty of administering justice. We can do no more than reiterate the words of the court as follows:

(6) On admission to the bar, all advocates make an affirmation, as officers of the court. section 15(4) of the *Advocates Act* provides that an aspiring Advocate:

> "shall take an oath or make an affirmation as an officer of the court before the Chief Justice in such form as he shall require, and shall thereafter sign the Roll in the presence of the Registrar or a Deputy Registrar who shall add his signature as witness."

(7) The status of an advocate as an officer of the court, is expressly provided for in section 55 of the *Advocates Act*. An advocate, consequently, bears an obligation to promote the cause of justice, and the due functioning of the constitutionally-established judicial process ensuring that the judicial system functions efficiently, effectively, and in a respectable manner. In that context, Advocates bear the ethical duty of telling the truth in Court, while desisting from any negative conduct, such as dishonesty or discourtesy. The overriding duty of the Advocate before the court, is to promote the interests of justice, and of motions established for the delivery and sustenance of the cause of justice.

.....

(11) It is clear, therefore, that Advocates, while discharging their duties, are under obligation to observe rules of professionalism, and in that behalf, they are to be guided by the fundamental values of integrity." [Emphasis added]

140. We now turn to the sad issue of affidavits containing misleading or fabricated evidence and specifically to the affidavit of John Mark Githongo, to which reference has been made. The 1st petitioner, through Githongo's affidavit contended that they had direct incriminating evidence from a hacker contracted by the 1st respondent's agent, Dennis Itumbi, detailing how he and others were tasked to intercept and manipulate Forms 34A transmitted from the KIEMS kits and thereafter transmit the altered Forms to IEBC's portal. John Githongo produced video evidence as well as transcription of the interview he had with a young man whose face and voice are both obscured. He also annexed purported digital logs and digital footprints showing the transaction ID, time stamps, generic user names, IP addresses and functions of IEBC.

141. It was on the basis of these logs that the 1st petitioner's witness, Benson Wesonga, swore three affidavits on 20th and August 21, 2022 wherein he claimed to have carried out an analysis of the same. He contended that he found evidence of access being granted to users with permissions to read, write, modify or edit and delete documents. He contends that from the screen grab, a user with a pseudo name or account wchebukati@iebc.or.ke deleted and

uploaded certain files for polling stations onto the server repository, thereby compromising the quality of the system.

142. The 1st and 2nd respondents through the affidavits of Dennis Itumbi, Davis Chirchir, Eric Mulei, Raymond Kiprotich dismissed the logs produced and argued that they were not genuinely sourced from the server as alleged but rather were the same as the ones posted by Prof Makau Mutua on twitter relating to the 2017 Presidential Election Petition.

143. In light of that response, John Githongo swore a further affidavit on August 28, 2022, withdrawing the purported logs contending that they did not emanate from himself or the 1st petitioner. He added that the same was only meant for purpose of demonstration. Obviously, neither the withdrawal of the logs nor the explanation thereof are acceptable and amount to outright dishonesty. It was also a radical departure from the pleadings of the 1st petitioner and completely altered the substance of their petition fatally. A party or witness cannot approbate and reprobate, more so under oath.

144. Without saying more, we dismiss the contents of the affidavit of John Mark Githongo, which may contain forgeries, for not meeting the evidential threshold. It was incredible and contained no more than hearsay evidence. We further note that no admissible evidence was presented to prove the allegation that Forms 34A were fraudulently altered by a group situated in Karen under the direction of persons named in the affidavit and video clip attached to it. In fact, his two affidavits amount to double hearsay, and incapable of being proved at each layer.

145. In the aforesaid video interview by John Githongo with the young self- confessed hacker, the latter asserted how he and others were tasked and did intercept and manipulate Forms 34A transmitted from the KIEMS kits in favour of the 1st respondent and thereafter transmitted the altered Forms to IEBC's portal; that this was made possible through collusion with IEBC, its Chairperson, IEBC's ICT Department and Smartmatic; and that they were enabled to access the back- end of IEBC server. Of interest is paragraph 13 of the affidavit of Githongo of August 21, 2022 where the young man confirmed that his team was also able to manipulate the gubernatorial results in some key Counties, as well as those for the presidential election. It is common knowledge that Governors' results are not transmitted electronically, in the same manner as those of presidential candidates. That statement alone should have been sufficient to cast serious doubts on the credibility of that witness. It was therefore improper for Githongo to accept such evidence and to present it to this court as the linchpin for the nullification of the results of the presidential election, and even worse, go ahead to swear that those facts were, to his knowledge, true.

146. Although John Githongo withdrew his earlier averments, this does not prevent the court from examining the same. In truth, his affidavit together with those of Celestine Anyango,

Arnold Oginga and Benson Wesonga were the anchors upon which the 1st petitioner's case was predicated. Without this foundation, the 1st petitioner's case on the instant issue must fail.

147. The 1st petitioner had also alleged through forensic reports attached to the affidavits of Martin Papa and Susan Wambugu that there was evidence of erasures, alteration and falsification on the original Forms 34A and the Forms 34A uploaded on the online Public Portal. It was further stated that, handwriting on some of the Forms 34A appear to have had a common origin.

148. We are convinced that the original Forms 34A were authenticated by their unique security features, including UV sensitive security features; Microtext with the words 'Independent Electoral and Boundaries Commission', tapered serialization, anti-copy features and water mark that enhanced the security of the information management environment therefore eliminating and protecting the system against the possibility by any unauthorized third party.

149. Again, as we have explained, in the Registrar's Report, it is noted that after the exercise, the physical and original Forms 34A were the same as those on the online Public Portal. In addition, the Forms 34A were carbonated to ensure that only one Form was filled by the Presiding Officers and acted as a measure to help authenticate the results at the polling stations before transmission.

150. Moreover, expert opinion, as a general rule is not binding on the Court. It is only an opinion. In reaching its determination, the Court is entitled to consider other relevant facts and the evidence as a whole. For reasons given above and having found that the Forms submitted to the experts were not authentic, we find that the forensic reports cannot be used as evidence and basis that the Forms 34A were tampered with.

151. We must now turn to another sensational piece of evidence produced on behalf of the 1st petitioner. Julie Soweto, Advocate, took this court through a demonstration of how the Forms 34A were interfered with and graphically pointed to Gacharaigu Primary School polling station, submitting that IEBC's stamp on the Form 34A on the portal gave the impression that it had been super-imposed over another stamp. Further, she also demonstrated to the court that at the top left hand corner, the name of Jose Camargo appeared, an indication to her, that he had access and opportunity to interfere with the Forms 34A uploaded on the system. Also, from the same polling station, she demonstrated that the Form 34A had laid over a document written 'Jose Camargo', as one of the Venezuelans claimed to have interfered with the elections.

152. Ms Soweto again pointed out to the court that Thunguma Primary School in Nyeri Constituency polling station and the polling station at Psongoywo Primary School

had the same serial number on the KIEMS kit with the same ID number which was F230450M00204133, the only difference being that the KIEMS kit from Thunguma Primary School transmitted the Form 34A on August 9, 2022, at 2349 hours while the KIEMS kit from Psongoywo primary school did so on the same date, August 9, 2022, but at 1956 hours, despite the two polling stations being located hundreds of miles apart. It was counsel's argument in this context that, this incident disproved IEBC's claim that each Form 34A could only be transmitted on its own unique KIEMS kit with its own unique IP address. This evidence, in Ms Soweto's opinion substantiated her claim that the Forms 34A on the online Public Portal were different from the physical Forms 34A.

153. Learned Counsel Mr Mahat, for IEBC disputed this narrative by availing to the Court the original Form 34A from Gacharaigu Primary School and explained that Jose Camargo's name was on the register of the QR code that had been printed by Smartmatic in his name; and that the image was an overlay on the Form 34A. He submitted that, from that understanding, the Presiding Officer took the picture of the Form 34A above the QR register which had the name 'Jose Camargo'. The name was not on the Form 34A or any election material. The original Form, that was being impugned, was produced before the court by IEBC and we were able to determine that there was no name of 'Jose Camargo' on the same. We therefore find the explanation of the overly credible, and a convincing rebuttal to Ms Soweto's claim on the issue. Mr Mahat however admitted that, the two KIEMS kits had the same serial number as alleged but that they had different IP addresses from the two different polling stations, and therefore, had distinct identifiers. Similarity in serial numbers, he said, could only be attributed to a manufacturer's fault. We find the reasons for the irregularity plausible. In any event, it has not been established that these minor infractions and errors were of a magnitude that would lead to a different result from that declared by IEBC.

154. Therefore, to the question whether there was a difference between Forms 34A uploaded on IEBC's Public Portal, those received at the NTC, and those issued to the candidates' agents at the polling stations, we have found none.

ii. Findings and Conclusion

155. It is our finding in conclusion on this issue and flowing from our judgment of September 5, 2022 that:

a. There were no significant differences captured between the Forms 34A uploaded on the Public Portal and the physical Forms 34A delivered to the NTC that would have affected the overall outcome of the Presidential Election.

b. No credible evidence was presented to support the allegation that Forms 34A presented to agents differed from those uploaded to the Public Portal. The Report

by the Registrar of this Court confirmed the authenticity of the original forms in the sampled polling stations.

c. The affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's Report confirmed that all the Forms 34A attached to those affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the Public Portal. The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective affidavits was not only inadmissible, but are also unacceptable. It has been established that none of the agents on whose behalf the forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two have gone ahead to depone on matters that are not within their knowledge.

d. This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed. We must remind counsel who appear before this court, or indeed before any other court, or tribunal of the provisions of sections 113 and 114 of *Penal Code*, that swearing to falsehoods is a criminal offence, and too that it is an offence to present misleading or fabricated evidence in any judicial proceedings.

e. The contents of the affidavit of John Mark Githongo, which may contain forgeries, are dismissed for not meeting the evidential threshold. They contained no more than incredible and hearsay evidence. No admissible evidence was presented to prove the allegation that Forms 34A were fraudulently altered by a group situated in Karen under the direction of persons named in the affidavit and video clip attached to it. In fact, his two affidavits amount to double hearsay, and incapable of being proved at each layer.

f. The Form 34A for Gacharaigu Primary School which was sensationally presented by Julie Soweto, Advocate, to show that one, Jose Camargo, accessed the RTS and interfered with the result contained therein turned out to be no more than hot air and we were taken on wild goose chase that yielded nothing of probative value.

g. The KIEMS kit relating to Psongoywo Primary School which bore the same serial number with another was admitted by IEBC as an inadvertent manufacturer's error. We are also satisfied that the two kits had other identifying features that were markedly different including the time stamps and polling code. Nothing turns on that anomaly.

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

156. On the eve of the election, August 8, 2022, IEBC through its Chairperson in his periodic press briefing to the nation, announced that it would suspend gubernatorial elections in Mombasa and Kakamega Counties; Member of National Assembly elections for Kitui Rural Constituency in Kitui County, Kacheliba Constituency in West Pokot County, Pokot South Constituency in West Pokot County, Rongai Constituency in Nakuru County; and Member of County Assembly Ward Nyaki West in North Imenti Constituency, Meru County and Kwa Njenga Ward in Embakasi South Constituency in Nairobi County.

157. From the statement, the postponement was occasioned essentially by the wrong pictures and details of the candidates on the ballot papers. The elections in these electoral units were "suspended to a later date that will be announced through a gazette notice." The following day which was indeed the polling day, the Chairperson in his first update reiterated the fact of the postponement, without giving any specific date. It was at the second briefing on the same day that the Chairperson declared that:

> " 3. The Commission has resolved to hold by-election in eight electoral areas due to court orders and mismatch of material content on August 23, 2022".

158. Subsequently, on August 12, 2022, through Gazette Notice No. 9617 and citing article 88 (4) of the *Constitution* of Kenya, sections 38, 39 and 55B (1) (b) of the *Elections Act*, and regulation 64A (1) (b) of the *Elections (General) Regulations, 2012*, the Chairperson formally confirmed that date. However, in a subsequent Gazette Notice No 9865 of August 19, 2022, the elections were for the second time postponed on account of what the Chairperson termed as threats and harassment of the Commission's officials and staff. However, the new date remained indeterminate. Finally, the elections were held on August 29, 2022, twenty days after the General Election.

159. It is emphasized that save for the specified units and seats, the postponement did not affect the Presidential or other elections which went on as scheduled. Of course, the postponement did not go without protestation from some of the candidates and parties. For example, in Mombasa 3 residents, Thani Mohamed, Moses Aran and Kevin Nzuki filed a Petition at the Mombasa High Court (Constitutional Petition No E036 of 2022) seeking to compel IEBC to conduct elections in the eight electoral areas on a date not later than August 30, 2022. In addition, Dr William Kingi, the then Deputy Governor of Mombasa challenged in court (Constitutional Petition No E038 of 2022) the constitutionality of IEBC's decision to postpone the County's gubernatorial election. In Kakamega, Fernandes Barasa, now the Governor, together with Ayub Savula filed a petition at the Kakamega High Court (Constitutional Petition No E012 as consolidated with Nos E011, E013 and 4 of 2022) also challenging the postponement of the Kakamega gubernatorial poll.

160. In this petition, it is the combined case of the 1st, 2nd and 3rd petitioners through the affidavit evidence of Martha Karua, Saitabao Kanchory, John Njoroge Kamau and Manyara Muchui Anthony that the postponement of elections in many electoral units was unprecedented in Kenya's electoral history. They have argued that, in terms of articles 136(2)(a), 177(1), 180(1) as read with article 101 of the *Constitution*, the Chairperson of IEBC had no jurisdiction to postpone elections in those areas; that section 55B of the *Elections Act* is inconsistent with the *Constitution* and therefore void to the extent that it purports to donate to IEBC power to postpone elections; that such power is not only contrary to the *Constitution* but also undermines the conduct of free, fair and credible elections; and that this particular postponement deprived the voters of an opportunity to vote for all the candidates on the date stipulated by the *Constitution*. In the petitioners' view therefore, the postponement was intended to have and indeed had the overall effect of suppressing voter turnout in the areas in question.

161. It was their further contention that the postponement could only be attributed to the 3rd respondent's inefficient planning and complicity in suppressing voter turnout in areas that have a history of overwhelmingly voting for the 1st petitioner. They believed therefore that the postponement of gubernatorial elections in Kakamega and Mombasa Counties and no other Counties was deliberate and targeted the 1st petitioner's stronghold Counties with the aim of handing a benefit to the 1st respondent. They deposed further that, as a result of the postponement, there was a dip in voter turnout in the two Counties. In Kakamega, for instance, using an average voter turnout of 72% in the last three General Elections vis-à-vis the 60.29% turnout in 2022, the 1st petitioner lost 73,958 votes while the 1st respondent lost 29,127 votes. In Mombasa, using an average voter turnout of 56% in the last three General Election, vis-à-vis the 43.76% turnout in 2022, the 1st petitioner lost 47,624 votes while the 1st respondent lost 33,786 votes. By these simulations, in their opinion, the 1st petitioner's

overall tally would be 7,064,512 and the 1st respondent's overall tally would be 7,239,054. This would bridge the gap between the declared total votes to 174,542 and not 233,211 as announced.

162. Further, the petitioners have argued that there was voter apathy and suppression following the failure of KIEMS kits in some constituencies in Kakamega and Makueni Counties, where the kits were deliberately mismatched between those constituencies. It was the petitioners' case that all these were schemes to reduce the 1st petitioner's votes so as to fraudulently benefit the 1st respondent.

163. IEBC, through the affidavits of Marjan Hussein Marjan, its Secretary and Chief Executive Officer, Moses Ledama Sunkuli and its Chairperson, denied claims that the postponement of elections was deliberate and aimed at voter suppression. They however, admitted that, due to an error on the part of the printer, there was a mix-up of the photographs of candidates; and that despite their spirited efforts to have the printer replace the ballot papers, it was logistically impossible to complete the exercise in time for elections which were due the next day. This is because the mix-up was only discovered on the eve of the election when the ballot papers were being distributed to the polling stations; and that as a practice, ballot papers can only be opened on the eve of the election day to avoid any mischief.

164. They forcefully denied the suggestion that the mix-up was a deliberate scheme to suppress voter turnout. They demonstrated that low voter turnout was experienced countrywide and gave examples of voter turnout in the neighbouring Counties where elections were not postponed to demonstrate this.

i. Analysis of Evidence

165. article 38 (3) (b) of the *Constitution* guarantees every adult citizen the right, without unreasonable restrictions, to vote by secret ballot in any election. The freedom of citizens to exercise their political rights under this article is considered a key principle of the electoral system, the fulfilment of which IEBC is required by article 81 to ensure.

166. In the same vein, voting in 'periodic genuine elections' is a well-established right according to international human rights law. It is enshrined in the *1948 Universal Declaration of Human Rights* (UDHR) and the *1966 International Covenant on Civil and Political Rights* (ICCPR). The decision to postpone an election and prevent citizens, albeit temporarily, from exercising their regular right to vote is therefore a weighty choice which should be made only in a very limited and exceptional set of circumstances.

167. Previously, in history and even today, these circumstances would include major crises such as civil wars, natural or humanitarian disasters, the prevalence of a deadly pandemic and

technical delays related to logistical issues. There may also be certain inevitable constraints such as fire incidents, bad weather, insecurity, or violence.

168. The 2019 elections in Nigeria were for example postponed by the Independent National Electoral Commission (INEC), the equivalent of IEBC due to logistical and operational challenges which included delays in transporting elections material to some polling centres.

169. There is no doubt that election postponement can have far-reaching ramifications in a country's democratic process and economic activities. It disrupts voters plans, schedules and activities, which in turn affect the voter and the candidates financially, emotionally and psychologically. It can lead to electoral apathy as citizens tend to lose interest in voting when they feel that it may be a waste of their time. This will then impact on the turnout among registered voters. There is also economic loss associated with postponement of election, in addition to loss of reputation of a nation in the international community. The citizens, political parties and candidates are the main victims of election postponement. The latter two categories invest heavily in elections by campaigning, deployment of agents in the polling stations and generally spend huge sums of money to monitor the elections.

170. Many voters travel long distances to ensure that they are present at their polling units to participate in the voting process. Many others close their businesses in order to make the journeys. The postponement of the election will also have an impact on foreign observers, media outlets, security agencies, employers and employees, as well as students. Although in this case it was IEBC that postponed the election, it would have been bound to incur extra costs to deploy personnel and materials for the election but the printers offered to print fresh ballot papers at no extra expense. In addition, its credibility would be damaged by the postponement.

171. We have examined the petitioners' claim against the aforesaid background. For this claim to succeed, the petitioners must demonstrate, first, that IEBC had no authority under the *Constitution* or in law to postpone the elections under any circumstance and secondly, that the postponement was deliberately calculated to suppress voter turnout so as to affect the result by reducing the 1st petitioner's overall votes in order to benefit the 1st respondent.

172. IEBC under the *Constitution* has a wide mandate in so far as the conduct and supervision of elections to any elective body or office is concerned. In the discharge of its general functions and exercise of its powers pursuant to articles 88 and 252 of the *Constitution*, IEBC may perform any functions and exercise any powers prescribed by legislation, in addition to those conferred by the *Constitution* itself.

173. By section 55B (1) of the *Elections Act* there are distinct circumstances when elections can be postponed by IEBC as follows:

> " 55 B. Postponement of Elections by the Commission
>
> 1. The Commission may, where a date has been appointed for holding an election, postpone the election in a Constituency, County or Ward for such period as it may consider necessary where —
>
> a. there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;
>
> b. it is impossible to conduct the elections as a result of a natural disaster or other emergencies,
>
> c. that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed." [Emphasis added].

174. We are satisfied, on the basis of the foregoing provisions of the *Constitution* and statute, and for the reasons proffered, that IEBC had the requisite constitutional and legal authority to postpone elections in the Counties, Constituencies, and Wards in question.

175. Concerning the allegation of voter suppression, we start by stressing that voter suppression is generally recognized as a political strategy which takes many forms but whose practical effect is ultimately to reduce voting by deliberately discouraging or preventing targeted groups of people from exercising their right to vote. The ultimate aim of this scheme is to influence the outcome of an election in favour of a preferred candidate. Suppression of votes may range from the seemingly harmless requirements, like strict voter identification rules. If, for instance a registered voter cannot be identified by the KIEMS kit it may amount to suppression if the election officials were to turn away the voter, instead of resorting to the voters' manual register, and if this is on a scale that is likely to lead to systemic disenfranchisement.

176. Though the very purpose of voter registration is to ensure that every adult person who qualifies to vote in an election is registered as a voter, voter registration can be used as a tool for suppressing votes of some communities by not availing registration facilities in time or at all to those communities.

177. Under article 88(4) of the *Constitution*, IEBC is not only responsible for the continuous registration of voters but also for the regular revision of the voters' roll. This latter role is critical in cleaning up the voters roll by removing from the roll voters who have died, or become ineligible to vote for other reasons or updating it with newly registered voters or those who have transferred their votes to other stations. Yet this process may be turned into a tool of mass disenfranchisement, purging eligible voters from rolls for illegitimate reasons or by design retaining deceased voters. A single purge can stop many people from voting. Often, voters will only learn they have been erroneously purged when they show up at the polls on election day and when it is too late to correct the error, considering that not every voter utilizes the window before election to verify their details in the roll.

178. These are but only examples of how voter suppression can be achieved using the very legal structures and processes that are meant to realize the principles of our electoral system, which include universal suffrage based on the aspiration for fair representation and equality of vote; free and fair elections; and elections that are free from improper influence or corruption.

179. By way of comparative experience, in the Democratic Republic of the Congo, now a partner State of the East African Community, during the elections held on December 30, 2018 there were allegations of serious instances and methods of voter suppression as reported by the Human Rights Watch in an article "*DR Congo: Voter Suppression, Violence*" (2019), where it is reported that more than 1 million eligible voters were denied the right to cast their ballot. The article makes note of the following:

> "More than a million Congolese were unable to vote when voting was postponed until March 2019 in three opposition areas. Other voters were unable to cast votes because of the last-minute closure of more than 1,000 polling stations in the capital, Kinshasa, problems with electronic voting machines and voter lists, and the late opening of numerous polling places across the country. People with disabilities, or who are elderly or illiterate, faced particular difficulties at polling places or using the voting machines, which had never before been used in Congo. Election observers were also denied access to numerous polling stations and vote tabulation centers."

180. The very essence of voter suppression, to disenfranchise voters, therefore goes against the letter and spirit of article 38 of the *Constitution* which guarantees every citizen the right to make political choices based on universal suffrage.

181. The *Constitution* enjoins IEBC in article 86 to ensure that, whatever voting method is used in an election, the system must be simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly.

Voting must therefore be as easy and accessible as possible and our nascent democracy will work best when all eligible voters can participate and have their voices heard in the ballot.

182. Back to the ultimate question under the second limb of this ground, whether there was voter suppression, the burden rests on the petitioners to demonstrate that as a result of the postponement of elections in the named electoral units, a particular number of voters or a specific group of people were unable to cast their ballots. This in our view, requires presentation of empirical evidence.

183. The petitioners have not only failed to present any such evidence, but have also not shown that the postponement was actuated by malice or bad faith or that it was influenced by irrelevant factors and considerations. However, from the explanation tendered by IEBC, we are satisfied that the postponement was occasioned by a genuine mistake, attributed to the printers, who are based abroad, in Athens, Greece. This fact and the discovery having been made only on the eve of the election, placed the situation out of hand. In our view, though, this mix-up could have been avoided had the members and staff of IEBC been more diligent when they went to inspect the templates in Athens. In that delegation too, were representatives of political parties and other groups. A mistake of this nature could have been avoided if IEBC exercised due diligence by counter checking and verifying the correctness of every detail in all the templates before approval of the printing. This is a basic standard operating procedure in printing especially of such a magnitude.

184. However, despite this infraction or lack of due diligence on the part of IEBC, there is absence of any empirical data, to persuade us that the postponement of elections was meant to suppress voter turnout. The data presented by the petitioners which was countered by IEBC with data from neighboring Counties as demonstrated elsewhere in this Judgment cannot form a basis upon which we can conclude, as a matter of fact or evidence, that the postponement affected voter turnout as a consequence of which the 1st petitioner, alone, as a Presidential candidate suffered a disadvantage. At any rate, the nature of the ballot being an individual decision and secret, there may be other variables to which the turnout in the named units can be attributed. From the evidence on record, however, it appears to us that this year's General Election recorded one of the lowest turnouts since the reintroduction of multi-party political system, some 30 years ago. If there was a low voter turnout, it affected all the six categories of candidates and its explanation, in our view lies elsewhere but certainly not a calculated suppression.

185. On the other hand, in rebuttal to these claims, IEBC illustrated, with examples, to our satisfaction that there was no nexus between the postponement of elections and voter turnout in the affected units; and that voter turnout in the neighbouring Counties was no different from the two Counties in question. For instance, the voter turnout for Kakamega, Vihiga and Bungoma Counties was 60.29%, 60.13% and 63.51% respectively. Similarly, the

voter turnout in Mombasa County compared to Kilifi County was shown to be 43.76% against 49.03%. Far from the fact that this claim was undoubtedly just another red herring, it has nothing to do with the question under review, and accordingly we reject it and hold that there is no proof that the postponement resulted in voter suppression to the detriment of the 1st petitioner.

ii. Finding and Conclusion

186. We conclude this issue by stating that:

a. We are satisfied that IEBC had the requisite constitutional and legal authority to postpone election in the Counties, Constituencies and Wards in question.

b. The petitioners have not only failed to present any evidence to prove that the postponement led to suppression of voter turnout, but also to show that the postponement was actuated by malice or bad faith or that it was influenced by irrelevant factors and considerations.

5. Whether there were unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions

187. The 1st and 3rd petitioners urged that there was systematic voter suppression in the 1st petitioner's strongholds and ballot stuffing in certain Counties in the Rift Valley and Central parts of Kenya in favour of the 1st and 2nd respondents. They alleged that upon analysis of Forms 34C alongside Forms 37C, 38C and 39C in eight Counties namely; Kwale, Nyandarua, Nyeri, Kirinyaga, Turkana, West Pokot, Vihiga and Migori, they discovered some variance between the total number of votes cast for the presidential election and other three elective positions of Governor, Senator and Women Representative. In their estimation, 33,208 votes were cast for the President without corresponding votes for the other three elective positions.

188. By way of samples, based on the affidavit evidence of Martha Karua, Celestine Anyango Opiyo, Arnold Ochieng Oginga and Manyara Muchui Antony, the petitioners alleged that:

i. In Othaya Constituency in Nyeri County the votes cast were 61,879; 62,492 and 44,205 for the Senator, member of the National Assembly and President, respectively. This translated to 18, 287 voters who were unaccounted for the Presidential votes.

ii. In North Imenti Constituency in Meru County, the number of registered voters for the National Assembly was 96,241 yet the number of registered voters for the President was 96,623. The registered voters for the President exceeded the registered voters of the National Assembly by 382.

iii. In the same Constituency, North Imenti, the total number of valid votes and rejected votes for the National Assembly was 62,196 and the number of valid votes and rejected votes for the President was 62,258, meaning that 62 more people voted in favour of President than for member of National Assembly.

189. Based on these allegations, it was the 1st petitioner's position that these irregularities impugned and affected the integrity of presidential results declared by IEBC; that according to regulation 69 (2) of the *Elections (General) Regulations, 2012* –as amended–the Presiding Officer must ensure that in a multiple election a voter is

> "... issued with ballot papers for all the six elections therein at the same time and shall after receiving the ballot papers... cast his or her votes in accordance with regulation 70 without undue delay".

In other words, all the six ballot papers must be dropped in each of the six ballot boxes appropriately marked for each elective position.

190. The 1st petitioner argued that if regulation 70 was followed, the total votes cast for the six positions ought to have been reasonably close, if not exactly the same. In their opinion, the differences between total votes cast for each position ought to have been fully explained by the total number of rejected or invalid votes; and any variance not so explained was prima facie evidence of fraud with the burden of proof shifting to IEBC.

191. The 3rd petitioner expressed similar sentiments of vote differential after sampling votes from twelve Counties. According to Manyara Muchui Antony, the sampled Counties of, Nyeri, Nyandarua, Muranga, Kirinyaga, Kiambu, Laikipia, Tharaka Nithi, Embu, Nakuru, Lamu, Kajiado and Nairobi, revealed that the Presidential votes were 5,009,871 while those of Members of County Assemblies (MCAs) were 4,669,068, making the vote differential between these two positions 340,803 votes. From these figures, the petitioners have urged us to conclude that, either 340,803 voters committed election offences under section 5(g) of the *Election Offences Act, 2016* which prohibits any person without authority to take out of a polling station any ballot paper; or in the alternative, that there were 340,803 incidents of ballot stuffing. To buttress this point, they relied on the decision of the court in the *Gatirau Munya* case wherein the court held that where there was evidence of irregularities of such magnitude that are likely to affect the election result, then such an election stands to be invalidated.

192. The 1st respondent's response to these claims was through the affidavit of Ashif Kassam sworn on August 26, 2022. Ashif Kassam is an Executive Chairperson of RSM Eastern Africa LLP, a firm of certified accountants licensed by the Institute of Certified Public Accountants of Kenya. He was instructed by the 1st respondent to undertake an analysis

of the votes captured in Form 34A and 34C and to respond to the issues raised by the petitioners. His evidence was to the effect that the vote differential in respect of the eight Counties cited by the petitioners related to votes from prisoners, who voted only for the President and not the other positions. The other factor to be considered was the rejected votes and stray ballots which are not included in the count for valid votes.

193. On the variance of 33,208 votes in respect to 8 named Counties, Ashif Kassam responds as follows:

a. Kwale County - The total valid results for gubernatorial should exclude the votes from 63 prisoners who do not vote for other elective positions including governor, but for President only.

b. Nyandarua County – variance is 608 votes.

c. Nyeri County - The figure in the Petition for gubernatorial results reflected as 335,709 is wrong as the actual declared valid votes is 328, 295 based on Form 37C. The Presidential votes stated does not consider 368 rejected votes and the votes from prisons in that County.

d. Kirinyaga County – The figure of 237,183 in the petition for gubernatorial results is incorrect as the actual declared valid votes is 261, 823 from Form 37C, and from which there are 136 votes from prisons.

e. Turkana County - The votes from prisons in that County is 26.

f. West Pokot County - The figure of 174,775 in the petition for gubernatorial results, is incorrect as the actual declared valid votes are 174,709 according to Form 37C, with votes from prisons in that County being 16.

g. Vihiga County had 20 votes from prisons for the presidential position.

h. Migori County - The votes from prisons were 34 votes for the presidential position.

194. Further, the deponent stated that the petitioners' analysis and the figure of 33,208 failed to factor in stray ballots, which are not accounted for in either of the A's series Forms for either election, considering that ordinarily stray ballots would vary for each election thus creating a variance. In light of the foregoing, Ashif Kassam concluded that the overall variance for the mentioned Counties added up to 718 votes and not 33,208. Overall, his analysis of all 47 Counties revealed that there were 791 less votes cast for the President than for the other County positions.

195. The Chairperson of IEBC and Moses Ledama Sunkuli in their sworn evidence agreed with the analysis of Ashif Kassam on the question of variance between votes cast for the

presidential election and the other positions, but reiterated that the alleged variance is not a strange phenomenon given that the same was in this election occasioned by a myriad of factors including; voters in diaspora and prisons who are eligible to vote only for the President, stray ballots, rejected votes and spoilt votes.

196. The postponement of gubernatorial elections in Mombasa and Kakamega Counties was another factor, so was the exclusion of votes cast in Dawardey Community Planning polling station in Garissa County which had 90 registered voters in the tally for the gubernatorial election.

(ii) Analysis of Evidence

197. Have the 1st and 3rd petitioners discharged the burden and proved their claim to the required standard? As discussed in preceding paragraphs, were there unexplainable discrepancies between the votes cast for presidential candidates and those of other elective positions equal to 33,208 votes which therefore affected the overall results?

198. We understand ballot stuffing, which includes illegal addition of extra ballots, to be a type of electoral fraud aimed at swinging the results of an election towards a particular direction. Not a single document has been presented by the 1st or 3rd petitioner to prove systematic ballot stuffing. A figure of 33,208 votes relied on in this claim is based on unproven hypothesis, that since the number of votes cast for President is higher than those for the other positions then, without more, it must follow that there was fraud committed in the form of ballot stuffing.

199. The petitioners have also cited regulation 69(1)(d) of the *Election (General) Regulations, 2012* in order to emphasize the fact that, because IEBC failed to cross out voters' names from the printed register after they had cast their votes, the variance in Presidential votes must logically lead to the conclusion that there was fraudulent ballot stuffing.

200. Regulation 69 states:

> " 69 Voting Procedure
>
> 1. Before issuing a ballot paper to a voter, an election official shall—
>
> a. require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;

> b. ascertain that the voter has not voted in that election;
>
> c. call out the number and name of the voter as stated in the polling station register;
>
> d. require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the printed copy register once the image has been retrieved."

201. We understand the petitioners to be saying that failure to cross out the name of the voter from the printed copy of the register once the image has been retrieved by the KIEMS kit allowed "overvoting" particularly in respect of the presidential position as manifested by the variance in the votes cast for different positions.

202. Under the complementary mechanism, the presiding officers could only use the printed register in case the KIEMS kits completely failed. There is no requirement, therefore, as claimed by the petitioners, for recourse to the printed register, whether for purposes of voter identification or for crossing out the name after identification.

203. Moreover, the mere crossing out of the name from the voters' register does not in itself address the issue of votes cast as the voter turnout is sufficient to determine the number of votes cast for whatever position. From the functionality of the KIEMS kit, it is possible to tell how many people were identified at any given polling station.

204. Fraud being a serious criminal offence its proof requires a higher standard; beyond reasonable doubt. Under section 5 (n) of the *Election Offences Act*, it is an offence for a person to vote more than once in any election. This court in *Raila 2017* declared in the passage below that where there are allegations of a criminal nature, the standard of proof remains the one required in criminal cases, beyond reasonable doubt:

> "(152) We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt..." [Emphasis added].

205. IEBC, in response to the claims of vote differential has proffered plausible explanation as follows. There are categories of voters who only vote for the President and no other

candidate in an election. These are prisoners and Kenyans in the diaspora. There were also an insignificant number of stray votes, whose combined effect do not meet the threshold in section 83 of the *Elections Act* to demonstrate that there was systematic stuffing of ballots in favor of the 1st respondent so as to justify nullification of the election.

206. Finally, a General Election in Kenya comprises six (6) different and separate elections held concurrently on the same day with voting being by secret ballot. It is impossible to predetermine the voter turnout or voters' candidate preferences in each election. None of the parties has flagged anything so significant that would have affected the outcome of the Presidential Election vis á vis the other five elections held on that day.

(ii) Finding and Conclusion

207. We find, in those circumstances, that:

a. There were no unexplainable discrepancies between the votes cast for presidential candidates and other elective positions.

b. The explanation for this differential was satisfactorily given those voters who only vote for the President and no other candidate in an election, prisoners and Kenyans in the diaspora. There were also an insignificant number of stray votes.

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*

208. This issue arises from the pleadings in all the Petitions as consolidated. Based on the said pleadings, the affidavits sworn in support thereof, and the written and oral submissions by the parties, two viewpoints regarding the meaning, scope, and application of article 138(3)(c) and (10) of the *Constitution* were advanced.

209. On the one hand, the petitioners submitted that pursuant to the foregoing provisions, the role of verifying and tallying of votes as received from polling stations countrywide, is vested in the Commission as a corporate entity and not the Chairperson of IEBC. It was their argument that the Chairperson cannot undertake this task to the exclusion of other Commissioners. They submitted that the language of article 138(3)(c), does not envisage a situation where the Chairperson, can arrogate to himself unfettered authority to verify and tally the results at the NTC, without involving the other Commissioners. Such action, they contended, would not only be unconstitutional, but would be sufficient ground without more, to nullify an election of a President-elect. In support of their argument, the petitioners cited the Court of Appeal decision in the *Maina Kiai* case as affirmed by this court in *Raila 2017*. The petitioners further submitted that regulation 87(3) of the *Elections (General)*

Regulations, 2012 is unconstitutional, to the extent that it purports to vest the power of verification and tallying in the Chairperson of IEBC.

210. On the other hand, the 1st, 2nd and 3rd respondents submitted that the power to verify, tally, and declare results of a presidential election at the NTC, is the exclusive preserve of the Chairperson of IEBC. According to them, there is nothing unconstitutional about Regulation 87 (3) of the *Elections (General) Regulations, 2012*. The said regulation, the respondents submitted, makes no mention of Commissioners, other than the Chairperson.

211. At any rate, the respondents argued, article 138(3)(c) of the *Constitution*, does not envisage a situation where it is the Commissioners who personally undertake the task of verifying and tallying the results as entered onto the thousands of Forms 34A. Such an undertaking, would be humanly impossible, they submitted. For good measure, the respondents submitted that section 11A(a) of *IEBC Act* provides that the Chairperson and members of the Commission are responsible for the formulation of policy and strategy of the Commission and oversight. In their view, the Act does not contemplate a situation where Commissioners would be directly involved in the verification and tabulation of presidential election results. The task of verification and tallying, submitted the respondents, is executed by staff of the Commission under the direction and supervision of the Commission Secretary, who in turn reports to the Chairperson.

212. As to whether the Chairperson acted unilaterally in verifying and tallying the presidential election results at the NTC, the petitioners claimed that indeed, this is what happened. It was the petitioners' case that the Chairperson, published Gazette Notice No 4956 of 2022 in which he designated himself as the 'Presidential Returning Officer', a position unknown in law and the *Constitution*. Having done so, the petitioners stated that the Chairperson proceeded to conduct the verification and tallying process, to the exclusion of the other Commissioners each of whom he had assigned peripheral roles unrelated to the verification and tallying exercise.

213. On his part, the Chairperson of IEBC submitted that although he has the exclusive authority to verify and tally the Presidential Election results as received at the NTC, he did involve all the other Commissioners in the exercise, before eventually declaring the final result. He submitted that he did this in the spirit of teamwork. The Chairperson of IEBC stated that indeed, the four Commissioners were involved in the preparation of the 9th August General Election from the time of their swearing into office, all the way to the verification and tallying of the results at the NTC, until they withdrew from the exercise, just when he was set to declare the final result.

i. Analysis of Evidence

214. The court must therefore interpret and settle the meaning, scope, and application of article 138(3)(c) and (10) of the *Constitution*. The first port of call is article 259 (1) of the *Constitution*. It stipulates:

> (1) This Constitution shall be interpreted in a manner that:
>
> a. Promotes its purposes, values and principles;
>
> b. Advances the rule of law, and human rights and fundamental freedoms in the bill of rights;
>
> c. Permits the development of the law; and
>
> d. Contributes to good governance.
>
> (2) .....
>
> (3) ...
>
> Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking..."

215. We must also emphasize that the starting point of constitutional interpretation is the text itself. As long as the text is clear and unambiguous, courts of law have to remain faithful to the natural and literal meaning of the words used in the *Constitution*. However, as this court has previously cautioned in past decisions, care should always be taken to avoid textual absurdity. We cannot over- emphasize the fact that the *Constitution*, is a living document that is always speaking.

216. It is against this background, that we seek to clarify the dictates of the *Constitution* regarding the mandate of IEBC and its Chairperson, in terms of their interconnected roles in the verification, and tallying of presidential election votes. article 88 (4) of the *Constitution* provides that – IEBC shall be responsible inter alia for:

> " ... conducting or supervising referenda and elections to any elective body or office established by [the] Constitution, and any other elections as prescribed by an Act of Parliament..."

217. article 88(5) provides that:

> " The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation."

218. The provisions of article 88 of the *Constitution* must be read together with the provisions of chapter fifteen of the *Constitution* on 'Commissions and Independent Offices'. article 248(2)(c) lists IEBC as a Constitutional Commission, to which the provisions of chapter fifteen apply. It is notable that article 248 creates two categories of bodies: Commissions, which are multi-member bodies consisting of at least three but not more than nine members by dint of article 250(1); and Independent Offices, those which vest the mandate of such bodies in a single office holder. In terms of section 5(1) of IEBC Act, the Commission consists of a Chairperson and six other members. At the time of the presidential election, the Commission was fully constituted.

219. It is not lost to us that as with all multi-member bodies, the position of Chairperson is provided for to preside over the Commission. Pursuant to this reality, article 250 and sections 5 and 6 of *IEBC Act* provide for appointment of the Chairperson and members of the Commission. The mandate and powers of the Chairperson so created is provided for in the *Constitution* and to a certain extent, the enabling legislation.

220. Pursuant to article 88(4) of the *Constitution* and similar provisions replicated under section 4 of *IEBC Act*, the general or plenary powers and responsibility relating to the conduct or supervision of referenda and elections to any elective body or office, vests in the Commission. This then must mean that unless there are clear textual departures in the *Constitution*, all the powers and functions of the Commission are vested in the Commission as a collective body and must be exercised by the Commissioners acting collectively.

221. Put differently, the broad powers vested in the Commission and typified in section 11A(a) of *IEBC Act* as 'formulation of policy and strategy of the Commission and oversight', ought to be understood as being vested in the collectivity of the Chairperson, and members of the Commission. The Commission must meet, act, and make decisions collectively in discharging these mandates. It would therefore be wrong to interpret the *Constitution* and statutory scheme regulating the operations of IEBC, as having vested sole authority on the Chairperson, to the exclusion of the Commissioners. Each of the members of the Commission is a constitutional office holder in his/her own right. Therefore, it cannot be constitutionally sound to expect that the Chairperson of the Commission can override, veto, or ignore the other Commissioners when discharging mandates vested in the Commission. In case a responsibility is exclusively vested in the Chairperson, the *Constitution* expressly and unambiguously provides so. This is evident in the following provisions:

222. article 138(3)(c) of the *Constitution*, provides as follows:

> "In a presidential election - after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result."

223. Whilst, article 138(10) 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" [Emphasis added].

224. Also important are the statutory provisions implicated in this dispute. section 39 (1C) (b) and (d), (1H), and (2) of the *Elections Act* provide as follows:

> 39(1C) For purposes of a Presidential Election, the Commission shall —
>
> a. ...;
>
> b. tally and verify the results received at the Constituency tallying centre and the national tallying centre; and
>
> c. publish the polling result forms on an online Public Portal maintained by the Commission.
>
> ...
>
> 39 (1H) The chairperson of the Commission shall declare the results of the election of the President in accordance with article 138(10) of the *Constitution*.
>
> 2. The Chairperson may declare a candidate elected as the President before all the Constituencies have transmitted their results if the Commission is satisfied the results that have not been received will not affect the result of the election.
>
> 3. The Commission shall announce the final results in the order in which the tallying of the results is completed."

225. It is the petitioners' case that the Chairperson, undertook the tallying, verification, and declaration processes to the exclusion of four Commissioners. In effect, their claim is that the Commission did not undertake the processes of tallying, verification, and declaration as a collective body. This is said to be the reason behind the walk-out by the four Commissioners, and their denunciation of the declared result. This brings into sharp focus the question, as to what role is vested in the Commission vis á vis the Chairperson.

226. Both the Supreme Court and the Court of Appeal have in the past made pronouncements regarding the import of articles 138(3)(c) and 138(10) of the *Constitution*.

227. In the *Maina Kiai* case, the learned judges of the Court of Appeal had this to say:

> " It is, in our view, fallacious and flies in the face of the clear principles and values of the *Constitution* to claim that the Chairperson of the appellant can alone, at the national tallying centre or wherever, purport to confirm, vary or verify the results arrived at through an open, transparent and participatory process as we have already set out.

article 138(3)(c) buttresses this argument. It stipulates that;

> " (3) In a presidential election—
>
> ...
>
> (c) after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.'
>
> Our interpretation of this article is that the appellant, which is represented at all the polling stations, Constituency and County tallying centres can only declare the result of the presidential vote at the Constituency tallying centre after the process we have alluded to is complete, that is, after tallying and verification."

228. In *Raila 2017*, this court opined thus:

> " What of article 138(3)(c) of the *Constitution*? It provides that:
>
> > 'in a presidential election - after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.'
>
> The critical element here is the duty placed upon the Commission to verify the results before declaring them. To ensure that the results declared are the ones recorded at the polling station. Not to vary, change or alter the results.
>
> The duty to verify in article 138 is squarely placed upon the Independent Electoral and Boundaries Commission (the 1st respondent herein). This duty runs all the way, from the polling station to the Constituency level and finally, to the National Tallying Centre. There is no disjuncture in the performance of the duty to verify. It is exercised by the various agents or officers of the 1st respondent, that is to say, the Presiding Officer at a polling station, the Returning Officer at the Constituency level, and the Chair at the National Tallying Centre."

229. Subsequently, the Supreme Court in *Raila Amolo Odinga & another v IEBC & Another; Presidential Petition No 1 of 2017*; [2017] eKLR (Raila 2017 Clarification Ruling) observed that:

> " With due respect, we find this question as framed, either mischievous, or informed by an inexplicable lack of understanding of the *Constitution*, the *Elections Act*, and the judgment of this court, not to mention the judgments of the Court of Appeal and the High Court regarding the duty of the 1st respondent [IEBC] to verify, accurately tally, and transmit the results of a Presidential Election coupled with the duty of the 2nd respondent [Chairperson of IEBC] to verify, accurately tally, and declare the results of the election of the President."

230. We must hasten to clarify that the responsibility of tallying and verifying the results of a presidential election at the NTC, vests in the Commission as a collective entity (article 138(3)(c)); while that of declaring the result, vests exclusively in the Chairperson, (article 138 (10)). The collectivity of the Commission must be viewed in the context of its extant roles during the preparation for, and actual conduct of a general election. In this regard, the Commission may at one time, be the Chairperson and the requisite number of other Commissioners. At another time, it may be the foregoing, and staff of the Commission. Yet at other times, the Commission may comprise of the Chairperson, the requisite number of

other Commissioners, staff of the Commission, and agents of the Commission, including but not limited to, Presiding Officers, and Returning Officers.

231. What this means is that the Chairperson, the Members of the Commission, and the secretariat (employees) are envisaged to undertake the article 138(3)(c) mandate. it has to be appreciated that pursuant to the terms of section 11A (b) of the *IEBC Act*, the Commission has a full-fledged secretariat headed by the Chief Executive Officer which is responsible for performing

> "the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission".

This acknowledges the reality that the Commissioners on their own, cannot undertake the huge enterprise of elections administration and management and other mandates vested in the Commission.

232. Relevant to the present dispute is the fact that while the staff of the Commission, undertake the "day-to-day administrative functions", they remain under the oversight of the Commission (Chairperson and other Commissioners). Given that the oversight mandate with respect to the tallying and verification is vested in the Commission, the Chairperson cannot exclude any member or members of the Commission from the execution of these twin constitutional and statutory mandates as they are vested in the Commission as a collectivity.

233. It is important to point out that nowhere in the *Constitution*, is the Chairperson of IEBC granted special or extraordinary powers with regards to the tallying or verification of results to be exercised by him or her alone without regard to the rest of the Commissioners. 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*.

234. Contrary, to this constitutional position, there were submissions made to the court which implied that IEBC has an 'Executive Chairperson'. Such an argument, goes against the constitutional scheme that seeks to build a strong collegiate institution. Consequently, to the extent that regulation 87 (3) of the *Elections (General) Regulations, 2012* purports to vest the power of verifying and tallying presidential election results, as received at the NTC, solely on the Chairperson to the exclusion of other members of the Commission, the same is contrary to and inconsistent with the provisions of the *Constitution*.

235. Given the view that Commissioners ought to exercise oversight over the tallying and verification process, it becomes necessary to interrogate whether the petitioners proved

to the requisite standard that the Chairperson of the Commission excluded the four Commissioners from the tallying and verification process.

236. The petitioners founded their case on press releases by four members of the Commission. These were the 5th to 8th respondents namely Juliana Cherera, the Vice Chairperson, Francis Wanderi, Justus Nyang'aya, and Irene Masit. The four Commissioners lamented that they were excluded from the tallying and verification process of the Presidential Election returns. They filed replying affidavits expounding on this allegation. Likewise, in oral submissions, counsel for the petitioners pointed out that the replying affidavit of the Chairperson supported their argument of exclusion. They submitted that the said Commissioners had been assigned peripheral roles unconnected to the tallying and verification exercise.

237. A consideration of the evidence before the court shows that all the four Commissioners, were involved in activities relating to the processing of results. In particular, they did not controvert the evidence that they announced results from several Constituencies upon the conclusion of the tallying and verification of the results. The four Commissioners actively participated in the verification and tallying exercise, from the beginning, up-to and until just before the declaration of the result by the Chairperson. They took turns announcing the results as verified and tallied and were present and active during the actual verification and tallying at the NTC. An example is Justus Nyang'aya, who on one occasion stood on the podium to announce to the public, an adjustment that had been occasioned by errors of tabulation.

238. The events of August 15, 2022 therefore came as a surprise. As the public waited for the Chairperson of IEBC to declare the final result, sporadic violence broke out at the NTC. The violence was swiftly contained by security forces, but there was unexpected drama, as two different factions of the Commission began to emerge. Kenyans found themselves watching an appalling split screen scenario on their television sets. On one part of the screen was the Chairperson, readying himself to declare the result in accordance with article 138 (10) of the *Constitution*. On the other part of the screen were four Commissioners on the lawns of the Serena Hotel-Nairobi, from where they announced that they would not "own" the result that was soon to be declared by their Chairperson.

239. The four Commissioners informed the public of their rejection of the yet to be announced result, terming it "opaque" due to the manner in which the Chairperson had been conducting the verification and tallying exercise. In his affidavit dated the August 25, 2022 Justus Nyang'aya averred that the Chairperson's actions during the tallying and verification exercise at NTC, made it difficult to ascertain the total number of votes cast, and the actual number of votes attained by each candidate, so as to enable him authoritatively state whether the Commission had declared accurate results.

240. All the petitioners anchored their arguments for the nullification of the 9th August Presidential Election, *inter alia*, on the walk-out from the NTC by the four Commissioners. They contended that by rejecting IEBC's results on grounds of opaqueness of the verification and tallying process, they called into question, the credibility of the entire election. They further submitted that being in the majority out of the seven-member Commission, their view should prevail and the election should be nullified. It was the petitioners' argument, therefore, that a dysfunctional Commission could not deliver a credible election.

241. 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.

242. 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.

243. The other limb of this issue, relates to whether the results from twenty- seven disputed Constituencies were tallied and verified. Whilst the petitioners argued that the results from the subject twenty-seven Constituencies were not tallied and verified, IEBC in its evidence pointed out that the results from these Constituencies were tallied and verified and the only process that was not undertaken was the announcement of the results for these Constituencies. It was not disputed that the results from these Constituencies, were actually included in the final tally declared by the Chairperson.

ii. Finding and Conclusion

244. In view of the foregoing, we are satisfied that:

a. Notwithstanding the divisions apparent between the Chairperson and the four Commissioners, IEBC carried out the verification, tallying, and declaration of results in accordance with article 138(3)(c) and (10) of the *Constitution*.

b. The mandate of tallying and verification of votes is vested in the Commission as a collectivity, and the Chairperson cannot exclude any member or members of the Commission. However the declaration of results vests exclusively in the Chairperson.

c. The Chairperson does not have executive, special or extraordinary powers with regards to the tallying or verification of results.

7. Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with article 138(4) of the *Constitution*

245. The 1st, 2nd, 3rd, 4th and 6th petitioners averred that the 1st respondent did not garner 50% + 1 of the total votes cast and therefore, did not meet the threshold provided for under article 138(4)(a) of the *Constitution*. They anchored their claims on the basis that in order to determine whether a candidate has attained 50% + 1 of the votes cast, this ought to be calculated based on the total number of votes cast excluding rejected votes. They urged that 50% of 14,353,165 which in their view were the valid votes cast, amounted to 7,176,582.77 votes. They contended that by attaining 7,176,141 votes, the 1st respondent did not meet the constitutional threshold to be declared President-elect.

246. The 1st, 2nd, 3rd, 4th, and 6th petitioners' contention was founded on the backdrop of a press briefing issued by the Chairperson of IEBC after the official closure of voting on August 9, 2022. In their opinion, the Chairperson of IEBC announced that the voter turnout was 65.4% of the total number of registered voters, based on the verification of the KIEMS kits which were functional during the process of voting. In addition, they urged that the voter turnout of 65.4% did not include 235 polling stations where the KIEMS kits had malfunctioned necessitating the use of the manual register. It was, therefore, urged that the minimum number of votes cast could not be less than 14,466,779. Additionally, it was argued that this number was bound to increase once the number of votes from the areas that used the manual register were included. The petitioners further claimed that a summation of the minimum number of votes cast and untallied manual votes would represent the actual voter turnout.

247. In challenging the declaration made by the Chairperson of IEBC, the petitioners averred that the final tally published in Form 34C only accounted for 14,326,641 votes cast, including 113,614 rejected ballots. They contended that this tally did not factor in 140,138 votes cast using the manual register. They computed this number by subtracting 14,326,641 declared votes cast from 14,466,779 generated by the 6th petitioner as representing 65.4% of the voter turnout.

248. Referring to the tallies in Form 34C, the 1st, 2nd, 3rd, 4th and 6th petitioners summed the number of votes cast for each candidate as follows: Raila Odinga (6,942,193), William Ruto (7,176,141), Waihiga Mwaure (31,987) and George Wajackoyah (61,969) adding to a total of 14,213,027. They then added 140,138 alleged to be untallied votes. This yielded a total of 14,353,165 total valid votes which the said petitioners used to compute the percentages garnered by each candidate as follows: Ruto (49.9%), Raila (48.372%), Waihiga (0.22%), and Wajackoyah (0.431%). It is on this basis, that the 6th petitioner grounded the claim that none of the candidates met the constitutional threshold set in article 138(4)(a).

249. IEBC and its Chairperson, in response, disputed the 1st, 2nd, 3rd, 4th, and 6th petitioners' claims. They submitted that the declaration of results is based on the number of people identified as having voted on the KIEMS kits and not the total persons on the Register of Voter's, as alleged. They contended that the final voter turnout comprising of voters who were identified through the KIEMS kits and those who voted manually was 64.76% and not 65.4% as alleged by the petitioners. They urged, that the announcement error by the Chairperson of IEBC on August 10, 2022, was immediately clarified during the same press briefing. Evidence of this correction was provided to this court in the affidavit of the 1st and 2nd respondents in Presidential Election Petition No E007 of 2022.

250. According to IEBC and its Chairperson, 14,239,862 voters were identified using the KIEMS kits while 86,889 voters were identified using the printed Register of Voters. Thus, the total valid votes cast were 14,213,137 while the total number of rejected ballots were 113,614 constituting 14,326,751 total votes cast. They illustrated that the 1st respondent garnered 7,176,141 votes against 14,213,137 total valid votes cast yielding a percentage of 50.49% to meet the requisite constitutional threshold for a candidate to be declared President-elect. In the upshot, the percentage attained by each candidate was as follows: Raila Odinga (48.84%), William Ruto (50.48%), David Waihiga Mwaure (0.22%), and George Luchiri Wajackoyah (0.43%).

251. IEBC and its Chairperson also admitted that the KIEMS kits malfunctioned in 235 polling stations necessitating the use of the printed Register of Voters. In these polling stations, backup KIEMS kits were later deployed for purposes of results transmission.

252. The 1st respondent in response to the question of 50%+1 constitutional threshold, maintained that he attained the threshold under article 138(4) of the *Constitution* as elaborated by IEBC and its Chairperson.

253. On its part, LSK admitted as *amicus curiae*, urged us to include rejected votes in the computation of the constitutional threshold of 50%+1 vote under article 138(4) (a) of the *Constitution*. The *amicus curiae* argued the *Constitution* does not use the words "valid votes" but votes cast as per articles 138(4) and 86(b); that the phrase "valid votes" is only a creature of Regulations 69(2), 70, 77(1), and 78 of the *Elections (General) Regulation, 2012* which contradict the *Constitution*; and that to disregard rejected votes, which in their view can be interpreted to either mean a protest vote or a demand of an absolute majority, will amount to limitation of the right to vote pursuant to article 38.

254. LSK asked that we be persuaded by the provisions in section 5(3)(f) of the retired *Constitution*; the CKRC Final Report; article 158(4) of the Bomas Draft Constitution; article 149(4) of the *Wako Draft*; and article 121 (4) of the Parliamentary Select Committee Report draft. In that context, they joined the 4th petitioner to submit that we ought to depart from this court's earlier finding on rejected votes in *Raila 2013* and *Raila 2017* where we interpreted the words 'votes' to mean 'valid votes' in distinguishing the same from a ballot paper.

i. Analysis of Evidence

255. This court has considered the differing formulas and threshold arguments presented by various parties to this petition. While the 1st, 2nd, and 3rd petitioners raised pertinent questions connected to this issue, we shall address them together with those of the 6th petitioner who has addressed and focused on the issue as specifically framed in detail.

256. It must be restated that the case made by the 1st, 2nd, 3rd, 4th, and 6th petitioners concerns a data-specific threshold enunciated under article 138(4) of the *Constitution* without the attainment of which, there can be no declaration. This data-specific threshold is what this court in the *Harun Mwau* case referred to as the ultimate yardstick for determining the winner in a presidential contest.

257. In Raila 2013, this court affirmed 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. We stated as follows:

> " 280. The regulations made by IEBC have no provision for "rejected votes", though they provide for "rejected ballot papers", "spoilt ballot papers", and "disputed votes". It is clear that "spoilt ballot

papers" are those which are not placed in the ballot box, but are cancelled and replaced where necessary, by the Presiding Officer at the polling station. This differs from the "rejected ballot papers" which,although placed in the ballot-box, are subsequently declared invalid, on account of certain factors specified in the election regulations – such as fraud, duplicity of marking, and related shortfalls.

281. No law and no regulation brings out any distinction between "vote" and "ballot paper", even though both the governing statute and its regulations have used these terms interchangeably. We have to draw the inference that neither the Legislature, nor IEBC, had attached any significance to the possibility of differing meanings; which leads us to the conclusion that a ballot paper marked and inserted into the ballot-box, has consistently been perceived as a vote; thus, the ballot paper marked and inserted into the ballot-box will be a valid vote or a rejected vote, depending on the elector's compliance with the applicable standards.

282. Since, in principle, the compliant ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, will not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate.

283. In that sense, the rejected vote is void. This leads to the crucial question in Petition No 3: why should such a vote, or ballot paper which is incapable of conferring upon any candidate a numerical advantage, be made the basis of computing percentage accumulations of votes, so as to ascertain that one or the other candidate attained the threshold of 50% + 1, – and so such a candidate should be declared the outright winner of the presidential election, and there should be no run-off election?"

258. In answering the above question, the court held that votes cast for the purpose of ascertaining the constitutional threshold under article 138(4) of 50% +1 "refers only to valid votes cast, and does not include ballot papers, or votes, cast but are later rejected for non-compliance with the terms of the governing law and regulations."

259. Consequently, we are not persuaded by the 4th petitioner and LSK who urged us to reconsider our position on this finding. We reiterate that rejected votes cannot be taken into

account when calculating whether a presidential candidate attained 50% +1 of votes cast in accordance with article 138 (4) of the *Constitution*.

260. Similarly, in the same *Raila 2013*, the court laid down the parameters of burden and standard of proof for electoral disputes relating to data specific electoral requirements. At paragraph 203, the court clarified that:

> " In the case of data-specific electoral requirements (such as those specified in article 138(4) of the *Constitution*, for an outright win in the Presidential Election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."

261. The question that follows, was whether the petitioners challenging the attainment of the 50%+1 constitutional threshold and the computations by the 1st, 2nd, 3rd, 4th, and 6th petitioners in general, met the standard of proof settled by this court in *Raila 2013*.

262. The premise of the petitioners' percentage computation was a press briefing made by the Chairperson of IEBC on August 10, 2022. When the evidential burden shifted to IEBC and its Chairperson as it does in election cases, they produced video evidence correcting the percentage of voter turnout to 64.76% (at the time of the briefing). This percentage however did not include reports from all the KIEMS kits and 86,889 voters who were identified manually using the printed Register of Voters.

263. In our view, the assertion by the petitioners that the percentage of voter turnout was, firstly, predicated on the uncorrected percentage given by the Chairperson of IEBC, was negated by the evidence adduced to prove the correction. Secondly, the petitioners based their percentage of voter turnout on the total number of registered voters while the Chairperson of IEBC made reference, in the press briefing, to the number of registered voters who were identified through the KIEMS kits, progressively.

264. The 6th petitioner also asserted that rounding off of votes cast in a presidential election as a means of assessing the threshold under article 138(4) of the *Constitution* "kills" and "births" voters, which is illegal and unconstitutional. We have deliberated on this proposition and found that it is not mathematically sound and that the rounding off done by IEBC and its Chairperson was correct.

265. Consequently, we find that the petitioners did not provide a watertight case to warrant the setting aside of the results of the presidential election on the basis of not having met the threshold provided under article 138(4)(a) of the *Constitution*.

266. On voter turnout, therefore, we find that the formula predicated on the number of voters identified through the KIEMS kits progressively and used by IEBC and its Chairperson to generate a percentage of 64.76% was correct.

267. Having settled the issue of voter turnout, we must ask ourselves whether in making the declaration, the Chairperson of IEBC applied the formula in article 138(4) of the *Constitution* which is:

$$\frac{\text{Total votes cast (less rejected votes)}}{2} = 50\% + 1 \text{ vote}$$

Given the numbers that were presented to us by IEBC and its Chairperson, this will translate to:

$$\frac{14,213,137}{2} + 1 = 7,106,569$$

ii. Findings and Conclusion

268. The question that must inevitably follow is whether this formula, when applied, will confirm that 7,106, 569 is less than 7,176,141 which represents the number of votes received by the 1st respondent. We find that it is. As such, on the basis of the foregoing formula and from the numbers provided by IEBC and its Chairperson, and the declaration by the Chairperson of the President-elect on August 15, 2022 it is our finding that:

a. The declared President-elect attained 50%+1 of all the valid votes cast in accordance with article 138(4) of the *Constitution*.

b. In calculating whether a presidential candidate has attained 50% +1 of votes cast in accordance with article 138 (4) of the *Constitution* only valid votes cast can be considered. Rejected ballot papers, or votes are void and incapable of conferring upon any candidate a numerical advantage.

8. Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential Election

269. The petitioners have provided numerous instances pointing to possible irregularities and illegalities, marked by failures of technology, alleged voter suppression, printing and utilisation of Book 2 of 2, failure of technology, IEBC indiscretions, transposition anomalies, absence of parties' agents, and many others.

270. The irregularities and illegalities pointed out by the petitioners comprise: fraudulent establishment of parallel Forms 34A; failure of KIEMS kits and late opening of polling stations; interference in the supply and delivery of ballot papers and statutory result declaration forms; postponement of elections in certain units; harassment of Azimio la Umoja One Kenya Coalition party agents; lack of procedures for special voting; reduction of votes for the 1st petitioner and increasing those of the 1st respondent; and, offences and ethical breaches committed by the Chairperson of IEBC contrary to the *Election Offences Act* and *Public Officer Ethics Act* No 4 of 2003. The petitioners took the position that the magnitude of the irregularities and illegalities was so grave to the extent that it affected the outcome of the election.

271. On fraudulent establishment of parallel Forms 34A, the 1st petitioner contended that IEBC and its Chairperson fraudulently ordered the ballot paper printing firm, Inform Lykos Hellas SA, to print a parallel set of Forms 34A and declined to make an order for requisite Forms 34B when printing other election materials. IEBC stated that the Forms 34B would be self-generated from the KIEMS kits after close of polling. Upon the 1st petitioner raising concern, IEBC and its Chairperson invited all presidential election stakeholders and by consensus it was agreed that IEBC would print Forms 34B and would not use Forms 34A Booklet 2 of 2. The terms of that consensus were published in the Kenya Gazette in Gazette Notice No 9280 of August 2, 2022.

272. Several results declaration forms were alleged to contain discrepancies as stated in the affidavits of Martha Karua, Dr Nyangasi Oduwo and Saitabao Kanchory. For instance, they pointed out that the Forms 34A did not have the anti- copy features and IEBC logo at the bottom left corner; that the Forms at the NTC did not show at the foot/tail end as "1 of 2" or "2 of 2"; and that some of the Forms did not have the security features as set out in the tender document or as demonstrated by the service provider during the inspection visit. According to them, in the absence of the physical distinction between the two Forms, it was not possible to ascertain which sets of Forms were used at the polling station putting to question the integrity of the transmission process.

273. The 1st petitioner accused the Chairperson of several election offences and ethical breaches under sections 6, 13 and 17 of the *Election Offences Act*; that the Chairperson made entries in Forms 34A which he knew to be false; omitting to include results; willfully contravening the law to give undue advantage to a Presidential candidate; indirectly procuring election materials without the authority of IEBC; obstructing election officers in the execution of their lawful duties; making a false statement knowing the same to be false; publishing and disseminating information with the intention to influence the outcome of the election; intentionally altering IEBC's network and portal, altering information residing in IEBC's portal knowing he was likely to cause wrongful loss or damage to the public; and knowingly

inputting, altering and deleting computer data with the intent that the result be considered or acted upon as authentic, regardless of whether or not the data is directly readable and intelligible. They also alleged that the Chairperson was guilty of using his office to improperly confer a benefit on a Presidential candidate contrary to section 46 of the *Anti–Corruption and Economic Crimes Act* No 3 of 2003.

274. According to the 1st petitioner, the Chairperson being a public officer violated sections 9, 10, 12 and 16 of the *Public Officer Ethics Act*, for failure to carry out his duties in a way that maintains public confidence; failing to treat the public and his fellow public officers with courtesy and respect; failing to improve the standard of performance and level of professionalism in his organization; failure to observe the ethical and professional requirements of the Law Society of Kenya; and acting as an agent for and furthering the interest of a political party.

275. The 1st and 3rd petitioners alleged that there was a deliberate failure of the KIEMS kits particularly in Kakamega and Makueni Counties and the late opening of polling stations led to delayed commencement of voting causing many voters to leave polling stations before casting their vote. This suppressed the voter turnout in such polling stations as Kikumini Primary School, Makasa Primary School, Muangeni Primary School, Ngangani Primary School, Mithumoni Primary School, Masamukye Primary School, Makasa Primary polling station, Mugai Primary School, Shirugu Primary School, Kalenda, Malekha Primary School, Malava Town Market, Musungu Primary, Gikundo primary school in Mukurwe-ini West and Nyakenyua Nursery School at Rware Ward, Mugumo-ini Primary School, and Mbari ya Ruga.

276. It was alleged that there was no uniformity of treatment of voters whose fingers are charred due to tea picking in Mathira and could not be identified by biometric means; that while some were identified through manual register, others were not; and that each situation depended upon the discretion of presiding officers.

277. IEBC and its Chairperson, in their response stated that despite the challenges with a few KIEMS devices in Kakamega, the issue was resolved and the KIEMS devices resumed functionality and ultimately transmitted results. This was confirmed by Oduor Juma Joseph, Returning Officer in charge of Malava Constituency, who added that the failure of KIEMS kits did not affect the voter turnout as alleged. The Chairperson conceded that KIEMS devices malfunctioned in just about 235 polling stations and IEBC was unable to replace them immediately. In those instances, printed registers were used to identify voters. They denied that there was a deliberate failure of KIEMS kits to occasion voter suppression in Kakamega and Makueni Counties; that any time lost as a result of KIEMS failure was compensated by commensurate time extension. It was estimated that the failed kits only constituted about 0.43% of the 46,229 deployed while 99.57% worked without a glitch.

278. On their part, the 3rd petitioner contended that there was interference in the supply and delivery of ballot papers, Register of Voters, and election result declaration forms. This interference was alleged to have been perpetrated by the 1st respondent through his associate, Moses Wetangula. It was this interference that led to Azimio La Umoja One Kenya Coalition Party press release dated July 5, 2022, condemning those activities. The press release called for investigation and public information on the issue.

279. On a different note, it was alleged that Azimio La Umoja One Kenya Coalition Party agents were subjected to harassment by IEBC officials and UDA political party members, who would arrest and detain them so as to deny them time and opportunity to distribute letters of appointment and other election material to agents in polling centres in Nyeri, Muranga, Kiambu, Nakuru, Nairobi and Meru Counties. Specifically, this affected the results from polling stations in Gamuriri and Kahara poling centres in Mathira Constituency, Mukurwe-ini Central Ward and Kianyaga Primary School in Mukurwe-ini West Ward in Mukurwe-ini Constituency, Thika Rescue Centre within Thika Town Constituency and CBD Ward within Starehe Constituency.

280. The 1st respondent dismissed the 1st petitioner's claims of intimidation insisting that he had not approached the Court with clean hands; that it was their agents and supporters who were engaged in acts of violence, intimidation, undue influence, and other election offences throughout the campaign period and during the tallying and verification of the result at the NTC; and that the 1st petitioner and his team used State resources and involved civil servants and public officers in their campaign. None of the allegations of the 1st petitioner's agents were supported by evidence and other particulars.

281. IEBC and its Chairperson similarly denied those allegations, and contended that from the named Counties or polling stations, no specific instances or names of the affected agents were furnished; that failure by the 1st petitioner to have agents at the polling stations could not be blamed on IEBC and its Chairperson. In any case, the 1st petitioner's Chief Agent's admission to serious inefficiencies in the appointment and deployment of agents in many polling stations was public knowledge.

282. On special voting, the 7th petitioner alleged that contrary to regulation 19 of the *Elections (General) Regulations, 2012*, IEBC failed to put in place procedures for special voting of 500,000 election officials, observers, patients admitted in hospitals, older members of society, members of the defence and security forces on duty and other persons by reason of the special need, who were not able to access polling stations.

283. IEBC enumerated the various steps it has taken to ensure compliance with regulation 19 of the *Elections (General) Regulations, 2012* and to facilitate voting by special groups. According to them the petitioners did not show which special group of voters were not

allowed to vote. Moreover, they insisted that the figure of 500,000 voters was merely speculative as the petitioners relied on a newspaper article which is of no evidentiary value.

i. Analysis of the Evidence

284. The question we pose is whether there were illegalities and irregularities of such a magnitude as to affect the final result declared in the Presidential Election of 2022. In other words, for the petitioners to succeed on this issue and thereby overturn the results declared by the Chairperson of IEBC, it is their burden to satisfy the Court, first, that there were irregularities and illegalities; and secondly that the proven irregularities and illegalities were of such overwhelming nature that it was likely to affect the actual result, or the integrity of the Presidential Election of August 9, 2022.

285. That is the ratio decidendi in the *Harun Mwau* case where we reiterated the position in *Raila 2017* in the following manner:

> "(373) This court has already pronounced itself in unequivocal terms, on the effect of irregularities upon an election. The legal position remains as stated in the majority decision of the court in Raila 2017. Our view is informed by the conclusion which we have made, as to the applicable law in relation to the October 26, 2017 election. This may be simply restated: not every irregularity or procedural infraction is enough to invalidate an election. The irregularities must be of such a profound nature as to affect the actual result, or the integrity of an election, for a court of law to nullify the same."

286. What therefore constitutes irregularities and illegalities? In *Raila 2017*, the term 'illegalities' was defined as 'breaches of the substance of specific law' and irregularities as the 'violation of specific regulations and administrative arrangements'.

287. As stated earlier in this Judgment, the burden is on the petitioner to prove his case. For seeking to nullify a presidential election on account of breaches and violation of the law or regulations, the petitioners must present "cogent and credible evidence" to prove those grounds. Cogent and credible evidence is the standard of proof, now known in this jurisdiction as the "intermediate standard". It is higher than the civil standard of balance of probabilities, but lower than the criminal standard of proof beyond reasonable doubt.

288. First, the 1st petitioner's case is that there was fraudulent establishment of parallel use of Forms 34A in the election through the simultaneous use of book 1 of 2 and 2 of 2; that despite there being a consent that book 2 of 2 would not be used but instead would be placed in a tamper proof paper, it was in fact used. The Registrar's Report on this question disclosed that while book 2 of 2 were missing in some of the boxes, the results in the provided Forms

34A as transmitted to IEBC's Portal and captured in the ultimate result declaration Form 34C, did not differ from the actual ballot papers cast and retrieved physically from the ballot boxes. This irregularity has not been proved and must fail.

289. On the failure of KIEMS kits and late opening of some polling stations and the alleged failure to extend the voting time, IEBC and its Chairperson, affirmed that indeed there were instances of failure of the KIEMS kits in certain polling stations. In those instances, the regulations require voting time to be extended to compensate the lost time. We note, however that the petitioners have not attached any material evidence or at all in support of their claims, which in any case were rebutted by IEBC's explanation that there were mechanisms in place to deal with the failed kits. Where technology fails, IEBC is empowered to employ complementary mechanism. IEBC's assertion that it did so has not been controverted. As for time lost, IEBC's Returning Officers presented evidence, again uncontroverted, to the effect that, time lost was recovered and compensated by proportionate time extensions.

290. Was there interference in the supply and delivery of ballot papers, Register of Voters, statutory election result declaration forms? Was there evidence of the involvement of Moses Wetangula in the interference? We find that these were merely, general statements not backed by "cogent and credible" evidence.

291. With regard to harassment of Azimio La Umoja One Kenya Coalition Party agents, though certain agents swore affidavits stating specific stations and incidences of harassment, no further evidence such as a report to the Police and the exact nature and manner of harassment were disclosed.

292. Although the Chairperson in his affidavit confirmed that close to 500,000 Kenyans were employed by IEBC in this year's election as staff and officials in polling stations, Constituency and County levels across the country, the petitioners did not show with specificity which election officials out of the 500,000 were not allowed to vote and in what circumstances. Likewise, no specifics of patients in hospitals, older members of society, members of the defence and security forces on duty, who did not vote on account of their situation were supplied. This ground has not met the requisite standard of proof and fails.

293. Having so found, we note from the response of IEBC that no mechanism has been put in place to allow for special voting as contemplated under regulation 90 of the *Elections (General) Regulations, 2012*. IEBC did not indicate whether it had published Notices on the manner and procedure of the conduct of special voting as required by the Regulations. There was specific and a deserving reason to make provision for special voting by the categories of people named in the Regulations who by reason of any special need, including disability, are unable to access a polling station.

294. By way of comparison, in South Africa, a special vote allows a registered voter who cannot vote at their voting station on election day to apply to vote on a predetermined day before election day. By their law, special votes can only be cast on the dates specified in the election timetable. We observe that there was specific and a deserving reason to make provision for special voting by the categories of people named in Regulation 90, who by reason of any special need, including disability, are unable to access a polling station. We expect IEBC to actualize the intentions expressed in regulation 90 aforesaid.

295. Finally, election offences and ethical breaches enumerated against the Chairperson are criminal in nature proof of which must attain a standard beyond reasonable doubt. section 87 of the *Elections Act* stipulates how a court may report on electoral malpractices:

> 1. An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.
>
> 2. Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.
>
> 3. Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —
>
> a. direct an investigation to be carried out by such State agency as it considers appropriate; and
>
> b. based on the outcome of the investigations, commence prosecution or close the matter."

296. Once an election offence has been alleged, the evidence in support thereof must be specific, satisfactory, definitive, cogent and certain. It is only when the election court is satisfied that the burden and standard of proof have been satisfied that it can proceed under the above provision. The general allegations do not meet the threshold to warrant the invocation of that section. By the same token, there is no evidence of violation or breach of any electoral law or Regulations by the Chairperson in the management of the August 9, 2022 Presidential Election.

ii. Finding and Conclusion

297. We conclude on this ground that the irregularities and illegalities cited by the petitioners were not proved to the required standard, or at all.

9. What reliefs and orders can the Court grant /issue?

298. The petitioners in this cause entertained the prospect of succeeding in their petitions and made prayers for a wide range of reliefs. However, the *Constitution* articulates clearly the terms of the orders that can be granted by this court on the question of validity of presidential election.

299. article 163 (3)(a) of the *Constitution* provides that the Supreme Court shall have#

> a. exclusive original jurisdiction to hear and determine disputes relating to the election of the office of the President arising under article 140; ..."

300. article 140 of the *Constitution* in turn provides:

> 140. Questions as to validity of Presidential Election
>
> 1. A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.
>
> 2. 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.
>
> 3. If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination." [emphasis added].

301. The *Supreme Court (Presidential Election Petition) Rules, 2017* reinforce these constitutional provisions as follows in rule 22:

> " 22. Orders of the court
>
> At the conclusion of the hearing of an election petition, the court may make an order —
>
> a. Dismissing the petition;
>
> b. invalidating the declaration made by the Commission under article 138(5) of the *Constitution*;

c. declaring the election of the President-elect to be

i. valid; or

ii. invalid;

d. on payment of costs; or

e. as it may deem fit and just in the circumstances."

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*. Accordingly, this court can neither remove the Chairperson of IEBC from office nor declare him unfit to hold public office as prayed for by the 1st and 2nd petitioners. The process of removal of members of constitutional Commissions is spelt out under article 251 of the *Constitution*. This article stipulates the requisite procedures and processes as well as the proper fora for adjudication of such matters.

306. In the same vein, a prayer to declare the Chairperson in breach of article 73 of the *Constitution* as sought by the 2nd and 3rd petitioners cannot be made in a presidential election petition.

307. The Attorney General's plea to us to dismiss the Chairperson's allegation that the National Security Advisory Council (NSAC) attempted to subvert the will of the people must meet the same fate as the prayers by the 2nd and 3rd petitioners. The Court is exercising in this consolidated petition its exclusive original jurisdiction under article 163 (3) (a) of the *Constitution*. Consequently, the court is unable to make any definitive findings or issue any orders on the matters raised.

308. The court can however make recommendations or observations, or structural interdicts besides giving advisory opinion under article 163(6) of *the Constitution*. Indeed, since 2013, this court has issued many recommendations arising from the determination of the past three presidential petitions. From this cause, we recommend and observe as follows:

D. Recommendations

i. IEBC

309. On the basis of the pleadings and submissions in this consolidated petition, the court retains a constitutional obligation to point out the institutional dysfunctionality undermining the optimal functioning of IEBC. It is clear to us that there are legal, policy and institutional reforms that are urgently required to address the glaring shortcomings within IEBC. We therefore recommend as follows:

a. On corporate governance issues

1. Parliament should consider enhancing the statutory and regulatory framework on the separate policy and administrative remit of IEBC.

2. IEBC ought to effect formal internal guidelines that clearly delineate the policy, strategy, and oversight responsibility of the Chairperson and the Commissioners; and develop institutionalized guidelines on how to manage the separation of administrative and policy domains.

3. The roles of the Chairperson, Commissioners, and the Chief Executive Officer, other staff and third parties should be clearly set out in both the legislative and administrative edicts as stipulated above.

b. On election technology

4. To avoid suspicion from stakeholders, unless where and when it is absolutely necessary, access to the servers supporting the transmission and storage of Forms 34A, 34B and 34C should be restricted to IEBC staff during the election period.

5. IEBC should ensure that the servers supporting the elections and those serving their internal administrative work are distinct and separate. This would then allow the Court, should the need arise, to carry out forensic imaging of the same without compromising and/or infringing any third-party agreements.

c. On statutory Forms

6. IEBC may consider simplifying and restructuring the Form 34A and include a column that accounts for stray ballots. In addition, it may consider having only one section for total valid votes. The independent body may also find it prudent to thoroughly train its Returning Officers as to what constitutes valid votes per this Court's decision.

7. IEBC ought to put in place specific mechanisms to allow for special voting as contemplated under regulation 90 of the *Elections (General) Regulations* 2012.

ii. Constitutional Reforms

310. We are constrained to revisit the recommendation we made in *Raila Amolo Odinga & another v IEBC & 2 others*, SC Petition Presidential Petition No 1 of 2017; [2017] eKLR regarding the need to extend the constitutional timeline, within which to hear and determine a presidential election petition. At paragraph 403 of the judgment, this court underscored the need to extend the fourteen-day limit, for purposes of efficient case management by the court, and also, to afford the parties sufficient time to ventilate their cases. We hereby make a similar recommendation.

iii. Conduct of the Proceedings Before the Supreme Court

311. The court has been greatly aided by the contributions made by learned counsel appearing for the parties and all amici curiae in this consolidated petition. We are grateful for their very able and well researched submissions, delivered with considerable passion and clarity. Throughout the three days' hearing, counsel maintained decorum in the courtroom as it ought to be. We also express our appreciation to our Judiciary staff who took part in the scrutiny exercise, and our Law Clerks for their research support.

312. However, before rendering our final disposition, we are constrained to advert to some of the guidelines of conduct that we set out at the commencement of this hearing. More specifically, ground rule 3 stipulated:

> " 3. The Rules of the Court require parties to conduct themselves with decorum to preserve the dignity of the court and the proceedings while bearing in mind the provisions of section 28 of the *Supreme Court Act*. In this regard, discussing the merits of the case by the parties outside the court is not permitted. The court may cite parties in violation of this rule for contempt."

313. Unfortunately, our caution went unheeded: Some counsel and parties have used inappropriate, and insulting language against the court even before the issuance of our detailed judgment. It ought to be appreciated by all, that given the adversarial nature of our legal system, a determination of any matter by a court of law can never be in favour of both sides of the contending parties. While a party or its counsel may understandably be aggrieved by a decision of the court, it does not help or take away such grief by resorting to insults or vitriolic attacks on courts. We reiterate the concern as expressed in *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 79 others (amicus curiae)*, SC Petition Noo 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) (BBI case) where we stated at paragraphs 2114 and 2116, as follows:

> "...For counsel to appear before the apex court then proceed to hurl unnecessary diatribe, insults, and speculations on a pending judgment amounts to unethical conduct on the part of the advocate concerned. The use of social media to disparage the court with the intention of lowering the dignity and authority of the court or influencing the outcome of a case pending before the court trespasses the bounds of legitimate advocacy and moves to the realm of professional misconduct. This is in line with section 60(1) of the *Advocates Act*, chapter 16 laws of Kenya; that defines professional misconduct as: "includes disgraceful or dishonourable conduct incompatible with the status of an Advocate.
>
> ...
>
> Advocates should familiarise themselves with the *Code of Standards of Professional Practice and Ethical Conduct*, Gazette Notice No 5212 and strive to conduct themselves in a manner that preserve and strengthen the dignity, honour and ethics of the profession. Consequently, advocates should restrain from conduct that amounts to indirectly attempting to influence decisions pending before courts. Relevant to the use of social media, we draw the attention of Advocates to *Standard of Professional Practice and Ethical Conduct* No 10 that stipulates thus:
>
> > 'Inappropriate use of social media, particularly in a manner that undermines the standing and dignity of the legal profession, is professional misconduct. Material and content drawn from social media sites may be taken into account by regulatory authorities in dealing with a charge of professional misconduct.'
>
> This caution should always play in the mind of advocates when tempted to utilize social media to advance their cause".

314. While freedom of speech is one of the fundamental principles upon which every democratic society is built, the exercise of these freedoms carries with it duties and responsibilities. Within the same norms which proclaim those freedoms, are also restrictions on the extent of their enjoyment. To the oath of office we shall remain faithful and defend the *Constitution* with a view to upholding the dignity and the respect for the Judiciary and the judicial system of Kenya. We shall dispense justice without any fear. We do this to protect the Institution not only for the present but also for the future: Judges serve their term and leave, but the institution of the Judiciary is there to serve today and for posterity.

E. On Costs

315. As part of their prayers, the 1st, 2nd, 4th, 5th, and 7th petitioners prayed for orders of costs in their respective petitions before us. On their part, the 1st, 3rd, and 4th respondents in their submissions urged that costs follow the event, and that in awarding the same, this court should be guided by section 84 of the *Elections Act*. Therefore, they urged us to dismiss the consolidated Petition with costs.

316. In *Raila 2013*, this court stated as follows on the issue of costs:

> " 308 Each of the parties coming before us has sought orders as to costs. This, of course, is an adversarial system of litigation; and therefore, parties will invariably be asking for costs, at the conclusion of a matter such as this.
>
> 309. Yet we have to take into account certain important considerations, in relation to costs. It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.
>
> 310. Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel."

317. We have considered that the issues raised in the instant presidential election petition impact, not just the parties before us, but the entire nation. Further, we note that some of the petitions were filed by individuals and organizations who were not Presidential candidates, but sought the court's interpretation and determination of issues of national interest. Therefore, we reiterate this court's position on costs in *Raila 2013* and see no reason to depart from it in the matter before us. Consequently, each party shall bear their own costs.

F. Final Orders

318. Having found that the presidential election was conducted in accordance with the principles set out in the *Constitution*, and election laws, and that the 1st respondent attained the constitutional threshold set out in article 138 (4) of the *Constitution*:

In unanimity, we make the following Orders:

i. The Presidential Election Petition No E005 of 2022, as consolidated with Presidential Election Petition Nos E001, E002, E003, E004, E007 & E008 of 2022 is hereby dismissed.

ii. As a consequence, we declare the election of the 1st respondent as President-elect to be valid under article 140(3) of the *Constitution*.

iii. Regulation 87 (3) of the *Elections (General) Regulations, 2012* is hereby declared unconstitutional to the extent that it purports to vest the power of verifying and tallying presidential election results, as received at the National Tallying Centre, solely on the Chairperson to the exclusion of other members of the Commission.

iv. This being a matter of national public interest, we order that each party shall bear their costs.

v. We direct that sums deposited as security for costs be released to the petitioners.

It is so ordered.

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) (5 September 2022) (Judgment)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 54 (KLR)

Constitutional Law *– Independent Commissions - Independent Electoral and Boundaries Commission (IEBC) – powers of the IEBC – powers of the IEBC vis-à-vis the powers of the chairperson of the IEBC – role of verifying and tallying of votes as received from polling stations countrywide - whether the role of verifying and tallying of votes as received from polling stations countrywide was vested in the IEBC as a corporate entity - whether the role of verifying and tallying of votes as received from polling stations countrywide could be undertaken by the chairperson of the IEBC to the exclusion of other IEBC Commissioners – Constitution of Kenya, 2010 articles 138(3)(c) and (10); Elections (General) Regulations, regulation 87(3).*

Electoral Law *– presidential election petition – constitutional threshold to be attained in order to win a presidential election – 50%+1 – what was the applicable formula to determine whether a president-elect attained the constitutional threshold of 50%+1 - whether in making the declaration, the IEBC and its chairperson applied the correct formula - whether the rounding off of votes cast in the presidential election by the IEBC and its chairperson as a means of assessing the threshold of 50%+1 was mathematically sound, legal and constitutional - whether the declared President-elect attained 50%+1 of all the votes cast – Constitution of Kenya, 2010, article 138(4).*

Electoral Law *– presidential election – technology used in a presidential election – technology used in transmitting Forms 34A from polling stations to the IEBC Public Portal - whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security and transparency to guarantee accurate and verifiable results - whether there was interference with the uploading and transmission of Forms 34A from the polling stations to the IEBC Public Portal - whether there was a difference between Forms 34A uploaded on the IEBC Public Portal and the Forms 34A received at the National Tallying Centre, and Forms 34A issued to agents at the polling stations.*

Electoral Law *– Independent Electoral and Boundaries Commission (IEBC) – powers of IEBC – powers of the chairperson of IEBC – power to postpone gubernatorial, parliamentary and ward elections in a general election – where the IEBC postponed elections for various seats during the General Elections of August 9, 2022 due to mix-up of ballot papers – claim that the postponement led to low voter turnout - whether the IEBC or its chairperson had the authority to postpone gubernatorial, parliamentary and ward elections in select counties during a general election - whether postponement of gubernatorial elections in Kakamega and Mombasa counties, parliamentary elections in select*

constituencies and electoral wards by the IEBC resulted in voter suppression to the detriment of the petitioners – whether section 55B of the Elections Act was inconsistent with the Constitution and void to the extent that it purported to donate to IEBC power to postpone elections in the constituency, county or ward - Constitution of Kenya, 2010, articles 101, 136(2)(a), 177(1) and 180(1); Elections Act, section 55B.

Electoral Law *– electoral offences – fraud – ballot stuffing – claim of systematic ballot stuffing - claim that there was a discrepancy between the total votes cast for a presidential candidate vis-à-vis the votes cast for other positions in a general election – claim that the discrepancy amounted to proof of fraud - whether the discrepancies between the total number of votes cast for presidential candidates vis-à-vis the total number of votes cast for other elective positions by itself was an indicator of fraud – whether there was systematic ballot stuffing in the general elections of August 9, 2022 - Election Offences Act, No. 37 of 2016, section 5(n).*

Statutes *– constitutionality of statutes – regulation 87(3) of the Elections (General) Regulations – power to verify and tally the results of the presidential elections - section 55B of the Elections Act - statutory provisions providing for the postponement of elections in the constituency, county or ward level - whether regulation 87(3) of the Elections (General) Regulations was unconstitutional, to the extent that it purported to vest the power of verification and tallying in the chairperson of IEBC - whether section 55B of the Elections Act was inconsistent with the Constitution and void to the extent that it purported to donate to IEBC power to postpone elections in the constituency, county or ward - Elections Act , No. 24 of 2011, section 55B; Elections (General) Regulations, regulation 87(3).*

Law of Evidence *– burden of proof – burden of proof in election petitions - who bore the burden of proof in election petitions – which party bore the burden of proof to prove electoral offences.*

Brief facts

On August 9, 2022 Kenya held the third general election under the Constitution of Kenya, 2010 (Constitution). Transmission of the results of the general election was done via the Kenya Integrated Electoral Management System (KIEMS); technology used in the biometric voter registration, and, on the election day, for voter identification as well as the transmission of election results from polling stations to the National Tallying Centre.

On August 15, 2017, the chairperson of the Independent Electoral and Boundaries Commission (IEBC) (4th respondent) declared the 1st respondent, William Samoei Ruto, the Presidential Candidate for the United Democratic Alliance Party, (1st respondent) the President-elect with 7,176,141 votes (50.49% of presidential votes cast) and the 1st petitioner, Raila Amollo Odinga as the runner's up with 6,942,930 votes (48.85% of presidential votes cast).

Aggrieved by the results and the process by which the results were obtained and declared, the 1st petitioners, Raila Odinga and Martha Karua, who were the presidential and deputy presidential candidates respectively of the Azimio La Umoja Coalition of parties filed the instant petition challenging the declared result of that presidential election (the election). Alongside the 1st

petitioners were a group of 6 other petitioners that also challenged the result of the presidential election; in total they filed 9 presidential election petitions.

The 1st, 3rd and 4th petitioners in the consolidated petition, challenged the technology used by IEBC during the 2022 General Election. They pleaded that the manner in which technology was deployed and utilized fell short of the prescribed constitutional and statutory standards. In response, IEBC submitted that the electoral system met the constitutional threshold; that all necessary information was accessed only by authorized persons; the information was accurate, complete and protected from malicious modification either by authorized or unauthorized persons; it maintained an audit trail on activities related to information; and the information was available and could be authenticated through the use of various security features.

The 1st petitioners further alleged that the results of the presidential election were staged. They claimed that a person who had access to the Result Transition System (RTS), intercepted, detained or stored Forms 34A temporarily to convert or manipulate them before uploading them on IEBC's public portal. IEBC through its chairperson denied staging an unauthorized intrusion of the RTS.

The petitioners also challenged the authority and the decision of the IEBC or its chairperson to postpone the 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. They contended that the IEBC had no jurisdiction to postpone elections in those areas. They further contended that section 55B of the Elections Act was inconsistent with the Constitution and void to the extent that it purported to donate to IEBC power to postpone elections in the constituency, county or ward contrary to the Constitution.

Those assertions were denied by IEBC and its chairperson. However, they admitted that they experienced confusion with the printed ballot papers and explained that they only discovered the mix-up on the eve of the election when the ballot papers were being distributed to the polling stations; that as a practice, ballot papers could only be opened on the eve of the election day to avoid any mischief; and that by the time the mix-up was discovered, it was logistically impossible to print and replace the ballots papers in time for the election.

The petitioners also contested the formula used by the IEBC or its chairperson to declare that the 1st respondent had obtained the threshold of 50% + 1 of the votes cast in the presidential election. In particular, they challenged the rounding off of votes cast.

Lastly the petitioners challenged the results of the presidential election on account of the opaque nature of the verification exercise at the National Tallying Center. On August 15, 2022, 4 commissioners of the IEBC held a press conference and termed the results "opaque" due to the manner in which the chairperson had been conducting the verification and tallying exercise, calling into question the credibility of the entire election. They further submitted that being in the majority out of the seven-member Commission, their view should prevail, and the election should

be nullified. It was the petitioners' argument, therefore, that a dysfunctional Commission could not deliver a credible election.

Issues

i. Whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security and transparency to guarantee accurate and verifiable results.

ii. Whether there was interference with the uploading and transmission of Forms 34A from the polling stations to the IEBC Public Portal.

iii. Whether there was a difference between Forms 34A uploaded on the IEBC Public Portal and the Forms 34A received at the National Tallying Centre, and the Forms 34A issued to agents at the polling stations.

iv. Whether the IEBC acted *ultra vires* their powers in postponing gubernatorial, parliamentary and ward elections in select counties during a general election due to some unforeseen hindrances.

v. Whether 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 by the IEBC resulted in voter suppression to the detriment of the petitioners.

vi. Whether the role of verifying and tallying of votes as received from polling stations countrywide could be undertaken by the chairperson of the IEBC to the exclusion of other IEBC commissioners.

vii. Whether regulation 87(3) of the Elections (General) Regulations was unconstitutional, to the extent that it purported to vest the power of verification and tallying in the chairperson of IEBC.

viii. Whether the discrepancies between the total number of votes cast for presidential candidates vis-à-vis the total number of votes cast for other elective positions by itself was an indicator of fraud.

ix. Which party bore the burden of proof in election petitions?

x. Whether the IEBC carried out the verification, tallying and declaration of results in accordance with article 138(3)(c) and 138(10) of the Constitution.

xi. Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with article 138(4) of the Constitution.

xii. Whether there were irregularities and illegalities of such magnitude as to affect the final result of the presidential election.

Relevant provisions of the Law

Constitution of Kenya, 2010.

Article *138(3)(c), (4) and (10).*

138. Procedure at presidential election

(3) In a presidential election—

(c) after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

(4) A candidate shall be declared elected as President if the candidate receives—

(a) more than half of all the votes cast in the election; and

(b) at least twenty-five per cent of the votes cast in each of more than half of the counties.

...

(10) 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.

Elections Act, No. 24 of 2011

Section 55B

55B. Postponement of elections by the Commission

(1) The Commission may, where a date has been appointed for holding an election, postpone the election in a constituency, county or ward for such period as it may consider necessary where —

(a) there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;

(b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,

(c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.

(2) Where an election is postponed under subsection (1), the election shall be held at the earliest practicable time.

(3) Notwithstanding the provisions of this section, the Commission may, if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made.

Elections (General) Regulations

Regulation 87(3)

87. Returns of persons elected.

(3) Upon receipt of Form 34A from the constituency returning officers under sub regulation (1), the Chairperson of the Commission shall—

(a) verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre;

(b) tally and complete Form 34C;

(c) announce the results for each of the presidential candidates for each County;

(d) sign and date the forms and make available a copy to any candidate or the national chief agent present;

(e) publicly declare the results of the election of the president in accordance with Articles 138(4) and 138(10) of the Constitution;

(f) issue a certificate to the person elected president in Form 34D set out in the Schedule; and

(g) deliver a written notification of the results to the Chief Justice and the incumbent President within seven days of the declaration; Provided that the Chairperson of the Commission may declare a candidate elected as the President before all the Constituencies have delivered their results if in the opinion of the Commission the results that have not been received will not make a difference with regards to the winner on the basis of Article 138(4)(a) and (b) of the Constitution; and Kenya Subsidiary Legislation, 201 7 379 (h) in the case of the other elections, whether or not forming part of a multiple elect ion, publish a notice in the Gazette, which may form part of a composite notice, showing the name or names of the person or persons elected.

Held

1. Kenya was a sovereign multi-party democratic state whose foundations were firmly spelt out in the Constitution. The Kenyan people's quest for electoral reforms since independence was well documented. That notwithstanding and even without going back to the pre-1992 era, every cycle of elections had been highly contested with the exception of 2002. That spoke to a background of distrust of the administration of our electoral process. As such, Kenyans made a decision to vest the Supreme Court with the jurisdiction to determine questions regarding the validity of a presidential election under article 140 of the Constitution. The reactions following the declaration of results of the presidential election of August 9, 2022 showed that the Independent Electoral and Boundaries Commission (IEBC) had not yet garnered universal public confidence and trust in the internal management of the Commission and elections.
2. Lack of trust in the electoral system had endured in Kenya for a long time. That led to the introduction of electoral technology via section 44 of the Elections Act, 2011. Under the Elections Act, IEBC was enjoined to adopt technology in the electoral process. IEBC developed technology known as the Kenya Integrated Electoral Management System (KIEMS) making Kenya's election process hybrid as it employed both technology and manual processes.
3. The technology deployed by IEBC did not fail the standard of article 86(a) of the Constitution on integrity, verifiability, security and transparency for the following reasons:
    1. whereas it was true that the KIEMS kit failed in 235 polling stations, 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled.

That happened successfully in Kibwezi West Constituency and parts of Kakamega County.

2. While the Audit Report was released to the public seven days before the August 9, 2022 election, the register of voters was used at the election without any apparent anomalies.
3. Smartmatic was procured to provide the necessary technological infrastructure as IEBC did not have the capacity to do so. No credible evidence meeting the requisite standard of proof of access to the system by unauthorized persons was adduced by the petitioners.
4. The Scrutiny Report (the Report) prepared by the Registrar of the Supreme Court (the Registrar) did not reveal any security breaches of the IEBC's Results Transmission and Presentation System (RTS).
5. IEBC successfully deployed a Biometric Voter Register (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. Those features were unique to each voter.
6. In compliance with section 6A of the Elections Act, 2011, IEBC opened the register of voters for verification of biometric data by members of the public for a period of 30 days. Thereafter, the Register was revised to address issues arising from the verification exercise. KPMG then audited the register and the inconsistencies and inaccuracies identified during the Audit were successfully addressed.

4. No credible evidence was presented to prove that anyone accessed the RTS to intercept, detain or store Forms 34A temporarily before they were uploaded onto the Public Portal. The allegation that 11,000 Forms 34A were affected by staging was not proved.
5. The allegation that IEBC, its officials and strangers used a tool to tamper with the Forms 34A before converting them to the Portable Document Format (PDF) that eventually appeared on the Public Portal was sufficiently explained when IEBC demonstrated how KIEMS captured and transmitted the image of Forms 34A. The allegation was dismissed.
6. The transmission logs produced by the petitioners were of no probative value after the ICT scrutiny. The Registrar of the Supreme Court's Report showed that the original Forms 34A from the contested polling stations which were allegedly intercepted were exactly the same as those on the Public Portal and the certified copies presented to the Supreme Court under section 12 of the Supreme Court Act, 2011.
7. The allegation that the integrity of the Public Portal was compromised was disproved by evidence of consistent attributes such as unique time stamps, uniform PDF conversions at the polling stations, correct polling station mapping and consistent KIEMS reporting from verification to transmission of results.
8. The RTS was configured on a Virtual Platform Network (VPN) and the SIM cards locked to a specific polling station. The server was also configured to accept results only from

authorized and properly mapped KIEMS kit. The petitioners failed to produce credible evidence to the contrary.

9. A review of some of the logs presented as evidence of staging showed that they were either from logs arising from the 2017 Presidential Election or were outright forgeries. There was no evidence of a man in the middle server configured to the IEBC's VPN network; and no evidence was produced to show that the chairperson of IEBC and staff were part of the alleged conspiracy to stage the transmission process.

10. There were no significant differences captured between the Forms 34A uploaded on the public portal and the physical Forms 34A delivered to Bomas (National Tallying Center) that would have affected the overall outcome of the presidential election.

11. No credible evidence was presented to support the allegation that Forms 34A presented to agents differed from those uploaded to the Public Portal. The Report by the Registrar confirmed the authenticity of the original forms in the sampled polling stations.

12. The affidavit evidence presented by the petitioners, while containing sensational information, was not credible as the Registrar's Report confirmed that all the Forms 34A attached to those affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the public portal.

13. The purported affidavit evidence was not only inadmissible but were also unacceptable. It had been established that none of the agents on whose behalf the forms were being presented swore any affidavit; that there was nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga (counsel for the petitioners) to act for them. Yet the two had gone ahead to depone on matters that were not within their knowledge. The Supreme Court could not countenance such conduct on the part of counsel who were officers of the court.

14. Affidavits filed in court had to deal only with facts which a deponent could prove on the basis of his own knowledge. As a general rule, counsel were not permitted to swear affidavits on behalf of their clients in contentious matters because they ran the risk of unknowingly swearing to falsehoods and could also be liable to cross-examination to prove the matters deponed. Sections 113 and 114 of Penal Code provided that swearing to falsehoods was a criminal offence, and it was an offence to present misleading or fabricated evidence in any judicial proceedings. One of the most serious losses an advocate could ever suffer was the loss of trust of judges for a long time. Such conduct amounted to interference with the proper administration of justice.

15. The contents of the affidavit of John Mark Githongo, which was alleged to contain forgeries, were dismissed for not meeting the evidential threshold. They contained no more than incredible and hearsay evidence. No admissible evidence was presented to prove the allegation that Forms 34A were fraudulently altered by a group situated in Karen under the direction of persons named in the affidavit and video clip attached to it. His two affidavits amounted to double hearsay, and incapable of being proved at each layer. In addition, no

probative value was found on the allegation that Jose Carmago had accessed the RTS and interfered with the result.

16. The KIEMS kit relating to Psongoywo Primary School which bore the same serial number with another was admitted by IEBC as an inadvertent manufacturer's error. The two kits had other identifying features that were markedly different including the time stamps and polling code. Nothing turned on that anomaly. There was no difference between Forms 34A uploaded on the IEBC Public Portal, those received at the National Tallying Centre, and those issued to the candidates' agents at the polling stations.

17. IEBC postponed elections for various seats during the general elections of August 9, 2022 due to a mix-up of ballot papers. Section 55B of the Elections Act, 2011, provided for circumstances when elections could be postponed in a particular electoral unit including in cases of emergency. The 3rd respondent had the requisite power to postpone elections in the constituencies, counties and wards in question.

18. Voter suppression was recognized as a political strategy which took many forms but whose practical effect was ultimately to reduce voting by deliberately discouraging or preventing targeted groups of people from exercising their right to vote and thereby influencing the outcome of an election. It was against the letter and spirit of article 38 which guaranteed every citizen the right to make political choices based on universal suffrage.

19. It had not been shown that, by postponing elections in the named electoral units, IEBC acted in bad faith or was influenced by irrelevant factors and considerations. The postponement was occasioned by a genuine mistake, which could have been avoided had the members and staff of the IEBC been more diligent when they went to inspect the templates in Athens, Greece where the printing of ballot papers was undertaken.

20. There was no basis for the court to conclude that the postponement of the elections affected voter turnout as a consequence of which the 1st petitioner, alone, as a presidential candidate suffered a disadvantage. The nature of the ballot being an individual decision and secret meant that there could be other variables to which the turnout in the named units could be attributed. The 2022 General Election recorded one of the lowest turnout since the reintroduction of multi- party political system, some 30 years ago. If there was a low voter turnout, it affected all the six categories of candidates and its explanation lay elsewhere but certainly not a calculated suppression. There was no nexus between the postponement of elections and voter turnout in the affected units, the claim was a red herring. There was no proof that the postponement resulted in voter suppression to the detriment of the 1st petitioner.

21. A person who asserted a fact had to prove it. The burden was cast upon the 1st petitioner to demonstrate that there were instances of ballot stuffing of such a magnitude as to justify the nullification of the presidential election. Ballot stuffing, which was the illegal addition of extra ballots, was a type of electoral fraud aimed at swinging the results of an election towards a particular direction. Not a single document had been presented by the 1st petitioner to

prove systematic ballot stuffing. A figure of 33,208 votes relied on in that claim was based on unproven hypothesis that since the number of votes cast for President was higher than those for the other positions then, without more, it had to follow that there was fraud.

22. Fraud was a serious criminal offence and had to be proved beyond reasonable doubt. Under section 5(n) of the Election Offences Act, it was an offence for a person to vote more than once in any election. IEBC had proffered a plausible explanation for the vote differential. There were categories of voters who only voted for the President, such as prisoners and Kenyans in the diaspora. There were an insignificant number of stray votes, whose combined effect could not justify nullification of the election.

23. A general election in Kenya comprised of 6 different and separate elections held concurrently on the same day. Such elections were held by secret ballot and one could not predetermine the voter turnout or how voters would vote in each election. None of the parties had flagged anything so significant that it would have affected the outcome of the presidential election vis á vis the other five elections held on that day. There were no unexplained discrepancies between the votes cast for presidential candidates and other elective positions.

24. Pursuant to article 138(3)(c) of the Constitution, the power to verify and tally presidential election results as received at the National Tallying Centre, vested not in the chairperson of IEBC, but in the Commission itself. The latter carried out the exercise through its secretariat staff, technical personnel, and any other persons hired for that purpose under the oversight and supervision of the chairperson, and other members of the Commission.

25. The chairperson of the IEBC could not arrogate to himself the power to verify and tally the results of a presidential election, to the exclusion of the other members of the Commission. Under Article 138(10) of the Constitution, although the power to declare the result of a presidential election after verification and tallying, was vested in the chairperson, he did so only as a delegate of the Commission. To the extent that regulation 87(3) of the Elections (General) Regulations purported to vest the power of verifying and tallying presidential election results, as received at the National Tallying Centre, solely on the chairperson to the exclusion of other members of the Commission, the same was contrary to and inconsistent with the provisions of the Constitution.

26. Apart from their eleventh-hour denunciation of the verification and tallying process, and their averments regarding the conduct of the chairperson, the four Commissioners had not placed before the 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. They had not explained why they participated in a verification process when they knew that it was opaque up until the last minute. The 4 Commissioners acknowledged that the entire election had been managed efficiently and credibly. The chairperson did not make matters any better by maintaining a stoic silence even as things appeared to be falling apart. There was a serious malaise in the governance of an

institution entrusted with one of the monumental tasks of midwifing our democracy. An institution that needed far-reaching reforms.

27. To nullify an election on the basis of a last-minute boardroom rapture between the chairperson of the Commission and some of its members in the absence of any evidence of violation of the Constitution and electoral laws; to upset an election in which the people had participated without hindrance, as they made their political choices pursuant to article 38 of the Constitution would be tantamount to subjecting the sovereign will of the Kenyan people to the quorum antics of the IEBC. The court was incapable of such action. The dysfunctionality at the IEBC impugned the state of its corporate governance but did not affect the conduct of the election itself. Notwithstanding the divisions apparent between the chairperson and the 4 Commissioners, IEBC carried out the verification, tallying and declaration of results in accordance with article 138 (3)(c) and (10) of the Constitution.

28. The case made by the 6th petitioners concerned a data-specific threshold enunciated under article 138(4) of the Constitution without the attainment of which, there could be no declaration. That was the ultimate yardstick for determining the winner in a presidential contest. Rejected votes could not be taken into account when calculating whether a presidential candidate attained 50% +1 of votes cast in accordance with article 138 (4) of the Constitution.

29. In the case of data-specific electoral requirements (such as those specified in article 138(4) of the Constitution, for an outright win in the presidential election), the party bearing the legal burden of proof had to discharge it beyond any reasonable doubt. The assertion by the 6th petitioner that the percentage voter turnout was predicated on the uncorrected percentage given by the chairperson of IEBC, was negated by evidence adduced to prove the correction. The 6th petitioner based his percentage of voter turnout on the total number of registered voters while the chairperson of IEBC made reference, in the press briefing, to the number of registered voters who were identified through the KIEMS kits, progressively. The rounding off done by IEBC and its chairperson was correct.

30. The petitioners did not provide a watertight case to warrant the setting aside of the results of the presidential election on the basis of not having met the threshold provided under article 138(4)(a) of the Constitution. The formula predicated on the number of voters identified through the KIEMS kit progressively and used by IEBC and its chairperson to generate a percentage of 64.76% was correct.

31. The chairperson of IEBC applied the formula in article 138(4) of the Constitution which was:

Total votes cast (less rejected votes) 2	= 50% +1 vote

Given the numbers that were presented to us by IEBC and its chairperson, that would translate to:

14, 213, 137 2	+ 1 = 7,106,569

7,106, 569 was less than 7,176,141 which represented the number of votes received by the 1st respondent. On the basis of the above formula and from the numbers provided by IEBC and its chairperson, and the declaration by the chairperson of the President-elect on August 15, 2022, the declared President-elect attained 50%+1 of all the valid votes cast in accordance with article 138(4) of the Constitution.

32. Although the petitioners had provided numerous averments pointing to possible irregularities and illegalities, the pointed illegalities and irregularities were not of such magnitude as to affect the final result of the presidential election.

33. In exercising its jurisdiction pursuant to article 140 of the Constitution, the Supreme Court sat as an election court, with the mandate to determine the validity or otherwise of the election of the President-elect. The jurisdiction of the court was quite circumscribed in terms of the orders or reliefs it could grant following the hearing and determination of an Election Petition under article 140.

34. The Supreme Court could only make the following orders when determining the validity of a presidential election petition under article 140 of the Constitution:

a. in the event the court determined that the election of the President- elect was invalid, it had to make an order nullifying the election. Consequently, it had also to make an order directing IEBC to hold a fresh election within sixty days after the determination.

b. Should the court determine that the election of the President-elect was valid, it was to issue a declaration to that effect. The court would then as a matter of course, make an order dismissing the petition, with or without costs as the case may be.

35. The court could not assume jurisdiction that was beyond the purview of articles 163(3) and 140 of the Constitution. However, nothing stopped the court from issuing orders or reliefs by way of recommendations.

36. Since 2013, the Supreme Court had issued many recommendations arising from the determination of three petitions that challenged the election of the President-elect. The recommendations were meant to improve Kenya's electoral landscape and hence aid in the development of Kenya's democracy. The court had been greatly aided by the contributions of *amici curiae*. The court placed a heavy premium on the *amici* briefs that were filed by those it admitted in such capacity.

Petitions dismissed.

Orders

i. *The Presidential Election Petition No. E005 of 2022, as consolidated with Presidential Election Petition Nos. E001, E002, E003, E004, E007 and E008 of 2022 was dismissed.*

ii. *The election of the 1st respondent as President-elect to be valid under article 140(3) of the Constitution.*

iii. *Each party would bear their costs.*

Citations

Cases

Kenya

1. *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] eKLR - (Explained)
2. *Mwau, John Harun & 2 others v Independent Electoral and Boundaries Commission & 2 others* Petitions 2 & 4 of 2017; [2017] eKLR (Consolidated) - (Followed)
3. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 4 others* [2013] 1 KLR 63 - (Explained)
4. *Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Petition 1 of 2017; [2017] eKLR - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 86;101; 136(2)(a); 138(3)(c)(4)(a)(10); 140(1)(3); 163(3)(a); 177(1); 180(1) - (Interpreted)
2. Election Offences Act, 2016 (Act No 37 of 2016) section 5(n) - (Interpreted)
3. Elections (Technology) Regulations, 2017 (Act No 24 of 2011 Sub Leg) regulations 11, 12 - (Interpreted)
4. Elections Act, 2011 (Act No 24 of 2011) sections 6A, 44, 55B - (Interpreted)
5. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 11A (a) - (Interpreted)
6. Penal Code (cap 63) sections 113, 114 - (Interpreted)
7. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 23(1) - (Interpreted)
8. Supreme Court Act, 2011 (cap 9B) section 12 - (Interpreted)

Advocates

None mentioned

September 5, 2022, the Court delivered the following Judgment:

(Pursuant to rule 23(1) of the *Supreme Court (Presidential Election Petition) Rules, 2017*)

The Presidential Election of 9th August 2022

A. Introduction

This Judgment is rendered pursuant to rule 23(1) of the *Supreme Court (Presidential Election Petition) Rules, 2017*.

1. Kenya is a sovereign multi-party democratic state whose foundations are firmly spelt in the *Constitution*. The Kenyan people's quest for electoral reforms since independence is well documented. That notwithstanding and even without going back to the pre-1992 era, every cycle of elections has been highly contested with the exception of 2002. This speaks to a background of distrust of the administration of our electoral process. Informed by this setting, Kenyans made a decision to vest the Supreme Court with the jurisdiction to determine questions regarding the validity of a Presidential Election under article 140 of the *Constitution*. The reactions following the declaration of results of the Presidential Election of August 9, 2022 shows that the Independent Electoral and Boundaries Commission (IEBC) has not yet garnered universal public confidence and trust in the internal management of the Commission and elections. On August 15, 2022, six days after the General Elections were held, Mr Wafula Chebukati, the Chairperson of IEBC announced the following results:

Candidates	Votes	Percentage
Raila Odinga	6,942,930	48.85
William Ruto	7,176,141	50.49
David Waihiga	31,987	0.23
George Wajackoyah	61,969	0.44

2. Based on the aforesaid results, the Chairperson of the IEBC declared William Samoei Ruto, (the 1st respondent), the Presidential Candidate for the United Democratic Alliance Party, as the President-elect. This declaration precipitated a total of nine (9) Presidential Election Petitions filed before this court to wit;

   (i) Presidential Election Petition No E001 of 2022 - *John Njoroge Kamau v Wafula Chebukati and 3 others (respondents) and Raila Amolo Odingaa and 7 Others (interested parties).*

(ii) Presidential Election Petition No E002 of 2022 - *Youth Advocacy Africa & another v IEBC & 12 others*.

(iii) Presidential Election Petition No E003 of 2022 - *Khelef Khalifa & 3 others v IEBC & 3 others*.

(iv) Presidential Election Petition No E004 of 2022 - *David Kariuki Ngari v IEBC & 9 others*.

(v) Presidential Election Petition No E005 of 2022 - *Raila Amollo Odinga & Another v IEBC & 8 others*.

(vi) Presidential Election Petition No E006 of 2022 - *Moses Kuria & others v Hon Raila Amolo Odinga and 4 other interested parties*.

(vii) Presidential Election Petition No E007 of 2022 - *Okiya Omtatah Okoiti & others v IEBC & others*.

(viii) Presidential Election Petition No E008 of 2022 - *Juliah Nyokabi Chege & 2 others v IEBC & 3 others*.

(ix) Presidential Election Petition No E009 of 2022 - *Reuben Kigame Lichete v The Independent Electoral & Boundaries Commission (IEBC), and others*.

3. Further, a total of twenty-four (24) interlocutory applications and one (1) preliminary objection were filed and determined by this court. Two of the Presidential Election Petitions were struck out, that is, Presidential Election Petition Nos E006 and E009 of 2022 for failure to meet the constitutional threshold as set out under article 140(1) of the *Constitution*.

4. On August 29, 2022 this court also admitted three *amici curiae* briefs by the Law Society of Kenya (LSK), the *Kenyan Section of the International Commission of Jurists (ICJ Kenya Chapter) and John Walubengo & 2 others*.

A. Consolidation of Petitions

5. Upon perusing and considering the issues raised in the remaining Presidential Election Petition Nos E001, E002, E003, E004, E005, E007, and E008, the responses and the submissions filed thereto; this court found that all the seven petitions substantially raised similar issues and sought similar reliefs. Consequently, on August 30, 2022, this court ordered that the seven petitions be consolidated and designated Presidential Election Petition No E005 of 2022 as the lead file.

B. Issues for Determination

6. From the consolidated petition, responses and submissions filed thereto by all the parties, the court crystallised the following issues for determination:

    1. Whether the technology deployed by the IEBC for the conduct of the 2022 general elections 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 the IEBC Public Portal;

    3. Whether there was a difference between Forms 34A uploaded on the IEBC 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 the 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?

7. Having considered and deliberated upon the consolidated petition, the attendant responses, submissions and the *amici curiae* briefs we now make the following determination:

(i) Whether the technology deployed by the IEBC for the conduct of the 2022 general elections met the standards of integrity, verifiability, security and transparency to guarantee accurate and verifiable results

8. As noted in the introduction, lack of trust in the electoral system has endured in Kenya for a long time. This led to the introduction of electoral technology following the recommendations made by the Independent Review Commission on the General Elections held on the December 27, 2007 (Kriegler Commission Report). The Report recommended integration of technology into Kenya's electoral processes for registration, identification of voters and transmission of results. These were enacted in section 44 of the *Elections Act, 2011*. By this statute, IEBC is enjoined to adopt technology in the electoral process. As a consequence, the IEBC developed a technology known as Kenya Integrated Electoral Management System (KIEMS) making Kenya's election process hybrid as it employed both technology and manual processes.

9. The 1st, 3rd and 4th petitioners in the consolidated Petition, challenge the technology used by IEBC during the 2022 General Election. They plead that the manner in which technology was deployed and utilized fell short of the prescribed constitutional and statutory standards. As regards the audit of the Register of Voters, they urge that IEBC, pursuant to its Elections Operations Plan, committed itself to conducting an audit of the Register of Voters by March 31, 2022. To the contrary, they allege, it only publicly availed the audit report on its website on August 2, 2022, 7 days to the election.

10. In this report, it was noted that the auditors established serious gaps and risks to the electoral process including; numerous cases of change of voting stations without knowledge or approval of the affected voters; grant of voter update privileges in IEBC IDMS to 14 user accounts unrelated to voter registration;reducing the accountability of user activities in the Register of Voters; presence of 11 active generic accounts on the ABIS application and two ABIS users with the same log in identification; risking unauthorized system users possible transference; change of particulars or deactivation of voters in the system; IEBC's failure to set up access recertification and user activity review process; and IEBC's failure to respond to request by auditors for crucial information.

11. On the integrity of the technology deployed, the 7th petitioner contends that in order to comply with article 86 of the *Constitution* and section 44 of the *Elections Act*, the technology deployed must be simple, accurate, verifiable, secure, accountable and transparent. On the simplicity of technology, the 7th petitioner contends that the KIEMS kit failed the test as they were not easily usable by ordinary citizens without expert knowledge. They further assert that IEBC was expected to procure and put in place a technology necessary for the conduct

of the General Election at least one hundred and twenty (120) days before the election and ensure consultation with the relevant agencies, institutions and stakeholders.

12. Furthermore, the petitioners allege that IEBC violated its constitutional duty by delegating the design, implementation and conduct of the KIEMS component of the election to a foreign company-Smartmatic International Holding BV (Smartmatic). As a result, IEBC's staff and the public did not have full comprehension of the KIEMS component. They conclude therefore that IEBC abdicated and surrendered its role to conduct elections to Smartmatic; and that IEBC vigorously fought any attempt to subject Smartmatic's activities to accountability and transparency including the safeguards required by regulations 61(4)(a), 69(1)(d), (e)(iii) and 75(6) of the Elections (General) Regulations, 2012.

13. In response, IEBC has submitted that the electoral system met the constitutional threshold; that all necessary information was accessed only by authorized persons; the information was accurate, complete and protected from malicious modification either by authorized or unauthorized persons; it maintained an audit trail on activities related to information; and the information was available and could be authenticated through the use of various security features.

14. In further response, IEBC contended that they engaged KPMG on April 7, 2022 to conduct an Audit of the Register of Voters, which was submitted on June 18, 2022. In addition, it issued a briefing on the Report on June 20, 2022, summarizing the thematic areas therein and disclosing its findings as well as actions taken to remedy the issues identified. It also conducted its annual audit in compliance with regulations 11 and 12 of the *Election (Technology) Regulations, 2017* and a Certification of Compliance issued to it on August 3, 2022.

15. IEBC relied on affidavits sworn by Michael Ouma, Moses Sunkuli and Marjan Hussein Marjan on August 26, 2022 to the effect that it published the interim report by KPMG on June 8, 2022 and embarked on remedial measures aimed at effecting the recommendations ahead of publication of the final report. It was asserted that it could not publish the full final Audit Report as doing so would compromise the integrity and security of the electoral technology system, considering the provisions of the Data Protection Act, which imposes a duty to protect the data of Kenyan voters.

16. On the other hand, the 1st and 2nd respondents urge that even if there was failure of technology, it did not vitiate the result of the Presidential Election.

17. Upon considering all the pleadings, submissions and the ICT scrutiny and Inspection, tallying and recount Report which fully examined the IEBC's Result Transmission System (RTS), we are not persuaded by the allegation that the technology deployed by IEBC failed

the standard of article 86(a) of the Constitution on integrity, verifiability, security and transparency for the following reasons:

(a) Whereas it is true that the KIEMS kit failed in 235 polling stations, 86,889 voters were granted the right to vote manually and the requisite Forms 32A duly filled. This happened successfully in Kibwezi West Constituency and parts of Kakamega County.

(b) While the Audit Report was released to the public seven days before the 9th August election, the Register of Voters was used at the election without any apparent anomalies.

(c) Smartmatic was procured to provide the necessary technological infrastructure as IEBC did not have the capacity to do so. No credible evidence meeting the requisite standard of proof of access to the system by unauthorized persons was adduced by the petitioners.

(d) The Scrutiny Report prepared by the Registrar of this court did not reveal any security breaches of the IEBC's RTS.

(e) IEBC successfully deployed a Biometric Voter Register (BVR) system which captures 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. These features are unique to each voter.

(f) In compliance with section 6A of the *Elections Act*, 2011, IEBC opened the Register of Voters for verification of biometric data by members of the public for a period of 30 days. Thereafter, the Register was revised to address issues arising from the verification exercise. KPMG then audited the Register and we are satisfied that the inconsistencies and inaccuracies identified during the Audit were successfully addressed.

(ii) Whether there was interference with the uploading and transmission of Forms 34A from the polling station to the IEBC Public Portal

18. The 1st petitioner alleged staging, that a person who had access to the RTS, intercepted, detained or stored Forms 34A temporarily to convert or manipulate them before uploading them on IEBC's public portal. It is alleged also on August 11, 2022 IEBC dumped over 11,000 Forms 34A on the public portal between 1101-1109 hrs.

19. To rebut this allegation, IEBC and its Chairperson in their response dated August 26, 2022 denied staging and unauthorized intrusion of the RTS. In that regard, they urge that every

image of Form 34A was uploaded immediately after the transmitted result form was received as evinced by the time stamp. Similarly, the 1st respondent denied this allegation.

20. It is our finding that#

(a) No credible evidence was presented to prove that anyone accessed the RTS to intercept, detain or store Forms 34A temporarily before they were uploaded onto the Public Portal. The allegation that 11,000 Forms 34A were affected by staging was similarly not proved.

(b) The allegation that IEBC, its officials and strangers used a tool to tamper with the Forms 34A before converting them to the Portable Document Format (PDF) format that eventually appeared on the Public Portal was sufficiently explained when IEBC demonstrated how KIEMS captured and transmitted the image of Form 34A. Accordingly we dismiss the allegation.

(c) During the ICT scrutiny it turned out that the transmission logs produced in the affidavit of Justus Nyang' aya were of no probative value.

(d) The Registrar's Report shows that the original Forms 34A from the contested polling stations which were allegedly intercepted were exactly the same as those on the Public Portal and the certified copies presented to this court under Section 12 of the *Supreme Court Act*, 2011.

(e) Regarding the allegation that the integrity of the Public Portal was compromised, this was disproved by evidence of consistent attributes such as unique time stamps, uniform PDF conversions at the polling stations, correct polling station mapping and consistent KIEMS reporting from verification to transmission of results.

(f) The RTS was configured on a Virtual Platform Network (VPN) and the SIM cards locked to a specific polling station.

The server was also configured to accept results only from authorized and properly mapped KIEMS kit. In our view, the petitioners failed to produce credible evidence to the contrary.

(g) A review of some of the logs presented as evidence of staging showed that they were either from logs arising from the 2017 Presidential Election or were outright forgeries. In our considered view, there was no evidence of a man in the middle server configured to the IEBC's VPN network; and no evidence was produced to show that the Chairperson of IEBC and staff were part of the alleged conspiracy to stage the transmission process.

(iii) Whether there was a difference between Forms 34A uploaded on the IEBC Public Portal, the Forms 34A received at the National Tallying Centre, and Forms 34A issued to the Agents at the Polling Stations

21. On this issue, the 1st petitioners' case was that there was deliberate manipulation and tampering with Forms 34A as demonstrated in their affidavits to the effect that votes were being deducted from the 1st petitioner and added to the 1st respondent.

22. To support this, the petition is supported by the evidence contained in the affidavits of Martha Wangari Karua sworn on August 21, 2022, Celestine Anyango Opiyo sworn on August 21, 2022 and August 28, 2022, Arnold Ochieng Oginga sworn on August 19, 2022 and August 28, 2022, John Mark Githongo sworn on August 21, 2022 and August 28, 2022, Dr Nyangasi Oduwo sworn on August 21, 2022 and Martin E. Papa sworn on August 20, 2022.

23. On the other hand, IEBC and its Chairperson urge that all Forms 34A transmitted to the IEBC portal were not interfered with or manipulated. Further, that the Forms 34A signed at the polling station and issued to the agents were identical to the Forms 34A uploaded on the Public Portal and delivered to the National Tallying Centre (Bomas). It was contended that in any event, IEBC used the original physical Forms 34A to tally, verify and declare the Presidential Election results.

24. The court ordered scrutiny of the Forms 34A from the 41 polling station outlined in the affidavit of Celestine Opiyo to ascertain allegations of interference.

25. It is our finding that#

    (a) There were no significant differences captured between the Forms 34A uploaded on the Public Portal and the physical Forms 34A delivered to Bomas that would have affected the overall outcome of the Presidential Election.

    (b) No credible evidence was presented to support the allegation that Forms 34A presented to agents differed from those uploaded to the Public Portal. The Report by the Registrar of this court confirmed the authenticity of the original forms in the sampled polling stations.

    (c) The affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's Report confirmed that all the Forms 34A attached to those affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the Public Portal. The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective affidavits was not

only inadmissible, but are also unacceptable. It has been established that none of the agents on whose behalf the forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two have gone ahead to depone on matters that are not within their knowledge.

(d) This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed. We must remind counsel who appear before this court, or indeed before any other court, or tribunal of the provisions of Sections 113 and 114 of the Penal Code, that swearing to falsehoods is a criminal offence, and too that it is an offence to present misleading or fabricated evidence in any judicial proceedings.

(e) SectioN 114 of the *Penal Code* states that:

> " Any person who swears falsely or makes a false affirmation or declaration before any person authorised to administer an oath or a declaration upon a matter of public concern, and at such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour."

One of the most serious losses an advocate may ever suffer is the loss of trust of Judges for a long time. Such conduct amounts to interference with the proper administration of justice.

(f) The contents of the affidavit of John Mark Githongo, which may contain forgeries, are dismissed for not meeting the evidential threshold.They contained no more than incredible and hearsay evidence. No admissible evidence was presented to prove the allegation that Forms 34A were fraudulently altered by a group situated in Karen under the direction of persons named in the affidavit and video clip attached to it. In fact, his two affidavits amount to double hearsay, and incapable of being proved at each layer.

(g) We turn to Form 34A for Gacharaigu Primary School which was sensationally presented by Julie Soweto, Advocate, to show that one, Jose Carmago, accessed the RTS and interfered with the result contained therein turned out to be no more than

hot air and we were taken on wild goose chase that yielded nothing of probative value.

(h) The KIEMS kit relating to Psongoywo Primary School which bore the same serial number with another was admitted by IEBC as an inadvertent manufacturer's error. We are also satisfied that the two kits had other identifying features that were markedly different including the time stamps and polling code. Nothing turns on that anomaly.

26. Therefore to the question whether there was a difference between Forms 34A uploaded on the IEBC Public Portal, those received at the National Tallying Centre, and those issued to the candidates' agents at the Polling Stations, we have found none.

(iv) 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

27. It is common knowledge that IEBC postponed elections for various seats during the General Elections of August 9, 2022 due to mix-up of ballot papers in the above named electoral units.

28. It is the combined case of the 1st and 2nd petitioners that, in terms of articles 136(2)(a), 177(1), 180(1) as read with article 101 of the *Constitution*, the Chairperson of IEBC had no jurisdiction to postpone elections in those areas; that section 55B of the *Elections Act* is inconsistent with *the Constitution* and therefore void to the extent that it purports to donate to IEBC power to postpone elections in the Constituency, County or ward contrary to the *Constitution* and the postponement undermined the conduct of free, fair and credible elections by depriving the voters an opportunity to vote for all the candidates on the date stipulated by the *Constitution*. The petitioners further contend that, the postponement of elections had the overall effect of suppressing voter turnout in the electoral units in question which was prejudicial to them.

29. Both the 1st and 3rd petitioners also believe that elections were deliberately postponed in Kakamega and Mombasa, Counties. It was alleged that these areas are considered to be 1st petitioner's strongholds, and as such, the postponement of elections worked to his disadvantage and handed a benefit to the 1st respondent.

30. These assertions were denied by IEBC and its Chairperson. They however, admitted that they experienced confusion with the printed ballot papers and explained that they only discovered the mix-up on the eve of the Election when the ballot papers were being

distributed to the polling stations; that as a practice, ballot papers can only be opened on the eve of the Election Day to avoid any mischief; and that by the time the mix-up was discovered, it was logistically impossible to print and replace the ballots papers in time for the election.

31. For this claim to succeed, it must be demonstrated, first, that IEBC had no authority in law to postpone the elections and secondly, that the postponement was deliberate and calculated to suppress voter turnout so as to affect the result by reducing the 1st petitioner's overall votes.

32. Section 55B of the *Elections Act*, 2011 provides for circumstances when elections can be postponed in a particular electoral unit including in cases of emergency.

33. We are therefore satisfied that on the basis of the foregoing provision, that the 3rd respondent had the requisite power to postpone election in the Constituencies, Counties and wards in question.

34. Concerning the allegation of voter suppression, we note that voter suppression is generally recognized as a political strategy which takes many forms but whose practical effect is ultimately to reduce voting by deliberately discouraging or preventing targeted groups of people from exercising their right to vote and thereby influence the outcome of an election. It therefore goes against the letter and spirit of article 38 which guarantees every citizen the right to make political choices based on universal suffrage.

35. Regarding this allegation, it has not been shown that, by postponing elections in the named electoral units, IEBC acted in bad faith or was influenced by irrelevant factors and considerations. From the explanation tendered, we are satisfied that the postponement was occasioned by a genuine mistake, which in our view, could have been avoided had the members and staff of the IEBC been more diligent when they went to inspect the templates in Athens, Greece where the printing of ballot papers was undertaken.

36. In the absence of any empirical data, we cannot find a basis upon which to conclude, as a matter of fact or evidence that the postponement affected voter turnout as a consequence of which the 1st petitioner, alone, as a Presidential candidate suffered a disadvantage. At any rate, the nature of the ballot being an individual decision and secret, there may be other variables to which the turnout in the named units can be attributed. From the evidence on record, however, it appears to us that this year's General Election recorded one of the lowest turnout since the reintroduction of multi- party political system, some 30 years ago. If there was a low voter turnout, it affected all the six categories of candidates and its explanation, in our view lies elsewhere but certainly not a calculated suppression.

37. On the other hand, in rebuttal to these claims, the IEBC illustrated, with examples to our satisfaction that there was no nexus between the postponement of elections and voter turnout in the affected units. Far from the fact that this claim was undoubtedly just another

red herring, it has nothing to do with the question under review, and accordingly we reject it and hold that there is no proof that the postponement resulted in voter suppression to the detriment of the 1st petitioner.

(v) Whether there were unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions

38. The 1st petitioner was categorical that there was systematic ballot stuffing in certain Counties mainly in the Rift Valley and central parts of Kenya, where, according to him a total of 33,208 votes were cast for President only without corresponding votes for the other elective positions.

39. On their part, IEBC and its Chairperson, while acknowledging that, indeed in some instances there was vote differential between those cast for President and for other positions, maintained that they were insignificant; that the instances related to votes by prisoners and citizens in the diaspora who only voted for President but not for the other elective positions. The differential also includes rejected ballot papers and stray votes which do not count as valid votes.

40. The well-established principle that the person who asserts a fact must prove it casts the burden upon the 1st petitioner to demonstrate that there were instances of ballot stuffing of such a magnitude as to justify the nullification of the Presidential Election.

41. Ballot stuffing, which is the illegal addition of extra ballots, is a type of electoral fraud aimed at swinging the results of an election towards a particular direction. Not a single document has been presented by the 1st petitioner to prove systematic ballot stuffing. A figure of 33,208 votes relied on in this claim is based on unproven hypothesis, that since the number of votes cast for President is higher than those for the other positions then, without more, it must follow that there was fraud. Fraud is a serious criminal offence and must be proved beyond reasonable doubt . Under section 5(n) of the *Election offences Act*, it is an offence for a person to vote more than once in any election.

42. IEBC has proffered a plausible explanation for the vote differential. There are categories of voters who only vote for the President, such as prisoners and Kenyans in the diaspora. There were an insignificant number of stray votes, whose combined effect cannot justify nullification of the election.

43. Finally, a General Election in Kenya comprises of six (6) different and separate elections held concurrently on the same day. Such elections are held by secret ballot and one cannot predetermine the voter turnout or how voters will vote in each election. None of the parties has flagged anything so significant that it would have affected the outcome of the Presidential Election vis á vis the other five elections held on that day. We find therefore that there were

no unexplainable discrepancies between the votes cast for Presidential candidates and other elective positions.

(vi) Whether the IEBC carried out the verification, tallying, and declaration of results in accordance with Article 138(c) and 138 (10) of *the Constitution*

44. This issue arises from the pleadings in all the Petitions as consolidated. Based on the said pleadings, the affidavits sworn in support thereof, and the written and oral submissions by the parties, two viewpoints regarding the meaning, scope, and application of article 138(3)(c) and (10) of the *Constitution* have been advanced.

45. On the one hand, the petitioners submit that pursuant to the foregoing provisions, the role of verifying and tallying of votes as received from polling stations countrywide, is vested in the Commission as a corporate entity and not the Chairperson of the Commission. It is their argument that the Chairperson cannot undertake this task to the exclusion of other Commissioners. They submit that the language of article 138(3)(c), does not envisage a situation where the Chairperson, can arrogate to himself unfettered authority to verify and tally the results at the National Tallying Centre, without involving the other Commissioners. Such action, they contend, would not only be unconstitutional, but would be sufficient ground without more, to nullify an election of a President-elect. In support of their argument, the petitioners cite the Court of Appeal decision in *IEBC v Maina Kiai & 5 others* as affirmed by this court in *Raila 2017*. The petitioners further submit that regulation 87(3) of the Elections (General) Regulations is unconstitutional, to the extent that it purports to vest the power of verification and tallying in the Chairperson of IEBC.

46. On the other hand, the 1st, 2nd and 3rd respondents submit that the power to verify, tally, and declare results of a Presidential Election at the National Tallying Centre, is the exclusive preserve of the Chairperson of IEBC. According to them, there is nothing unconstitutional about regulation 87(3) of the Elections (General) Regulations. The said regulation, the respondents submit, makes no mention of Commissioners, other than the Chairperson. At any rate, the respondents argue, article 138 (3) (c) of the *Constitution*, does not envisage a situation where it is the Commissioners who personally undertake the task of verifying and tallying the results as entered onto the thousands of Forms 34A. Such an undertaking, would be humanly impossible, they submit. For good measure, the respondents submit that section 11A (a) of the *IEBC Act* provides that the Chairperson and members of the Commission are responsible for the formulation of policy and strategy of the Commission and oversight. In their view, the Act does not contemplate a situation where Commissioners would be directly involved in the verification and tabulation of Presidential Election results. The task of verification and tallying, submit the respondents, is executed by staff of the Commission under the direction and supervision of the Commission Secretary, who in turn reports to the Chairperson.

47. As to whether the Chairperson acted unilaterally in verifying and tallying the Presidential Election results at the National Tallying Centre, the petitioners claim that indeed, this is what happened. It is the petitioners' case that the Chairperson, published Gazette Notice No 4956 of 2022 in which he designated himself as the 'Presidential Returning Officer', a position unknown in law and the *Constitution*. Having done so, the petitioners state that the Chairperson proceeded to conduct the verification and tallying process, to the exclusion of the other Commissioners each of whom he had assigned peripheral roles unrelated to the verification and tallying exercise.

48. On his part, the Chairperson of IEBC submits that although he has the exclusive authority to verify and tally the Presidential Election results as received at the National Tallying Centre, he did involve all the other Commissioners in the exercise, before eventually declaring the final result. He submits that he did this in the spirit of teamwork. The Chairperson of IEBC states that indeed, the four Commissioners were involved in the preparation of the 9th August General Elections from the time of their swearing into office, all the way to the verification and tallying of the results at the National Tallying Centre, until they withdrew from the exercise, just when he was set to declare the final result.

49. Having considered all parties' submissions, we find that, pursuant to article 138(3)(c) of the *Constitution*, the power to verify and tally Presidential Election results as received at the National Tallying Centre, vests not in the Chairperson of IEBC, but in the Commission itself. The latter carries out this exercise through its secretariat staff, technical personnel, and any other persons hired for that purpose under the oversight and supervision of the Chairperson, and other members of the Commission. In line with this Court's decision in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR (Raila 2017) and the Court of Appeal in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR (Maina Kiai Case), we also find that the Chairperson cannot arrogate to himself the power to verify and tally the results of a Presidential Election, to the exclusion of the other members of the Commission. Indeed, article 138(10) of the *Constitution*, although the power to declare the result of a Presidential Election after verification and tallying, is vested in the Chairperson, he does so only as a delegate of the Commission.

50. Consequently, to the extent that regulation87(3) of the Elections (General) Regulations purports to vest the power of verifying and tallying Presidential Election results, as received at the National Tallying Centre, solely on the Chairperson to the exclusion of other members of the Commission, the same is contrary to and inconsistent with the provisions of the *Constitution*.

51. That said, we however take cognizance of the fact that the 5th, 6th, 7th and 8th respondents herein, actively participated in the verification and tallying exercise, from the beginning, up-to and until just before the declaration of the result by the Chairperson. They took turns announcing the results as verified and tallied and were present and active during the actual verification and tallying at Bomas. An example is Justus Nyang'aya, who stood on the podium to announce to the public an adjustment that had been occasioned by errors of tabulation.

52. The events of August 15, 2022 therefore came as a surprise. As the public waited for the Chairperson of the IEBC to declare the final result, sporadic violence broke out at Bomas. The violence was swiftly contained by security forces, but there was unexpected drama, as two different factions of the Commission began to emerge. Kenyans found themselves watching an appalling split screen scenario on their television sets. On one part of the screen was the Chairperson, readying himself to declare the result in accordance with article 138(10) of the *Constitution*. On the other part of the screen were four Commissioners on the lawns of the Serena Hotel-Nairobi, from where they announced that they would not "own" the results that were soon to be declared by their Chairperson.

53. The four Commissioners informed the public of their rejection of the yet to be announced results, terming them "opaque" due to the manner in which the Chairperson had been conducting the verification and tallying exercise. In his affidavit dated the August 25, 2022 Justus Nyang'aya averred that the Chairperson's actions during the tallying and verification exercise at Bomas, made it difficult to ascertain the total number of votes cast, and the actual number of votes attained by each candidate, so as to enable him authoritatively state whether the Commission had declared accurate results.

54. All the petitioners have anchored their arguments for the nullification of the 9th August Presidential Election, *inter alia*, on the walk-out from the Bomas by the four Commissioners. They contend that by rejecting IEBC's results on grounds of opaqueness of the verification and tallying process, they called into question, the credibility of the entire election. They further submitted that being in the majority out of the seven-member Commission, their view should prevail and the election should be nullified. It is the petitioners' argument, therefore, that a dysfunctional Commission cannot deliver a credible election.

55. 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 have not placed 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 have not explained

why they 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. An institution that obviously needs far-reaching reforms, of which we shall say more in our detailed reasons.

56. But are we to nullify an election on the basis of a last-minute boardroom rapture (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 make 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 the IEBC. This we cannot do. Clearly the current dysfunctionality at the Commission impugns the state of its corporate governance but does not affect the conduct of the election itself.

57. In view of the foregoing, we are satisfied that notwithstanding the divisions apparent between the Chairperson and the four Commissioners, IEBC carried out the verification, tallying, and declaration of results in accordance with article 138(3)(c) and (10) of the *Constitution*.

(vii) Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with Article 138(4) of the *Constitution*

58. The 1st, 2nd and 3rd petitioners averred that the 1st respondent did not garner 50% + 1 of the total votes cast and therefore did not meet the threshold provided by article 138(4)(a) of the *Constitution*. They anchored their claims on the basis that in order to determine whether a candidate has attained 50% + 1 of the votes cast, this ought to be calculated based on the total number of votes cast excluding rejected votes. They urged that 50% of 14,353,165 which in their view were the valid votes cast, amounted to 7,176,582.77 votes. They contended that by attaining 7,176,141 votes, the 1st respondent did not meet the constitutional threshold to be declared President-elect.

59. Supporting the claim that the 1st respondent did not meet the 50%+1 constitutional threshold was the 6th petitioner. His contention was founded on the backdrop of a press briefing issued by the Chairperson of IEBC after the official closure of voting on August 9, 2022. According to the 6th petitioner, the Chairperson of IEBC announced that the voter turnout was 65.4% of the total number of registered voters, based on the verification

of the KIEMS kits which were functional during the process of voting. In addition, the 6th petitioner urged that the voter turnout of 65.4% did not include 238 polling stations where the KIEMS kits had malfunctioned necessitating use of the manual register. It was therefore urged that the minimum number of votes cast could not be less than 14,466,779. Additionally, that, this number was bound to increase once the number of votes from the areas that used the manual register were included. The 6th petitioner further claimed that a summation of the minimum number of votes cast and untallied manual votes would represent the actual voter turnout.

60. In challenging the declaration made by the Chairperson of IEBC, the 6th petitioner averred that the final tally published in Form 34C only accounted for 14,326,641 votes cast, including 113,614 rejected ballots. The 6th petitioner contended that this tally did not factor in 140,138 votes cast using the manual register. The 6th petitioner computed this number by subtracting 14,326,641 declared votes cast from 14,466,779 generated by the 6th petitioner as representing 65.4% of the voter turnout.

61. Referring to the tallies in Form 34C, the 6th petitioner summed the number of votes cast for each candidate as follows: Raila Odinga (6,942,193), William Ruto (7,176,141), Waihiga Mwaure (31,987) and George Wajackoyah (61,969) adding to a total of 14,213,027. He then added 140,138 alleged to be untallied votes. This yielded a total of 14,353,165 total valid votes which the 6th petitioner used to compute the percentages garnered by each candidate as follows: Ruto (49.9%), Raila (48.372%), Waihiga (0.22%) and Wajackoyah (0.431%). It is on this basis, that the 6th petitioner grounded the claim that none of the candidates met the Constitutional threshold set in Article 138(4)(a).

62. IEBC and its Chairperson, disputed the 6th petitioner's claim. They submitted that the declaration of results is based on the number of people identified as having voted on the KIEMS kit and not the total persons on the voter's register, as alleged. They contended that the final voter turnout comprising of voters who were identified through the KIEMS kits and those who voted manually was 64.76% and not 65.4% as alleged by the petitioners. They urged, that the announcement error by the Chairperson of IEBC on 10th August 2022, was immediately clarified during the same press briefing. Evidence of this correction was provided to this court in the affidavit of the 1st and 2nd respondents in Presidential Election Petition No E007 of 2022.

63. According to IEBC and its Chairperson, 14,239,862 voters were identified using the KIEMS kit while 86, 889 voters were identified using the printed voter register. Thus, the total valid votes cast were 14,213,137 while the total number of rejected ballots were 113,614 constituting 14,326,751 total votes cast. They illustrated that the 1st respondent garnered 7,176,141 votes against 14,213,137 total valid votes cast yielding a percentage of 50.49% to

meet the requisite constitutional threshold for a candidate to be declared President-elect. In the upshot, the percentage attained by each candidate was as follows: Raila Odinga (48.84%), William Ruto (50.48%), David Waihiga Mwaure (0.22%) and George Luchiri Wajackoyah (0.43%).

64. IEBC and its Chairperson also admitted that the KIEMS kits malfunctioned in 235 polling stations necessitating use of the printed voter register. In these polling stations, back up KIEMS kits were later deployed for purposes of results transmission.

65. The 1st respondent in response to the question of 50%+1 constitutional threshold, maintained that he attained the threshold under article 138(4) of the *Constitution* as elaborated by the IEBC and its Chairperson.

66. This court has considered the differing formulas and threshold arguments presented by various parties to this petition. While the 1st, 2nd and 3rd petitioners raised pertinent questions connected to this issue, we shall address them together with those of the 6th petitioner who has addressed and focused on the issue as specifically framed in detail.

67. It must be restated that the case made by the 6th petitioners concerns a data- specific threshold enunciated under article 138(4) of the *Constitution* without the attainment of which, there can be no declaration. This data-specific threshold is what this court in *John Harun Mwau & 2 others v IEBC & others*, Petitions Nos 2 and 4 of 2017 (Consolidated) referred to as the ultimate yardstick for determining the winner in a Presidential contest.

68. In *Raila Odinga & 5 Others v IEBC & 4 others*, Petition Nos 5, 3 & 4 of 2013 (Consolidated), [2013] eKLR, (Raila 2013), the court asserted that rejected ballot papers do not constitute a vote cast to be included in calculating the final tally in favour of a Presidential candidate. We are not persuaded by the *amicus curiae's* (Law Society of Kenya) brief who attempted to persuade us to reconsider our position on this finding. We reiterate that rejected votes cannot be taken into account when calculating whether a Presidential candidate attained 50% +1 of votes cast in accordance with article 138(4) of the *Constitution*.

69. Similarly, in the same *Raila 2013*, the court further laid down the parameters of burden and standard of proof in electoral disputes. More specifically, the burden and standard of proof required in disputes challenging the outcome of a Presidential election.

At Paragraph 203, the court clarified that:

> " In the case of data-specific electoral requirements (such as those specified in article 138(4) of the *Constitution*, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."

70. The question that follows, was whether the petitioners challenging the attainment of the 50%+1 constitutional threshold and the computations by the 6th petitioner in general, met the standard of proof settled by this court in Raila 2013.

71. The premise of the 6th petitioner's percentage computation was a press briefing made by the Chairperson of the IEBC on August 10, 2022. When the evidential burden shifted to IEBC and its Chairperson as it does in election cases, they produced video evidence correcting the percentage voter turnout to 64.6% (at the time of the briefing). This percentage however did not include reports from all the KIEMS kits and 86,889 voters who were identified manually using the printed Register of Voters.

72. In our view, the assertion by the 6th petitioner that the percentage voter turnout was, firstly, predicated on the uncorrected percentage given by the Chairperson of IEBC, was negated by evidence adduced to prove the correction. Secondly, the 6th petitioner based his percentage of voter turnout on the total number of registered voters while the Chairperson of IEBC made reference, in the press briefing, to the number of registered voters who were identified through the KIEMS kits, progressively.

73. The 6th petitioner also asserted that rounding off of votes cast in a Presidential Election as a means of assessing the threshold under article 138(4) of the *Constitution* "kills" and "births" voters, which is illegal and unconstitutional. We have deliberated on this proposition and found that it is not mathematically sound and that the rounding off done by IEBC and its Chairperson was correct.

74. Consequently, we find that the petitioners did not provide a watertight case to warrant the setting aside of the results of the Presidential Election on the basis of not having met the threshold provided under article 138(4)(a) of the *Constitution*.

75. On voter turnout, therefore, we find that the formula predicated on the number of voters identified through the KIEMS kit progressively and used by IEBC and its Chairperson to generate a percentage of 64.76% was correct.

76. Having settled the issue of voter turnout, we must ask ourselves whether in making the declaration, the Chairperson of IEBC applied the formula in article 138(4) of the *Constitution* which is:

$$\frac{\text{Total votes cast (less rejected votes)}}{2} = 50\% + 1 \text{ vote}$$

Given the numbers that were presented to us by IEBC and its Chairperson, this will translate to:

$$\frac{14,213,137}{2} + 1 = 7,106,569$$

77. The question that must inevitably follow is whether this formula when applied, will confirm that 7,106, 569 is less than 7,176,141 which represents the number of votes received by the 1st respondent. We find that it is. As such, on the basis of the foregoing formula and from the numbers provided by IEBC and its Chairperson, and the declaration by the Chairperson of the President-elect on August 15, 2022, it is our finding that the declared President-elect attained 50%+1 of all the valid votes cast in accordance with article 138(4) of the *Constitution*.

(viii) Whether there were irregularities and illegalities of such magnitude as to affect the final result of the Presidential Election

78. Although the petitioners have provided numerous averments pointing to possible irregularities and illegalities, marked by failures of technology, alleged voter suppression, printing and utilisation of Book 2 of 2, ill preparation by the IEBC and its Chairperson, Commission indiscretions, transposition anomalies, agent absences and many others, we are of the view that the pointed illegalities and irregularities were not of such magnitude as to affect the final result of the presidential election. We will delve into deeper details in our reasoned Judgement.

(ix) What reliefs and orders can the Court grant /issue?

79. Article 163 (3)(a) of the *Constitution* provides that the Supreme Court shall have#

a. exclusive original jurisdiction to hear and determine disputes relating to the election of the office of the president arising under Article 140;

80. Article 140 of the *Constitution* in turn provides:

1. A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

2. 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.

3. If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.

81. 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 an Election Petition under article 140 of the *Constitution*.

82. In the event the court determines that the election of the President-elect is invalid, it must make an order nullifying the election. Consequently, it has also to make an order directing IEBC to hold a fresh election within sixty days after the determination.

83. Should the court determine that the election of the President-elect is valid, it shall issue a declaration to that effect. The court has then as a matter of course, make an order dismissing the petition, with or without costs as the case may be.

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.

C. Final Orders

85. In unanimity, we make the following orders:

i. The Presidential Election Petition No E005 of 2022, as consolidated with Presidential Election Petition Nos E001, E002, E003, E004, E007 & E008 of 2022 is hereby dismissed.

ii. As a consequence, we declare the election of the 1st respondent as President-elect to be valid under article 140(3) of the *Constitution*.

iii. This being a public interest, matter we order that each party shall bear their costs.

It is so ordered.

Youth Advocacy for Africa (YAA) & 7 others v Independent Electoral and Boundaries Commission & 17 others (Election Petition E002, E003 & E005 of 2022 (Consolidated)) [2022] KESC 42 (KLR) (Election Petitions) (30 August 2022) (Ruling)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 42 (KLR)

Electoral Law *– scrutiny – recount – application for scrutiny and recount - what criteria should courts employ in determining applications for scrutiny and recount in election results - 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 - Elections Act, 2011, sections 39 and 44; Supreme Court Act, 2011, sections 12, 23, and 26; Supreme Court (Presidential Election Petition) Rules 2017, Access to Information Act, The Elections (Technology) Regulations 2017 rule 17 and 18; Election (Technology) Regulations, 2017, regulation 10*

Electoral Law *– parties to the presidential election petition – power of the court to issue orders to third parties not enjoined in the presidential election petition - whether the Supreme Court in determining a presidential election petition 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 - Supreme Court (Presidential Election Petition) Rules 2017, Access to Information Act, The Elections (Technology) Regulations 2017 rules 17 and 18; Election (Technology) Regulations, 2017, regulation 10*

Brief facts

The petitioners in Presidential Election Petition No. E002 of 2022 (the applicants) through an application sought court orders to compel the Independent Electoral and Boundaries Commission (IEBC) to give the petitioners or any person or expert engaged by IEBC in relation to the petition, the complete unedited soft copy of the Voters Register; to give the petitioners full and unfettered physical and remote access to electronic device(s) used to capture Form 34A's and 34B's on the Kenya Integrated Election Management System (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 server(s) at the constituency tallying centre for storing and transmitting voting information and that the servers would be forensically imaged to capture *inter alia*, metadata such as data files for all Forms 34A and Forms 34B among other orders regarding the technology used in the presidential election that was conducted on August 2022. The petitioners also sought court order for inspection, scrutiny and recount for various polling stations.

Issues

i. What criteria should courts employ in determining applications for scrutiny and recount of election results?

ii. Whether the Supreme Court in determining the presidential election petition 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.

iii. 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.

Held

1. While considering a request for scrutiny of either the forms or the technology used in an election, the request for scrutiny had to be made for a sufficient reason. Any request that would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would be rejected. Any prayer couched in general terms, not pleaded with specificity or such other request that was impracticable in terms of scope and time would be declined. The narrow timelines granted by the Constitution for the hearing and determination of a presidential election dispute, meant that only reasonable, practical and helpful orders should be issued in that regard.
2. Subject to section 12 of the Supreme Court Act all of the certified copies of the documents used to declare the results of the presidential election were already in the custody of the court and were available to the parties upon request. There was no reason to grant the prayers to avail the soft copy of the voters register and to order scrutiny of the biometric voter register as the register was already in the public domain. No justification in the context had been given to show why the same should be provided. The request to access to all KIEMS kits and servers for all Constituency Tallying Centers was unrealistic given the short timelines for the hearing and determination of the presidential election petitions.
3. The orders sought regarding the technological aspects of the presidential election petitions were not practicable, reasonable and helpful to ensure that the Supreme Court reached a just and fair determination of the petitions. They were couched in general terms and were vague.
4. There could be possible legal issues that could arise in granting the prayer asking for the terms of reference between Smartmatic International and Local Service Providers. The Supreme Court could not blindly grant orders to direct the production of contracts with terms of reference between third parties who were not parties to the petitions before the court. Smartmatic International was not a party to the proceedings neither were local service providers and to demand that such terms of reference be accessed by the applicants was impractical and may cause unnecessary delay in the hearing and determination of the presidential election petition.
5. An order allowing for the filing of further affidavits arising from the attainment of the information from the scrutiny exercise, noting the time left for the hearing and determination of the petition from the date of delivery of the instant ruling, would only but delay the proceedings and would occasion prejudice to the respondents who would not be able to respond to the issues raised in the affidavits.

Application partly allowed.

Orders

i. *The IEBC was to provide to the applicants copies of its technology system security policy comprising but not limited to password policy, password matrix, owners of system administration password(s), system users and levels of access, and workflow chats for identification, tallying, transmission and posting of portals and any API's that had been integrated and the list of human interface and controls for such intervention subject however to any security related issues thereof.*

ii. *IEBC was compelled to give the applicants supervised access to any server(s) at the National Tallying Centre for storing and transmitting voting information and which were forensically imaged to capture a copy of the Form 34C which was the total votes cast.*

iii. *The IEBC was to provide the applicants with certified copies of penetration tests conducted on the IEBC election Technology System prior to and during the 2022 General and Presidential Election including certified copies of*

   1. *all reports prepared pursuant to Regulation 10 of Election (Technology) Regulations, 2017; and*
   2. *certified copies of certificates by a professional(s) prepared pursuant to Regulation 10(2) of Election Technology) Regulations,2017.*

iv. *The IEBC was directed to avail partnership agreements with its technical partners, list of users, trail and admin access to provide clarity on the IEBC systems and their usage for review and verification, subject however to any security related issues thereof.*

v. *The ballot boxes for the following polling stations were to be opened for inspection, scrutiny and recount:*

   1. *Nandi Hills and Sinendeti Primary School in Nandi.*
   2. *Belgut, Kapsuser and Chepkutum Primary Schools in Kericho County.*
   3. *Jomvi, Mikindani and Ministry of Water Tanks Polling Stations in Mombasa County.*
   4. *Mvita, Majengo and Mvita Primary Schools in Mombasa County.*
   5. *Tinderet CONMO, in Nandi County.*
   6. *Jarok, Gathanji and Kiheo Primary School Polling in Nyandarua County.*

vi. *The error forms signed by the chairperson of IEBC during the tally and verification exercise at the National Tallying Centre between August 10 – 15, 2022 were to be provided to the applicants.*

vii. *IEBC should provide certified copies of Forms 32A and 34C Book 2 used in the impugned election subject to the applicants providing to the IEBC specific contested polling stations for compliance thereof.*

viii. *The above exercise was to be conducted within 48 hours of the instant orders.*

ix. *Each party was to be represented by two agents during the exercises above and they would at all times be under the supervision of the Registrar of the Supreme Court and her staff. The Registrar was to file her report by 5:00 PM on September 1, 2022 and avail copies to all parties.*

x. *Any party was at liberty to submit on the Report before conclusion of the hearing as was to be directed by the President of the court.*

xi. *No order as to costs.*

Citations

Cases

Kenya

1. *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* Civil Appeal No 105 of 2017; [2017] eKLR - (Explained)
2. *Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Petition 1 of 2017; [2017] eKLR - (Mentioned)

Statutes

Kenya

1. Access to Information Act, 2016 (Act No 31 of 2016) In general - (Cited)
2. Constitution of Kenya articles 1, 2, 3, 19, 20, 22, 23(3); 35; 81; 86;138(1)(c); 140; 159; 258 - (Interpreted)
3. Elections (Technology) Regulations, 2017 (Act No 24 of 2011 Sub Leg) regulation 10(2) - (Interpreted)
4. Elections Act, 2011 (Act No 24 of 2011) sections 39(1)(c); 44 - (Interpreted)
5. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 27 - (Interpreted)
6. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 24 of 2011 Sub Leg) rules 3, 4,17, 18 - (Interpreted)
7. Supreme Court Act, 2011 (cap 9B) sections 12, 23, 26 - (Interpreted)

Advocates

None mentioned

August 30, 2022, the Court delivered the following Ruling:

1. Upon reading the notice of motion by Youth Advocacy Africa (YAA) and Peter Kirika, the petitioners in Presidential Election Petition No E002 of 2022 brought under articles 19, 20,22, 23(3), 35, 81, 86, 140, 159 and 258 of the *Constitution*, sections 39 and 44 of the *Elections Act, 2022*, sections 12, 23 & 26 of the *Supreme Court Act, 2011* rule 17 and 18 of the *Supreme Court (Presidential Election Petition) Rules 2017*, *Access to Information Act*, *The*

Elections (Technology) Regulations 2017 and all other enabling provisions wherein they seek orders that:

1. The IEBC be compelled to give the petitioners or any person or expert engaged by IEBC in relation to this petition, the complete unedited soft copy of the Voters register in excel format used in the General Elections held on August 9, 2022;

2. The IEBC be compelled to give the petitioners full and unfettered physical and remote access to electronic device(s) used to capture Form 34A's and 34B's on the KIEMS system and transmitted to the Constituency Tallying Centre and the National Tallying Centre;

3. The IEBC be compelled to give full and unfettered physical and remote access to the smartphones used on 9th August 2022 General Elections by the Returning Officers deployed in constituencies in Murang'a County, Kirinyaga County, Laikipia County, and Baringo Central Constituency in line with paragraph (k) of the Kenya Gazette Notice Vol CXXIV No 150 dated August 3, 2022;

4. That the IEBC be compelled to give access to and supply to the court and to the petitioners certified copies of the raw images of Forms 34As prepared and obtained from the Polling Stations by the Presiding Officers before being converted to PDF Format as well as all the Forms 32As prepared at all the Polling Stations in the Presidential Elections held on August 9, 2022;

5. That the IEBC be compelled to give access and supply to the Court and to the parties' information and data in its exclusive possession on;

    (a) The IEBC Election System Network Architecture comprising but not limited to the servers, number of servers, location of the servers; the firewalls, the IP addresses, the operating systems, and software running applications.

    (b) The IEBC election technology system security policy comprising but not limited to password policy, password matrix, owners of system administration password(s), system users and levels of access, and workflow chats for identification, tallying, transmission, and posting of portals and any API's that had been integrated and a list of human interface activities and controls for such intervention.

    (c) Certified copies of certificates of penetration tests conducted on the IEBC election Technology System prior to and during the 2022 General and Presidential Election including certified copies of a) all reports prepared pursuant to regulation 10 of *Election (Technology) Regulations, 2017*, and

b) certified copies of certificates by a professional(s) prepared pursuant to regulation 10(2) of *Election (Technology) Regulations, 2017*.

(d) In relation to KIEMS kits; the (i) static IP addresses of each KIEMS kit used during the presidential election held on August 9, 2022, (ii) specific GPS location of each KIEMS Kits and GPS location for each polling station used during the Presidential Election for each period including August 5, 2022 and August 15, 2022; (iii) certified list of all KIEMS Kits unique device identifiers including but not limited to MAC address, IMEI numbers, Sim Card numbers procured used, unused and or deployed during the elections; (iv) polling station allocation for each KIEMS Kits used during the presidential election including the six back up kits per ward; (v)electronic voter identification (EVID) logs of each KIEMS Kits used during the presidential election on 9th August 2022 transmitted from polling stations to the constituency tallying Centre and to IEBC National Tallying Centre; and from i) IEBC Result Transmission Data Base Application protocol interphase (API) logs showing user access rights, time of transmissions from KIEMS Kits to the IEBC Result Transmission Data Base, Access time of transmission from IEBC Result Transmission Data Base to the Media Houses API; (vi) count of identified voters by each KIEMS Kit by biometric identification to alphanumeric search, manual identification through physical register and overall count including found and not found; logs for EVI application logs to include log in details of the user, opening and closing time, voters IDs, device MAC address, mode of identification, time stamp, polling station Code and GPS location; RTS applications to include log in details of the user, opening and closing time of the application, time of Form 34As image captured and transmitted and; access to the original Form 34A image captured by the KIEMS Kits, sent to the RTS central server prior to processing to PDF with original metadata including time stamp, resolution, device ID and GPS location.

(e). technical partnership agreements for IEBC Election technology system including the list of technical partners, the kind of access they had, the list for APIs for exchange of data with partners, log in trail of users and equipment into IEBC servers, log in trails of users and equipment into the KIEMS Database management systems; and access to administrative access into the IEBC obelic portal between August 9, 2022 to date.

6. That IEBC be compelled to give the applicants and any person engaged by the court full and unfettered physical and remote access to any local server connected to the

electronic device(s) used to verify voters identification against the list of registered voters at each polling station, from which a forensic image will be taken;

7. That IEBC be compelled to give the applicants full and unfettered physical and remote access to any server(s) at the constituency tallying centre for storing and transmitting voting information and that the servers will be forensically imaged to capture *inter alia*, metadata such as data files for all Forms 34A and Forms 34B.

8. That IEBC be compelled to give the applicants access to certified copies of the original Forms 34B prepared at and obtained from the Constituency Tallying centers and returning officers;

9. That IEBC be compelled to give access to particulars of the webmaster(s), log-in time, log-in access, log-in codes, and logs of all the Forms 34A and 34B PDF Forms uploaded from the RTS to the public portal;

10. That IEBC be compelled to give certified copies of the minutes of IEBC postponing elections for Governor in Mombasa and Kakamega Counties

11. That IEBC be compelled to supply to the court and the petitioners' copies of the Minutes of the 1st respondent held to tally and verify the count of the presidential election in line with article 138(1)(c) of the *Constitution*; and

2. Upon considering the grounds in support of the application and the averments in the supporting affidavit sworn by Peter Kirika and Francis Wamutitu where the applicants claim that: that the impugned declaration of the presidential results was made in breach of the *Constitution* and the national legislation, in particular, the Election (Technology) Regulations, 2017 and section 39(1)(C) of the *Elections Act 2011*; that the IEBC Election Technology System was penetrated and or deliberately compromised and used in a manner not intended by law so as to interfere and affect the result of the presidential election; that the information sought is critical to demonstrate that IEBC did not conduct a free, fair, secure, verifiable, accountable and transparent presidential election and; that the grant of access to the information and data sought is in line with the IEBC's duty to be independent, transparent and accountable; and

3. Also noting the Notice of Motion by Khelef Khalifa, George Osewe, Ruth Mumbi and Grace Kamau, the petitioners in Presidential Election Petition No E003 of 2022 brought pursuant to rule 3, 4 & 17 of the *Supreme Court (Presidential Election Petition) Rules, 2017* wherein they seek orders that:

1. The IEBC do produce the full KPMG independent audit of the Register of Voters report dated June 16, 2022.

2. An order for scrutiny and review of the following information infrastructure deployed by the IEBC including: the API server access primary server; all the files in IEBC's external server; all proxy users, all authorized access users; IP address of proxy users, information on all rest request, get access, head access, post access, put access, delete access, patch access, and options access to the servers; server integration access, all information generated at the back office, KIEMS Kit deployment register, database entry register, IP address of all Kits, Transmission gateways, IDM Registered, integrated data management system, dashboard users, system users access rights, command center users (administrative rights of access).

3. That IEBC does 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 and the same be scrutinized by the court.

4. That IEBC does provide geolocation data/logs of the KIEMS Kit while on voter identification mode and results transmission mode;

5. That IEBC does provide the KIEMS Kit mobile device management logs for Forms 34C in CSV or in excel format, Forms 37B in CSV or in excel format, and Forms 38B in CSV or in Excel format.

6. That IEBC does provide a list of Form 32As capturing the details of all registered voters not identified through the KIEMS Kits and were identified to vote manually.

7. That's the IEBC does produce all the Forms 34A book 2.

8. That the Court does issue an order for scrutiny of the Biometric Voter Register used in the 2022 presidential elections pending the hearing and determination of the petition; and

4. Further considering the grounds in support of the application, the averments contained in the supporting affidavit of Khelef Khalifa sworn on behalf of the petitioners and their written submissions dated August 28, 2022 where they contend that IEBC is required, at least six months before a general election, to engage a professional reputable firm to conduct an audit of the Voters Register in order to verify the accuracy of the Register, recommend mechanisms of enhancing the accuracy of the register and update the register; that IEBC had engaged the services of KPMG on or about April 7, 2022 to conduct an audit of the register of Voters while the continuous voter registration was still ongoing and therefore, the Auditor could not get accurate information on the Voters Register; that despite the legal requirement that IEBC publicizes the audit report, the same is yet to be done despite the allegation that the IEBC's ICT system was vulnerable to hacking and manipulation and; that the audit report revealed serious gaps in IEBC's new voter register system despite IEBC

claiming that they had fixed the anomalies identified in the audit report with there been no public or private information confirming the rectification and therefore the applicants urge the court to find that the electoral process adopted by IEBC and the Chairperson of the IEBC in particular during the General Election held on August 9, 2022 was convoluted, opaque, vulnerable to manipulation, and fraught with unconstitutionalities, illegalities and irregularities which substantially affected the presidential election results; and

5. Having also considered the Notice of Motion by Raila Odinga and Martha Karua, the petitioners in Presidential Election Petition No E005 of 2022 brought pursuant to articles 1,2,3,19,20, 22, 23(3), 35,81,86,140,159 and 258 of the *Constitution*, section 39,44, 80(4), and 82 of the *Elections Act*, section 27 of the IEBC Act, section 23 & 26 of the *Supreme Court Act, 2011*, rule 17 of the *Supreme Court (Presidential Election Petition) Rules 2017*, regulation 15 of the *Elections (Technology) Regulations 2017* and all enabling provisions of the law wherein they seek orders that:

    1. The IEBC do deliver to the court the following documents for inspection: all physical and digital(public portal) forms 34B in respect of the two hundred and ninety Constituencies; all Forms 32A used in the election to authorize manual identification of voters; the full KPMG Report on the Register of Voters; full audit report on the technology used; Report of the vendor, due diligence, technology used in the General Election on August 9, 2022; error forms signed by the Chairperson of IEBC during the tally and verification exercise at the National Tallying Centre between 10th to August 15, 2022; copies of polling station diaries from Kiambu, Kirinyaga, Nyandarua, Nyeri, Muranga, West Pokot, Bomet and Bungoma Counties; result transmissions system simulation exercise report of the results; training schedule if any for technology operators; the sign offs/ verification of ballot paper printing and distribution, the terms of reference of all support contracts between Smartmatic International and Local Service Providers, the list of third party integration including APIs and associated security controls, the list of data repositories for both the physical and digital copies of election materials.

    2. Prayer 5 as sought by the applicants in Presidential Petition E002 of 2022 and additionally, that IEBC does deliver the IEBC Election technology system redundancy plan comprising the business continuity plan and disaster recovery plan;

    3. That the IEBC does deliver to the court and parties all ballot boxes for inspection, scrutiny and recount in the following polling stations, Nandi Hills and Sinendeti Primary School 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; Jarok, Gathanji and Kiheo Primary School Polling in Nyandarua County;

4. That the IEBC does deliver all ballot boxes in Bomet, Nandi, Kiambu, Kericho, Kirinyaga and Nyeri counties for inspection, scrutiny, recount and such terms as it deems fit;

5. That in the alternative, the IEBC does deliver all ballot boxes in Gatundu North Constituency, Chepalungu Constituency, Konoin Constituency, Sotik Constituency, Kiambaa Constituency, Belgut and Nyali Constituency for inspection, scrutiny and recount on such terms as the court deems fit;and

6. That this court be pleased to grant the applicants 48 hours from the date of supply to inspect, scrutinize and recount as the case may be, the foregoing information and to file such affidavits or reports as may be necessary;and

6. Upon reading the grounds in support of the application, the averments in the supporting affidavit sworn by Martha Karua on behalf of the petitioners and their written submissions filed and dated August 26, 2022 where the applicants claim that IEBC conducted and supervised the impugned election of 9th August and on August 15, 2022, the Chairperson purported to announce William Ruto as president-elect and gazetted him in Notice No CXXIV on August 16, 2022; that the impugned declaration of the presidential results were made in flagrant violation of the *Constitution* and the Electoral Laws; that the electronic transmissions of results from polling stations to the Constituency Tallying Centre were not secure so as to deliver a free, fair, secure, credible, transparent, accurate and verifiable election; that the statutory forms 34 A, B, and C used to declare the results were fraudulently manipulated or altered by compromised staff of IEBC and third parties with the connivance of the Chairperson and senior staff of IEBC in order to achieve a predetermined outcome in favour of the President-elect and further submission that the results transmissions system was demonstrably compromised and there was corroboration with glaring irregularities, inaccuracies, inconsistencies in the physical and public portal result forms as demonstrated to court, with the applicants relying on Independent *Electoral & Boundaries Commission v Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017; [2017] eKLR (The Maina Kiai Case);

7. We Now opine as follows:

   i) The applicants have in their applications, set out their prayers specifically asking for scrutiny as well as the information they intend to be granted access to. We note that this court, while considering an application for access and scrutiny in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others, Presidential Petition No 1 of 2017;* [2017] eKLR determined that, while considering

a request for scrutiny of either the Forms or the technology used in an election, the request for scrutiny must be made for a sufficient reason and that any prayer that would in effect be a fishing exercise to procure fresh evidence not already contained in the petition must be rejected. Further any prayer couched in general terms, not pleaded with specificity or such request is impracticable in terms of scope and time will also be declined. Furthermore, we noted that, because of the narrow timelines granted by the *Constitution* to hear and determine a presidential election dispute, only reasonable, practical and helpful orders should be issued in that regard. We shall maintain that criteria in determining the present applications.

ii) Section 12 of the *Supreme Court Act* obligates IEBC to submit to the court certified copies of the documents used to declare the results of the Presidential Election including the Forms used to announce the results of the elections at the polling station and the constituency tallying center and to declare the result at the national tallying center. All these documents are already in the custody of the court and are available to the parties upon request.

iii) Flowing from the above therefore and with regard to prayer 1 in Presidential Election Petition No E002 of 2022 as well as prayer 8 in Presidential Election Petition No. E003 of 2022 on the availing of the soft copy of the voters register as well prayer 8 in Presidential Election Petition No E003 of 2022 seeking scrutiny of the biometric voter register, we see no reason to grant these prayers as the register is already in the public domain and in any event, no justification in the context of the dispute before us has been given why the same should be provided.

iv) On prayer 2 in Presidential Election Petition No E002 of 2022 which touches on access to all KIEMS kits and servers for all Constituency Tallying Centers, we note that such a request is unrealistic given the short timelines for the hearing and determination of the petitions before us.

v) With regard to prayers 4,5, 6, 7, 8, and 10 in Presidential Election Petition No E002 of 2022 as well as Prayer 2 in Presidential Election Petition No. E003 of 2022 and Prayers 1 and 2 in Presidential Election Petition No E005 of 2022 which majorly touch on the technological aspects of the presidential election petitions, we note that the orders sought are not practicable, reasonable and helpful to ensure that we reach a just and fair determination of the petitions. They are also couched in general terms and are vague.

vi) With regard to prayer 1 in petition Presidential Election Petition No E005 of 2022 asking for the terms of reference between Smartmatic International and Local Service Providers, we note that there may be possible legal issues that may arise as this

Court cannot blindly grant orders to direct the production of contracts with terms of reference between third parties who are not parties to the petitions before us. Smartmatic International is not a party to these proceedings neither are local service providers and to demand that such terms of reference be accessed by the applicants is impractical and may cause unnecessary delay in the hearing and determination of the election petitions before us.

vii) Regarding prayer 6 by the applicants in Presidential Election Petition No E005 of 2022 on the filing of further affidavits arising from the attainment of the information from the scrutiny exercise, noting the time left for the hearing and determination of the petition from the date of delivery of this ruling, such an order would only but delay the proceedings and will occasion prejudice to the respondents who will not be able to respond to the issues raised in the affidavits. That prayer is therefore disallowed.

8. Having noted the above, we hereby grant the following orders:

1. The IEBC shall provide to the applicants copies of its technology system security policy comprising but not limited to password policy, password matrix, owners of system administration password(s), system users and levels of access, and workflow chats for identification, tallying, transmission, and posting of portals and any API's that had been integrated and the list of human interface and controls for such intervention subject however to any security related issues thereof.

2. That IEBC be compelled to give the applicants supervised access to any server(s) at the National Tallying Centre for storing and transmitting voting information and which are forensically imaged to capture a copy of the Form 34C which is the total votes cast.

3. The IEBC shall provide the applicants with Certified copies of penetration tests conducted on the IEBC election Technology System prior to and during the 2022 General and Presidential Election including certified copies of a) all reports prepared pursuant to Regulation 10 of *Election (Technology) Regulations, 2017* and b) certified copies of certificates by a professional(s) prepared pursuant to Regulation 10(2) of *Election Technology) Regulations,2017*.

4. IEBC is hereby directed to avail partnership agreements with its technical partners, list of users, trail, and admin access to provide clarity on the IEBC systems and their usage for review and verification, Subject however to any security related issues thereof.

5. That the ballot boxes for the following polling stations be opened for inspection, scrutiny and recount:Nandi Hills and Sinendeti Primary School 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; Jarok, Gathanji and Kiheo Primary School Polling in Nyandarua County;

6. That the error forms signed by the Chairperson of IEBC during the tally and verification exercise at the National Tallying Centre between 10th to 15th August 2022 be provided to the applicants.

7. That IEBC should provide certified copies of Forms 32A and 34C Book 2 used in the impugned election Subject to the applicants providing to the IEBC specific contested polling stations for compliance thereof.

8. That the above exercise shall be conducted within 48 hours of these orders ie from 2 pm on Tuesday, 30th August to 2 pm on Thursday,September 1, 2022.

9. Each Party shall be represented by two agents during the exercises above and they shall at times be under the supervision of the Registrar of the court and her staff. The Registrar shall file her report by 5 pm on September 1, 2022 and avail copies to all parties.

10. Any party is at liberty to submit on the report before conclusion of the hearing as shall be directed by the President of this court.

11. There shall be no order as to costs.

9. It is so ordered.

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) (30 August 2022) (Ruling)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 51 (KLR)

Electoral Law *– election petitions – presidential election petitions - 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.*

Brief facts

The applicant filed the instant application seeking to prosecute a draft preliminary objection and counterclaim as a pauper due to lack of funds for payment of court fees totaling to Kshs. 1,004,000. The applicant contended 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.

Issues

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.

Held

Considering the Supreme Court (Presidential Election Petition) Rules, 2017 and the fact that the applicant was not a petitioner and/or had not been sued as a respondent in any of the presidential election petitions before the court and that he had also not sought to participate as a friend of the court, the application was unmerited.

Application dismissed.

Orders

No orders as to costs.

Citations

Statutes

Kenya

Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) In general - (Cited)

Advocates

None mentioned

August 30, 2022, the Court delivered the following Ruling:

1. Upon perusing the notice of motion dated August 26, 2022 seeking to prosecute a draft preliminary objection and counterclaim as a pauper due to lack of funds for payment of court fees totaling to Kshs 1,004,000; and

2. Upon reading the supporting affidavit of Benjamin Barasa Wafula sworn on August 26, 2022; and

3. Upon perusing the grounds adduced by the applicant in support of the orders sought wherein he contends 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; and

4. Furthermore, considering the applicant's preliminary objection and counterclaim where he contends there were 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 Kwanza Alliance of Political Parties; and

5. Having considered the *Supreme Court (Presidential Election Petition) Rules, 2017* it is evident to us that the applicant is not a petitioner and/or has not been sued as a respondent in any of the Presidential Election Petitions before us, he has also not sought to participate as a friend of the court. Consequently, we find that the application before us is not merited and is therefore, dismissed.

6. For the foregoing reasons, the final orders of the court are as follows:

Orders:

a. The application dated August 26, 2022 seeking waiver of fees; and leave to prosecute a preliminary objection and counterclaim is hereby dismissed.

b. There shall be no orders as to costs.

7. Orders accordingly.

Khalifa & 3 others v Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition E003 of 2022) [2022] KESC 49 (KLR) (Election Petitions) (30 August 2022) (Ruling)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 49 (KLR)

Electoral Law *– presidential election petition – applications – applications filed out of time – whether in determining applications in the presidential election petition, the Supreme Court could determine an application filed out of time – Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.*

Brief facts

The 3rd respondent filed the application in which he sought leave to strike out the name of the Attorney General in petition No. E003 of 2022 on grounds of misjoinder, outside the prescribed time limits.

Issues

Whether in determining applications in the presidential election petition, the Supreme Court could determine an application filed out of time.

Held

The application was filed out of time. It was incompetent and an abuse of court process. In any event, the court had determined the issue in the said application in its ruling delivered on the August 29, 2022 in Petition E002 of 2022.

Application dismissed.

Citations

Cases

None referred to

Statutes

Kenya

Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 17 - (Interpreted)

Advocates

None mentioned

August 30, 2022, the Court delivered the following Ruling:

1. This application is dated the August 27, 2022 and filed on the August 29, 2022 by William Samoei Ruto, (the 3rd respondent). He seeks leave to strike out the name of the Attorney

General in Petition No E003 of 2022 on grounds of misjoinder. It is supported by the affidavit of William Samoei Ruto, sworn on the 27th August, 2022 and filed on the August 29, 2022. It is brought pursuant to rule 17 of the *Supreme Court (Presidential Election Petition) Rules, 2017*.

2. We have considered the application, affidavit in support, as well as the petitioners' replying affidavit and submissions in opposition thereto. We find that the application, which was filed on the August 29, 2022 at 4:45 pm was filed out of time, is therefore incompetent and an abuse of the court process. In any event, the court has determined the issue in the said application in its ruling delivered on the August 29, 2022 in Petition E002 of 2022.

3. Consequently, the application is hereby dismissed with no orders as to costs.

Odinga & another v Independent Electoral and Boundaries Commission & 8 others (Presidential Election Petition 5 of 2020) [2022] KESC 47 (KLR) (Election Petitions) (29 August 2022) (Ruling)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 47 (KLR)

Law of Evidence *– admissibility of evidence – admissibility of affidavit evidence – supporting affidavit – claim that a supporting affidavit was inadmissible as it contained hearsay - 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.*

Brief facts

The application by the 9th respondent, William Samoei Ruto, sought to strike out the affidavits of John Mark Githongo, Benson Wesongo and Martin E. Papa which were sworn in support of the petition. The applicant also sought to expunge paragraphs in the petition that sought to summon the Director of Criminal Investigations into the petition. The applicant contended that the affidavits were inadmissible in evidence as they contained hearsay material and that the impugned paragraphs of the petition sought to expand the purview of a petition contrary to the matters which ought to form a petition under article 140 of the Constitution.

Issues

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.

Held

1. The affidavits contained factual contestations which had been responded to substantively by the 1st respondent and by 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 the evidence adduced by each party. Striking out of the affidavits at the instant juncture in isolation while leaving the responses on record was premature.
2. The impugned affidavits could only be dealt with on merits. The court was aware of its circumscribed jurisdiction both under article 140 of the Constitution and as an election court in respect of potential electoral and other offences and therefore it deferred the issue so that it could be dealt with at an appropriate stage.

Application disallowed.

Orders

No order as to costs.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya articles 140, 163(3)(a); 253 - (Interpreted)
2. Independent Electoral and Boundaries Commissions Act, 2011 (Act No 9 of 2011) section 13 - (Interpreted)
3. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rules 11, 17 - (Interpreted)

Advocates

None mentioned

August 29, 2022, the Court delivered the following Ruling:

1. Upon perusing the notice of motion application brought under certificate of urgency by the 9th respondent / applicant dated August 27, 2022 under provisions of article 253 of the *Constitution of Kenya*, section 13 of the *Independent Electoral and Boundaries Commissions Act* and rule 11 & 17 of the *Supreme Court (Presidential Election Petition) Rules, 2017* seeking orders that:

    i) The matter herein be certified as urgent and the same be heard expeditiously.

    ii) This honourable court be pleased to strike out the affidavit in support of the petition sworn by John Mark Githongo on August 21, 2022 and filed on August 22, 2022.

    iii) This honourable court be pleased to strike out the further affidavit in support of the petition sworn by Benson Wesongo on August 21, 2022 and filed on August 22, 2022.

    iv) This honourable court be pleased to strike out the affidavit in support of the petition sworn by Martin E Papa on August 20, 2022 and filed on August 22, 2022.

    v) Paragraphs 64 and 69 together with paragraphs 115 to 127 of the Petition be expunged.

2. Upon perusing the grounds on the face of the application that the affidavits are inadmissible in evidence as they contain hearsay material and that the impugned paragraphs of the petition seek to expand the purview of a petition contrary to the matters which ought to form a petition under article 140 of the *Constitution*; and

3. Upon considering the affidavit dated August 27, 2022 by Josphat Koli Nanok, the Deputy Chief Agent of UDA's Presidential Candidate at the National Tallying Centre, in support of the application who depones that the request to summon the DCI who is a known proxy of the petitioner and who has publicly avowed bias against the 9th respondent is intended to unfairly advance the petitioners' case by introducing extraneous matters which are beyond the purview of a petition under article 140 of the *Constitution*.

4. Taking into account that no responses to the application were filed by the petitioners and the 1st to 8th respondents within the required timelines.

5. Noting the nature of the proceedings before the court being one involving the court's exclusive and original jurisdiction under article 163(3)(a) of the *Constitution* respondent's submissions dated December 27, 2021 and filed on January 5, 2022 through his advocates in which the respondent only addresses the first two issues.

6. We opine that the said affidavits reveal that they contain factual contestations which have 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 has been directly implicated and Davis Kimutai Chirchir on behalf of the applicant. It is 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 of the evidence adduced by each party. Striking out of the affidavits at this early juncture in isolation while leaving the responses on record, in our view, is premature under the circumstances.

7. Regarding the request to expunge specific paragraphs of the petition, again we note that it is an issue that can only be dealt with on merits as and when it is made in each of the impugned instances. In the same vein, the court is aware of its circumscribed jurisdiction both under article 140 and as an election court in respect of potential electoral and other offences and will defer this issue to be dealt with appropriately.

8. From the foregoing, the applicant has not persuaded us to grant the reliefs sought at this moment. In the end, we make the following orders:

    i. The notice of motion application dated and filed on August 27, 2022 be and is hereby disallowed.

    ii. There shall be no order as to costs.

Orders accordingly.

Odinga & 4 others v Independent Electoral Boundaries Commission & 7 others (Presidential Election Petition E005, E002 & E004 of 2022 (Consolidated)) [2022] KESC 43 (KLR) (29 August 2022) (Ruling)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 43 (KLR)

Electoral Law *- presidential election petition – parties to a presidential election petition – IEBC commissioners – whether IEBC commissioners could be included as respondents in their personal capacity in a presidential election petition - whether the inclusion of IEBC commissioners as respondents in a presidential election petition violated the principle that commissioners of an independent constitutional body could not be liable for any acts done in good faith in execution of the body's powers – Independent Electoral and Boundaries Commission Act (Cap 7C) section 15.*

Electoral Law *- presidential election petition – parties to a presidential election petition – Office of the Attorney General – whether the Office of the Attorney General was wrongfully named as a respondent in a presidential election petition - whether the inclusion of IEBC commissioners as respondents in a presidential election petition violated the principle that commissioners of an independent constitutional body could not be liable for any acts done in good faith in execution of the body's powers – Independent Electoral and Boundaries Commission Act (Cap 7C) section 15.*

Brief facts

The 9th applicant (HE Dr. William Samoei Ruto) sought to strike out the names of the 3rd to 8th respondents from the presidential election petitions. The applicant contended that the respondents, being members of the 1st respondent (being Commissioners of the IEBC), an independent constitutional and corporate entity, could not be parties to the petitions. The application also sought to strike out the 13th respondent, the Office of the Attorney General, from the presidential election petition on the grounds that the respondent had no role in the petition, unless the instant court granted leave for him to be joined as a friend of the court.

Issues

i. Whether the inclusion of IEBC commissioners as respondents in a presidential election petition violated section 15 of the IEBC Act which insulated the commissioners from being personally liable for any acts done in good faith in execution of their mandate.

ii. Whether the office of the Attorney General's role in a presidential election petition was limited to being a friend of the court.

Held

1. The statement by the 5th to 8th respondents (4 IEBC commissioners who refused to own the presidential election results due to the "opaque nature" of the process) brought them squarely within the ambit of grievance by the petitioners. The latter could not be faulted for seeking to place before the court any evidence emanating from the four. To use section

15 of the Independent Electoral and Boundaries Act as a shield would be tantamount to suppressing evidence by the applicant.

2. The Attorney General of the Republic of Kenya had more capacity than any other litigant in Kenya to fend off any attempts to join him in proceedings to which he ought not to be a party. As the Attorney General, he did not need the aid of the 9th respondent to accomplish such a routine task.

Applications dismissed.

Orders

No order as to costs.

Citations

Statutes

Kenya

1. Constitution of Kenya article 138(3)(c) - (Interpreted)
2. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 15 - (Interpreted)
3. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) In general - (Cited)

Advocates

None mentioned

August 29, 2022, the Court delivered the following Ruling:

1. William Samoei Ruto, (the applicant) has been named as the 9th respondent in Petitions E002, E004, and E005 respectively. By three separate applications all dated the August 27, 2022, he seeks to strike out firstly, the names of the 3rd to 8th respondents in Petitions E004 and E005 respectively, and secondly, the names of the 3rd to 8th and 13th respondents in Petition E002.

2. Regarding the 3rd to 8th respondents in the three petitions, the applicant submits that the said respondents, being members of the 1st respondent, an independent constitutional and corporate entity, cannot be sued in their individual capacity. In support, the applicant cites section 15 of the *IEBC Act, 2011* which insulates and protects the respondents, from being personally liable for any acts done in good faith and in the execution of the 1st respondent's powers, functions and duties.

3. As for the 13th respondent in Petition E002, the applicant submits that the said respondent has no role in this petition, unless this court grants leave for him to be joined as a Friend

of the court. Further, the applicant argues that the *Supreme Court (Presidential Election) Rules, 2017* do not envisage the 13th respondent as a respondent in a petition challenging the Presidential Elections.

4. We have considered the applications and written submissions in support thereof. It is not lost on us that one of the main grounds on which the three petitions are based is that the 1st respondent of which the 3rd to 8th are members, failed to perform its functions under article 138(3)(c) of the *Constitution*. This failure as claimed by the petitioners, was occasioned by the exclusion of the 5th to 8th respondents from the verification and tallying process by the 2nd respondent.

5. This claim is based on a highly publicized Press statement by these very respondents disowning the declaration of the Presidential Election results by the 2nd respondent. This statement by the four respondents brings them squarely within the ambit of grievance by the petitioners. The latter cannot be faulted for seeking to place before the court any evidence emanating from the four. To use section 15 of the *IEBC Act*, as a shield, would be tantamount to suppressing evidence by the applicant.

6. Regarding the application to strike out the 13th respondent from Petition E002, it is also not lost on us that the said respondent is the Attorney General of the Republic of Kenya. The holder of such an office, has more capacity than any other litigant in this Country to fend off any attempts to join him in proceedings to which he ought not to be a party. As the Attorney General, he does not need the aid of the 9th respondent to accomplish such a routine task.

Accordingly, We Make the Following Orders:

i. The three applications by the 9th respondent dated August 27, 2022 and filed on August 28, 2022, are hereby dismissed.

ii. No Orders as to Costs.

Odinga & another v Independent Electoral and Boundaries Commission & 9 others (Presidential Election Petition E005 of 2022) [2022] KESC 45 (KLR) (29 August 2022) (Ruling)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 45 (KLR)

Electoral Law *- presidential election petition - parties – joinder application – application to be joined as an interested party – category of persons that may be enjoined as an interested party - whether the applicant could be admitted as an interested party in the presidential election petition - Supreme Court Rules, 2020, rule 19; Supreme Court (Presidential Election Petition) Rules, 2017, rule 17A(1) and (2)*

Brief facts

The applicant sought to be joined as an interested party in the presidential election petition on grounds 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 under articles 10, 38, 73, 81, 86 and 140 of the Constitution, and that he had substantial issues to raise about the legitimacy of Forms 34A and 34B, which were central to the petition. No party filed a response to the petition.

Issues

Whether the applicant could be admitted as an interested party in the presidential election petition.

Relevant provisions of the Law

Supreme Court (Presidential Election Petition) Rules, 2017

Rule 17A - Third party applications

(1) A person seeking to be admitted as a friend of the Court may apply for admission at the close of pleadings.

(2) An application made under sub-rule (1) shall include a friend of the court brief setting out the person's expertise and reasons for requesting the admission.

(3) The Court may deliver a ruling by way of electronic communication to the applicant.

(4) An application by any person to join the petition as an interested party shall not be allowed.

Held

Rule 17A (4) of the Supreme Court (Presidential Election Petition) Rules, 2017 provided that an application by any person as an interested party could not be allowed in a presidential election petition.

Application dismissed. No order as to costs.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya articles 10, 38, 73, 81, 86, 140 - (Interpreted)
2. Supreme Court (Presidential Petition) Rules, 2017 (cap 9B Sub Leg) rule 17A(4) - (Interpreted)

August 29, 2022, the Court delivered the following Ruling:

1. Upon perusing the notice of motion application by Milton Nyakundi Oriku, the applicant, dated August 23, 2022 and filed on August 28, 2022, seeking to be enjoined in these proceedings as an interested party; and

2. Upon reading the supporting affidavit sworn on August 23, 2022, of the said Milton Nyakundi Oriku, a Kenyan citizen, who is a registered voter and works as a journalist; and

3. Upon considering the said application together with his written submissions dated August 23, 2022 and filed on August 28, 2022, wherein the applicant argues that he has an inherent interest in the outcome of the petition as it raises fundamental issues which are integral to the protection of his rights as enshrined under articles 10, 38, 73,81, 86 and 140 of the *Constitution*; and that he has substantial issues to raise about the legitimacy of Forms 34A and Forms 34B which are central to Petition; and

4. Noting that no party has filed a response to the application; and

5. We note that the relevant law in this regard is rule 17A (4) of the *Supreme Court (Presidential Petition) Rules 2017*, which provides that an application by any person as an interested party shall not be allowed in a presidential election petition.

6. Havingcarefully considered the application, responses and submissions by the respective parties herein, we find no merit in the application. We accordingly, dismiss it.

Orders:

a. The application dated August 23, 2022 and filed on August 28, 2022 seeking joinder of Milton Nyakundi Oriku as interested party to this petition is hereby dismissed.

b. There shall be no orders as to costs.

7. It is so ordered.

Odinga & another v Independent Electoral and Boundaries Commission & 9 others (Presidential Election Petition E005 of 2022) [2022] KESC 46 (KLR) (Election Petitions) (29 August 2022) (Ruling)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 46 (KLR)

Electoral Law *- parties – joinder application – application to be joined as amicus curiae - circumstances when a party can be admitted as amicus – principles a court should consider on an application to be enjoined as an amicus curiae - whether the Kenyan Section of the International Commission of Jurists (ICJ Kenya) could be admitted as amicus curiae in a presidential election petition on grounds that they sought to address the court on the role of the Independent Electoral and Boundaries Commission (IEBC) vis-à-vis the role of its chairperson – Supreme Court (Presidential Election Petition) Rules, 2017, rule 17A; Supreme Court Rules, 2020, rule 19(1) - Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others [2014] eKLR - Francis Karioki Muruatetu & another v Republic & 5 others [2016] eKLR.*

Brief facts

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) filed an application to be enjoined as *amicus curiae* in the presidential election petition. The petitioner contended that it was neutral and it was guided by fidelity to the law. They sought to address the court on the role of the Independent Electoral and Boundaries Commission (IEBC) vis-à-vis the role of its chairperson.

Issues

i. What principles should a court consider on an application to be joined as an *amicus curiae*?

ii. Whether the Kenyan Section of the International Commission of Jurists (ICJ Kenya) could be admitted as *amicus curiae* in a presidential election petition on grounds that they sought to address the court on the role of the Independent Electoral and Boundaries Commission (IEBC) vis-à-vis the role of its chairperson.

Held

1. Rule 17A of the Supreme Court (Presidential Election Petition) Rules 2017 made provision for admission of *amicus curiae* (a friend of the court) in a presidential election petition; and rule 19(1) of the Supreme Court Rules 2020, stated that the court could 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.

2. The principles below guided the Supreme Court in handling an application to be admitted as *amicus curiae: -*

    1. An *amicus* brief should be limited to legal arguments.
    2. 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.
    3. 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 could, and on a case- by- case basis, reject *amicus* briefs that did not comply with the principle.
    4. 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.
    5. The court could 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 was not defeated solely by the subsistence of a State interest, in a matter of public interest.
    6. Where, in adversarial proceedings, parties alleged that a proposed *amicus curiae* was biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appeared to be partisan on an issue before the court, the court would consider such an objection by allowing the respective parties to be heard on the issue.
    7. An *amicus curiae* was not entitled to costs in litigation. In instances where the court requested the appearance of any person or expert as *amicus*, the legal expenses could be borne by the Judiciary.
    8. The court would regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role into a partisan role.
    9. In appropriate cases and at its discretion, the court could assign questions for *amicus* research and presentation.
    10. An *amicus curiae* should not participate in interlocutory applications, unless called upon by the court to address specific issues.

3. The applicant was to confine itself to only 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-a vis* its chairperson in the management of a presidential election result.

Application allowed.

Orders

i. *The application dated August 27, 2022 and lodged on even date by Kenyan section of the International Commission of Jurists (ICJ Kenya) was allowed.*
ii. *The amicus brief attached to the application was deemed as filed and the applicant was not to make oral submissions at the hearing of the petitions.*
iii. *Parties were to bear their own costs.*

Citations

Cases

Kenya

1. *Muruatetu, Francis Karioki & another v Republic & 5 others* Petitions 15 & 16 of 2015; [2016] eKLR (Consolidated) - (Mentioned)
2. *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Petition 12 of 2013; [2014] eKLR - (Applied)
3. *Wetangula, Moses Masika v Musikari Nazi Kombo & 2 others* Petition 12 of 2014; [2015] eKLR - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 38, 81, 86, 138(3)(a)(b)(c) - (Interpreted)
2. Election Offences Act, 2016 (Act No 37 of 2016) In general - (Cited)
3. Elections Act, 2011 (Act No 24 of 2011) section 87 - (Interpreted)
4. Supreme Court Rules, 2020 (No 7 Sub Leg) rule 19 - (Interpreted)
5. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 17A - (Interpreted)

Advocates

None mentioned

August 29, 2022, the Court delivered the following Ruling:

1. Upon perusing the notice of motion dated August 27, 2022, and lodged on even date by the Kenyan Section of the International Commission of Jurists (ICJ Kenya) pursuant to the provisions of rule 17A of the *Supreme Court (Presidential Election Petition) Rules 2017*, and rule 19 of the *Supreme Court Rules 2020*, seeking to be enjoined in the petition as a friend of the court; and

2. Upon reading the affidavit of Mr Christopher Gitari, Vice Chairperson of the Council of the Kenyan Section of the International Commission of Jurists (ICJ Kenya), sworn on the August 3, 2018; and

3. Upon considering the applicant's grounds in support of its application, its intended amicus brief and written submissions filed on August 27, 2022 wherein the applicant submits that it has the relevant expertise in rule of law, democracy and the intersection of law and electoral technology, and that it intends to assist the court in developing the law on novel legal aspects of the case, in relation to the following arguments:

    i. What broad principles, consistent with 10 articles 10, 38, 81, 86, and 138(3)(a), (b), and (c) of *the Constitution*, govern the use of technology in elections?

    ii. Considering legal reforms following the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* Petition 12 of 2014 [2015] eKLR (amending section 87 of the *Elections Act, 2011* and enacting the *Election Offences Act, 2016*) what is the requisite standard of proof in Kenyan election petitions? And what powers does an electoral court possess where 20 allegations imputing criminal conduct are pleaded in an election petition?

    iii. What are "appropriate reliefs" in the context of a presidential election petition?

    iv. What are the respective roles of the Commission and its Chairperson in presidential election result management under article 138(3)(c) and 10?

4. Upon considering the applicant's further arguments that it is neutral in this petition and guided by fidelity to the law that is consistent with this court's decision in the cases of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Sup Ct Petition No 12 of 2013 [2014] eKLR (*Mumo Matemu* Case) and *Francis Karioki Muruatetu & another v Republic & 5 others* Sup Ct Petition No 15 and 16 of 2015 [2016] eKLR.

5. Noting that no party has filed a response to this application;

6. Further considering the provisions of rule 17A of the *Supreme Court (Presidential Election Petition) Rules 2017*, which makes 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 states 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;

7. Noting the decision in Mumo Matemu, where this court considered the role of *amicus curiae*, and set out the guiding principles 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].

8. Upon considering that the applicant will confine itself to only addressing this 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 Commission *vis-a-vis* its Chairperson in the management of a presidential election result;

9. Having considered the application, the attached *amicus* brief and written submissions thereof, it is our decision that the same is merited and is for allowing. We therefore make the following orders:

Orders:

a. The application dated August 27, 2022 and lodged on even date by Kenyan Section of the International Commission of Jurists (ICJ Kenya) is allowed.

b. The amicus brief attached to the application is deemed as filed and the applicant shall not make oral submissions at the hearing of the petitions.

c. Parties shall bear their own costs.

10. Orders accordingly.

Odinga & another v Independent Electoral and Boundaries Commission & 8 others (Presidential Election Petition E005 of 2022) [2022] KESC 48 (KLR) (29 August 2022) (Ruling)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2022] KESC 48 (KLR)

Electoral Law *– presidential election petitions – filing of further affidavits in presidential election petitions - where an application was made for the filing of further affidavits by an applicant seeking to respond to serious allegations made by other parties to the suit against them - what were the circumstances where the filing of further or other affidavits could be allowed in a presidential election petition - Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.*

Law of Evidence *- affidavits - further affidavits - application to file further affidavits in the presidential election petition - whether one could file further affidavits in the presidential election petition - what were the circumstances where the filing of further or other affidavits could be allowed in a presidential election petition - Supreme Court (Presidential Election Petition) Rules, 2017, rule 17.*

Brief facts

The application sought for the court to admit on record the replying affidavits of the 5th to 8th respondents being members of the 1st respondent. 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 contended 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.

Issues

What were the circumstances in which the filing of further or other affidavits could be allowed in a presidential election petition?

Held

1. Under rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017 there was no provision to allow any further or other affidavits of the instant nature. However, there were special circumstances where facts or allegations were made by the 2nd, 3rd and 4th respondents in their response to the petition. Those events took place during the pendency of the instant 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 be heard regarding the same. That was an exceptional circumstance considering all aspects of the matter.

Application allowed with no order as to costs.

Citations

Cases

None referred to

Statutes

Kenya

1. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B) rule 4(2); 17 - (Interpreted)
2. Supreme Court Act, 2011 (cap 9B) section 3A - (Interpreted)

Advocates

None mentioned

August 29, 2022, the Court delivered the following Ruling:

1. Upon perusing the notice of motion application dated August 28, 2022 and filed on even date by the 5th respondent, anchored on rule 17 of the *Supreme Court (Presidential Election) Rules, 2017* seeking the following orders;

    a) That this honourable court be pleased to admit on record the replying affidavits of Juliana Cherera, Justus Nyangaya, Francis Wanderi and Irene Masit, being members of the 1st respondent, attached hereto.

    b) That the costs of this application be provided for.

2. Upon considering the grounds on the face of the application, the supporting affidavit sworn on August 28, 2022 by Juliana Cherera and filed on even date. It is the applicants' argument that the 2nd, 3rd and 4th respondents in their replying affidavits have alleged that all the members of IEBC attended a meeting with a delegation from the National Security Advisory Committee (the 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. It is further contended that the 5th, 6th, 7th and 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. To contending that unless the 5th, 6th, 7th and 8th respondents are allowed to file responses to the said allegations, they will suffer great prejudice as the court

will make adverse findings without hearing the affected respondents. We have also perused the further affidavit sworn on August 28, 2022 and filed on even date by the 5th respondent.

We now opine as follows:

3. We have considered the application and the given justifications for the admission of the further affidavit sworn by the 5th respondent.

4. Under rule 17 of the *Supreme Court (Presidential Election Petition) Rules, 2017* there is no provision to allow any further or other affidavits of this nature. However, we have considered the special circumstances where the facts/allegations made by the 2nd, 3rd and 4th respondents are contained in their response to the petition. These events took place during the pendency of this 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 be heard regarding the same.

5. We deem this to be an exceptional circumstance considering all aspects of the matter. We hereby invoke 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* (Act No 7 of 2011) on the inherent powers of the court, and allow the further affidavits to be admitted as applied for.

6. Consequently, we make the following orders:

   a) The notice of motion dated August 28, 2022 be and is hereby allowed.

   b) There shall be no order as to costs.

Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties) (Election Petition 2 & 4 of 2017) [2017] KESC 54 (KLR) (11 December 2017) (Judgment)

Supreme Court of Kenya

DK Maraga, CJ, PM Mwilu, DCJ & VP, JB
Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 54 (KLR)

Electoral Law *– presidential election – repeat presidential election – validity of a presidential election – petition challenging the validity of the President elect after a repeat election – allegations of non-compliance with the Constitution and electoral laws – allegations of various irregularities and illegalities duringthe conduct of the elections – what are the principles of free and fair elections – whether the PresidentialElection was conducted in accordance with the principles laid down in the Constitution and the written laws relating to elections – whether there were irregularities and illegalities committed in the conduct of the October 26, 2017 Presidential Election and if in the affirmative, what was theirimpact, if any, on the integrity of the election – Constitution, articles 81, 86,138.*

Electoral Law *– presidential elections – withdrawal of a presidential candidate – withdrawal before a repeat election – manner in which such withdraw should be made – what was the legal effect of the withdrawal of a candidate before election – in determining the legal effect of withdrawal by a candidate before an election, what guidance was to be drawn from the pronouncements of the Supreme Court in Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (Raila 2013) – Elections (General) Regulations, 2017, cap 7 Sub Leg, regulation 52.*

Electoral Law *– presidential elections – conduct of presidential elections – constitutional threshold of a free and fair election – whether the election conducted on October 26, 2017 met the constitutional threshold of a free and fair election under article 81 of the Constitution – what are the legal consequences of not holding a Presidential election in each constituency under article 138(2) of the Constitution – whether the election held on October 26, 2017 and its results, was legitimate and credible, both in fact and in law – Constitution, articles 81 and 138(2).*

Statutes *– amendment of statutes-retrospective application of statutes – what was the effect of the Election Laws (Amendment) Act, 2017 on the conduct of the Presidential election held on October 26, 2017 – was section 83 of the Elections Act (as amended) unconstitutional – Elections Act, cap 7, section 83 (as amended).*

Electoral Law *– presidential election – electoral process – repeat presidential election-nomination of candidates – what was the purpose of nominations in a presidential election– whether there was need to conduct fresh nominations of candidates in preparation for the repeat presidential election – what was the place of the Raila 2013 decision, and the Ekuru Aukot v Independent Electoral & Boundaries*

Commission & 3 others(Petition 471 of 2017) [2017] KEHC 9390 (KLR) (Ekuru Aukot Judgment) in the conduct of the fresh election.

Jurisdiction *– jurisdiction of the Supreme Court – exclusive original jurisdiction of the Supreme Court– jurisdiction to determine matters pertaining to a presidential election – whether the Supreme Court could determine an issue touching on the constitutionality of any law integral to the determination of a cause before it, although pending before another Court – whether the Court would, notwithstanding thefact that a matter is pending on appeal, proceed to determine the issue – Constitution, articles 140(3) & 163(3).*

Legal Precedent *– stare decisis – binding (ratio decidendi) and persuasive precedents (obiter dicta) – nature of observations in a judgment which are not an issue raised or pleaded by the parties to the disputein question – whether the Courts are bound by such observations – extent to which such observations would be of persuasive value – whether the observations in Raila 2013 were of binding authority – whether it was necessary for the Court to make a clarification of the meaning of the said paragraphs, in view of the contradictory interpretations attendant upon them.*

Electoral Law *– principles of elections – legitimacy and credibility of elections – the meaning and applicability of the term 'legitimacy' and 'credibility', in the general context of a Presidential election – whether the election conducted on October 26, 2017 lacked legitimacy and credibility.*

Statutes *– constitutionality of statutes – constitutionality of section 83 of the Elections Act as amended – where the section had two limbs – compliance with the law on elections, and irregularities that may affect the result of the election – where the amendment made the two limbs in the provision disjunctive – whether the section as amended was unconstitutional – Elections Act, cap 7, section 83.*

Brief facts

Kenya held its second general election under the Constitution of Kenya, 2010, on August 8, 2017, where Hon Uhuru Muigai Kenyatta was declared the winner of the Presidential election. That result was contested by Hon. Raila Amolo Odinga and Hon. Stephen Kalonzo Musyoka in 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] KESC 42 (KLR). On September 1, 2017, the Supreme Court, by a majority decision, nullified the election, citing irregularities and illegalities. The court ordered the Independent Electoral and Boundaries Commission (IEBC) to conduct a fresh Presidential election within 60 days, as was required by article 140(3) of the Constitution. Consequently, the IEBC scheduled the new election for October 26, 2017.

Ekuru Aukot, a presidential candidate in the August 8, 2017 election, moved the High Court to challenge the exclusion of candidates other than Jubilee Party and Orange Democratic Movement from the fresh election. The High Court ruled in Aukot's favor, directing that he, along with other candidates from the original election, be included in the repeat poll. on their part, Raila Odinga and Stephen Kalonzo Musyoka withdrew their candidacies and urged their supporters to boycott the repeat election. On October 26, 2017, the IEBC proceeded with the election despite unrest in 25

constituencies, where elections were postponed due to violence. However, even after rescheduling, elections were not conducted in those constituencies, and the IEBC declared Kenyatta the winner on October 30, 2017, with 7,483,895 votes out of 7,616,217 valid votes cast.

The instant matter comprised of two consolidated petitions challenging the validity of the said October 26 repeat presidential election. Petition No 2 of 2017 argued, among others, that the election was null and void due to the lack of fresh nominations. Petition No 4 of 2017, *inter alia,* raised concerns over the integrity of the election, citing violence, lack of transparency, and breaches of constitutional principles. At the centre of the dispute was the effect of the Election Laws (Amendment) Act, 2017 which was passed by Parliament on October 12, 2017 before the October 26 elections. The President did not assent to the subject Bill by October 26, 2017 (the 14th day), and, by operation of law under article 115(6) of the Constitution, it was deemed assented to on that date. It was subsequently published in the Gazette on November 2, 2017.

Issues

i. Who had *locus standi* to file a petition challenging the outcome of a presidential election?

ii. Whether the Presidential election was conducted in conformity with the Constitution and the applicable laws.

   a. Whether the election met the constitutional threshold of a free and fair election under article 81 of the Constitution?

   b. Whether the Presidential election held on October 26, 2017 was marred by illegalities and irregularities, and if so, what impact they had on the validity of the election.

iii. What was the legal effect of the withdrawal of a Presidential election candidate before a repeat election?

iv. In determining the legal effect of withdrawal by a candidate before an election, what guidance was to be drawn from the pronouncements of the Supreme Court in *Raila 2013?*

   a. *W*hether the pronouncement on withdrawal of a presidential candidate in the *Raila 2013,* was of binding authority.

   b. Whether the court could, notwithstanding the fact that the matter was pending on appeal, proceed to determine the issue.

   c. Whether it was necessary for the Court to make a clarification of the meaning of the said paragraphs, in view of the contradictory interpretations attendant upon them.

v. What were the legal consequences of not holding a Presidential election in each constituency under article 138(2) of the Constitution?

vi. What was the effect of the Election Laws (Amendment) Act, 2017 on the conduct of the Presidential election held on October 26, 2017?

   a. Was section 83 of the Elections Act (as amended) unconstitutional?

vii. Whether fresh nominations ought to have been conducted following the annulment of the presidential election held on August 8, 2017 and before holding the repeat elections.
   a. What was the purpose of nominations in a Presidential election?
   b. What was the place of the *Raila 2013* decision, and the *Ekuru Aukot* Judgment, in the conduct of the fresh election?

viii. What is the meaning and applicability of the term 'legitimacy' and 'credibility', in the general context of a Presidential election?

ix. Whether the Supreme Court could determine an issue touching on the constitutionality of any law integral to the determination of a cause before it, although pending before another court.

Relevant provisions of the Law

Elections Act, cap 7

Section 3 - Right to vote.

"(1) An adult citizen shall exercise the right to vote specified in Article 38(3) of the Constitution in accordance with this Act.

"(2) A citizen shall exercise the right to vote if the citizen is registered in the Register of Voters."

Section 8 - Updating of the Register of Voters.

"(1) The Commission shall maintain an updated Register of Voters.

"(2) For purposes of maintaining an updated register of voters, the Commission shall?

(a) regularly revise the Register of Voters;

(b) update the Register of Voters by deleting the names of deceased voters and rectifying the particulars therein;

(c) conduct a fresh voter registration, if necessary, at intervals of not less than eight years, and not more than twelve years, immediately after the Commission reviews the names and boundaries of the constituencies in accordance with Article 89(2) of the Constitution;

d) review the number, names and boundaries of wards whenever a review of the names and boundaries of counties necessitates a review; and

(e) revise the Register of Voters whenever county boundaries are altered in accordance with Article 94(3) of the Constitution."

Section 8A - Audit of the register of votes.

"(1) The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of –

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

"(2) ....

"(3) For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of –

(a) verifying the accuracy of the Register;

(b) recommending mechanisms of enhancing the accuracy of the Register; and

(c) updating the register.

"(4) The firm engaged under subsection (3) shall conduct the audit and report to the Commission within a period of thirty days from the date of engagement.

"(5) The Commission shall, within fourteen days of receipt of the report under subsection (4), submit the report to the National Assembly and the Senate.

"(6)The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate.

Section 14 - Initiation of Presidential election.

"(1) Whenever a presidential election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in electronic and print media of national circulation—

(a) in the case of a general election, at least sixty days before the date of the election; or

(b) in the case of an election under Article 138(5) of the Constitution, at least twenty-one days before the date of the election;

(c) in any other case, upon the office of the President becoming vacant.

"(2) The notice referred to in subsection (1) shall be in the prescribed form and shall specify—

(a) the nomination day for the presidential election; and

(b) the day or days on which the poll shall be taken for the presidential election, which shall not be less than twenty-one days after the day specified for nomination.

Section 55B - Postponement of elections by the Commission.

"(1) The Commission may, where a date has been appointed for holding an election, postpone the election in a constituency, county or ward for such period as it may consider necessary where??

(a) there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;

(b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,

(c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.

"(2) Where an election is postponed under subsection (1), the election shall be held at the earliest practicable time.

"(3) Notwithstanding the provisions of this section, the Commission may, if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made"

Section 83 - Nullification of an election.

(1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that –

(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and

(b) the non-compliance did not substantially affect the result of the election.

(2) Pursuant to section 12 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

Elections (General) Regulations, 2017, cap 7 Sub Leg

Regulation 52

"(1) A candidate who has been nominated may withdraw his or her candidature by delivering to the respective returning officer a notice to that effect in Form 24A not later than three days after nomination.

"(2) Where there are only two nominated candidates and one candidate withdraws, the remaining candidate shall be declared duly elected in accordance with regulation 53.

Elections (General) Regulations, 2012, cap 7 Sub Leg

Regulation 87

"(3) Upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the Commission shall??

(a) verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre;

(b) tally and complete Form 34C;

(c) announce the results for each of the presidential candidates for each County;

(d) sign and date the forms and make available a copy to any candidate or the national chief agent present;

(e) publicly declare the results of the election of the president in a accordance with Articles 138(4) and 138(10) of the Constitution;

(f) issue a certificate to the person elected president in Form 34D set out in the Schedule; and

(g) deliver a written notification of the results to the Chief Justice and the incumbent president within seven days of the declaration;

Provided that the Chairperson of the Commission may declare a candidate elected as the President before all the Constituencies have delivered their results if in the opinion of the Commission the results that have not been received will not make a difference with regards to the winner on the basis of Article 138(4)(a) (b) of the Constitution...

Supreme Court (Presidential Election Petition) Rules, 2017

Rule 8

(i) the validity of the conduct of a presidential election;

(ii) the validity of the qualification of a President-elect;

(iii) the commission of an election offence as provided under the Election Offences Act (No. 37 of 2016);

(iv) the validity of the nomination of a Presidential candidate or

(v) any other ground that the Court deems sufficient, provided such ground shall not be frivolous, vexatious or scandalous.

Constitution of Kenya, 2010

Article 38 - Political rights.

The right to vote is enshrined in article 38 of the Constitution, which provides that:

"(1)...

"(2) ...

"(3) Every adult citizen has the right, without unreasonable restrictions??

a) to be registered as a voter;

b) to vote by secret ballot in any election or referendum; and,

c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office"

Article 83 - Registration as a voter.

"(1) A person qualifies for registration as a voter at elections or referenda if the person –

(a) is an adult citizen;

(b) is not declared to be of unsound mind; and

(c) has not been convicted of an election offence during the preceding five years.

"(2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.

"(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

Supreme Court (Presidential Election Petition) Rules, 2017

Rule 8

(i) the validity of the conduct of a presidential election;

(ii) the validity of the qualification of a President-elect;

(iii) the commission of an election offence as provided under the Election Offences Act (No. 37 of 2016);

(iv) the validity of the nomination of a Presidential candidate or

(v) any other ground that the Court deems sufficient, provided such ground shall not be frivolous, vexatious or scandalous.

Case law

Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others **(Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR)**

Paragraphs 289- 290

"289. It is clear that a fresh election under Article 140(3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme Court, following a successful petition against such election. Since such a fresh election is built on the foundations of the invalidated election, it can, in our opinion, only involve candidates who participated in the original election. In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest.

"290. Suppose, however, that the candidates, or a candidate who took part in the original election, dies or abandons the electoral quest before the scheduled date: then the provisions of Article 138(8) (b) would become applicable, with fresh nominations ensuing."

Republic v Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & Hassan Abdi Abdille **(Judicial Review 628 of 2017) [2017] KEHC 9447 (KLR)**

Paragraph 114

114 *"Having considered the issues raised herein and pursuant to Section 11 of the Fair Administrative Action Act, 2015, these are my findings:*

(1) The Respondent was under a constitutional and statutory obligation pursuant to Regulation 3(2) of the Elections (General) Regulations, 2012 to provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.

(2) The Respondent did not provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.

(3) In so doing the Respondent violated Regulation 3(2) of the said Regulations as read with Articles 38 and 81 of the Constitution.

(4) Since there is no prayer seeking either the cancellation of the fresh elections due for 26th October, 2017 or their postponement, it would not be efficacious to grant the orders herein in the manner sought.

115. Therefore without sanitizing the said process, I decline to issue the reliefs sought herein in the exercise of my discretion not based on lack of merit, but on public interest."

Held

1. Article 140 of the Constitution vested the Supreme Court with jurisdiction to hear and determine a Presidential election petition. That provision allowed any person to challenge the election of the president-elect in the court. Article 260 defined a "person" to include both natural individuals and entities such as companies or associations, whether incorporated or unincorporated. Therefore, the term "person" under article 140 included both natural and juristic persons, and there was no requirement that the petitioner had to have participated

in the election. As a result, the petitioners had the legal standing to bring the petition under article 140(1).

2. The subject-matter of the petitions before the court met the criteria to be characterized as being in the category of public-interest litigation. Public-interest litigation was a public right, enshrined in articles 22 (1) (c) and 258 (2) (c) of the Constitution. It was a veritable vehicle for the vindication of public rights, such as extended beyond the constraints of the common law doctrine of *locus standi.* The proliferation of issues raised in the instant matter were symbolic of parties aggrieved, and were presenting a real cause for judicial resolution.

3. The nomination process was deeply rooted in the Constitution, which recognized that an electoral contest had to be preceded by the nomination of candidates to vie for elective positions. Article 137 of the Constitution specified the qualifications and disqualifications of a Presidential candidate. Article 138(8)(a) also underscored the centrality of nomination, by decreeing that a Presidential election should be cancelled if no person had been nominated as a candidate before the expiry of the period set for the delivery of nomination papers. Nominations, therefore, was not just a formality, or an exercise in futility, nor could it be dispensed with, save for lawful cause.

4. Not everyone was qualified to be nominated as a contestant, as indicated by the wording of articles 137(1) and 137(2) of the Constitution, which outlined the conditions for qualification and disqualification for nomination. The Constitution provided clear criteria for the nomination process, and only individuals who met the requirements set out in article 137 could be validly nominated. Additionally, article 138 outlined the procedure that followed after the nomination process was completed.

5. Nomination was a process through which candidates were identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they sought. It was a critical component of an electoral process, without which there would be no election.

6. The Constitution envisaged several situations in which a Presidential election could be held:
    1. During a General Election, in accordance with article 136(2)(a) of the Constitution;
    2. When a vacancy arose in the office of the President, as outlined under article 146;
    3. Following an election where no candidate met the required constitutional threshold, as provided by article 138(5);
    4. If the President-elect died before taking office, under article 139;
    5. If the Supreme Court declared the election of the President-elect invalid, as per article 140(3).

7. Each of those elections occurred under different circumstances, and it was important to evaluate them individually, recognizing their distinct contexts.

8. Though the use of the phrase 'whenever a presidential election is to be held' under section 14 of the Elections Act signalled a wide scope of application, the substantive provision,

nonetheless, confined the application of section 14 to just three kinds of Presidential election;

1. a general election;
2. an election conducted under article 138(5); and,
3. whenever a vacancy occurred.

9. In all those instances, the nomination process was identified as an imperative step, before the conduct of any such election. The only Presidential election not specifically mentioned therein, was a fresh election conducted pursuant to article 140(3) of the Constitution. The failure to recognize the need for nomination in an election under article 140(3), was not out of oversight, or inattention, on the part of the drafters of the Constitution, but arose from a proper appreciation of the law.

10. Though section 14 of the Elections Act required nominations to be conducted for an election under article 138(5), the Constitution itself restricted the candidates who could participate in such an election, to only the candidate, or candidates with the greatest number of votes, and the candidate, or candidates, with the second greatest number of votes. Consequently, nominations would be pointless, as the Constitution itself established with specificity who the participating candidates should be.

11. An election held under article 138(5) of the Constitution was not a stand-alone election, but rather, one anchored on an 'initial' election that had been conducted and where no candidate met the constitutional threshold, for being declared elected. Similarly, a fresh election conducted pursuant to article 140(3) was anchored upon the nullification of a Presidential election, which could have been part of a general election; an election upon a vacancy occurring in the office of the President; or an election held under article 138(5) of the Constitution. It was therefore not a stand-alone election, devoid of a historical foundation.

12. The election held on October 26, 2017 was the outlaw of the nullification of the Presidential election held on August 8, 2017. The election of August 8, 2017 was itself a General Election, which was held every second Tuesday in August of every fifth year. It was also the second national election held under the Constitution of Kenya, 2010. An objective appreciation of the fresh Presidential election held on October 26, 2017 could only be achieved if it was seen in context, rather than in isolation from the General Election of August 8, 2017 and the processes leading to that earlier election.

13. Article 140 conferred upon the Supreme Court jurisdiction to determine the validity of a Presidential election, upon a contest hinged on any of the grounds provided for under rule 8 of the Supreme Court (Presidential Election Petition) Rules, 2017. The election petition in *Raila 2017* revolved around the question of results transmission, irregularities, and illegalities touching on the conduct of the election held on August 8, 2017. Upon making that finding, the court directed the IEBC to conduct a fresh election in strict conformity with the Constitution and the applicable election laws. The nomination exercise that had taken place prior to the election, was not the subject of any contest, and so it remained valid ¾ and

therefore, was a proper basis for the conduct of the fresh Presidential election of October 26, 2017. It emerged from that analysis that, a fresh election under article 140(3) was not a disjointed phenomenon, but one lodged within the motions of the previous electoral contest.

14. The fresh election held on October 26, 2017 only happened because the August 8, 2017 election, in view of the *Raila 2017* decision, did not culminate in its logical conclusion, that of determining who the winner was. The purpose of the October 26, 2017 election, therefore, was to conclude a 5-year electoral cycle, which would have ordinarily ended on August 8, 2017, and to initiate another electoral cycle of 5 years, ending on the second Tuesday in August of the next fifth year.

15. Given the timing of events, it would not be logical for a person who was not a Presidential candidate in the August 8, 2017 election to be a contestant in a repeat election. Furthermore, subjecting candidates to a fresh nomination process was unnecessary since that issue was neither raised in the petition challenging that election nor addressed in the final court orders. That position could be contrasted with the scenarios envisioned under article 139, where the President-elect died before assuming office, or under Article 146, of the Constitution where a vacancy arose in both the offices of the President and the Deputy-President. In those cases, a fresh nomination process would be necessary as there would be no other way to identify a candidate.

16. In the appraisal of the law relating to the nomination of candidates for Presidential election, the purposive standpoint, predicated on the Constitution's intent of assuring unbroken governance process was preferred. The nominations for Presidential-election candidates which took place on May 28 & 29, 2017, remained valid and no other nomination was required for the purposes of the fresh Presidential election held on October 26, 2017. All the Presidential candidates in the election held on October 26, 2017, were validly nominated, and it was proper for the 2nd Respondent to include them in the ballot papers as Presidential candidates.

17. The decision in *Raila 2013* had limited the number of candidates who would participate in a fresh Presidential election, in the context in which the issue was raised in that petition. While the High Court in the Judgment in *Ekuru Aukot* had directed the inclusion of Dr. Aukot as an additional Presidential candidate, but without mentioning the status of the other potential candidates, the court's reasoning in paragraph 73 had contemplated the availability of an opportunity for every other person who had been a Presidential candidate in the elections of August 8, 2017, to participate in the fresh election. Therefore, there was no fault with the 1st and 2nd Respondents' decision not to conduct fresh nominations and the inclusion of all the August 8, 2017 candidates on the ballot paper; it was a decision fully in keeping with *Raila 2013,* and later, the *Ekuru Aukot* decision: that position was binding on them at the time.

18. In making some of the pronouncements it made in *Raila 2013,* the Supreme Court was responding to hypothetical questions that had been expressed before it by the Attorney-General, in his capacity as *amicus curiae.* The questions were not essential for the determination of the two petitions before the court; and the answers to them could not, therefore, constitute the *ratio decidendi* of *Raila 2013.* To that extent, therefore, the pronouncements in those and other related paragraphs, were *orbiter dicta,* and thus, not binding on other courts. The High Court in *Ekuru Aukot,* was not, therefore, to be faulted for having characterized the said statements as such.
19. The matter before the Supreme Court was no ordinary matter, resolution to which could await the appellate process. The petitions before the court could stand or fall, on the basis of how the Supreme Court would determine the twin issues of withdrawal of candidature, and nominations. As the Supreme Court, in the instance, was exercising its original and exclusive jurisdiction under article 140 of the Constitution, an abnegation of its task was not tenable; and the responsibility devolved to it to resolve the relevant questions, without reservation. The court's task was to determine the Presidential election petition.
20. Having declared paragraphs 286-290 of the *Raila 2013* decision *obiter dicta,* there would be no need to clarify their meaning, since they were of no binding effect. They were of no precedential value. However, though *obiter,* those pronouncements held special stature, emanating as they did from the apex Court.
21. It was appropriate, in the circumstances, to consider paragraphs 289 and 290 of the *Raila 2013* decision, as the issues raised were relevant before the court. Paragraph 289 stated that a fresh election under article 140(3) was triggered by the Supreme Court's invalidation of the declared President-elect's election following a successful petition. The court held that, since such a fresh election was based on the invalidated election, it could only involve candidates who participated in the original election. That represented the correct legal position. However, the paragraph also indicated that there would be no basis for fresh nominations in the resultant electoral contest. That latter statement was only correct when the nullification of the election did not involve issues related to the nomination of candidates. In the petitions before the court, the nomination of candidates was not the reason for nullifying the August 8, 2017 election. However, if an election were nullified due to flawed nominations, a fresh election could not be held based on those same flawed nominations, and new nominations would be required.
22. Paragraph 290 of the *Raila 2013* decision, which appeared more speculative in nature, stated that if a candidate from the original election were to die or abandon their electoral pursuit before the scheduled date, the provisions of article 138(8)(b) would apply, leading to fresh nominations. If that statement had not been made *obiter* but instead as *a ratio decidendi*,

it would have been considered *per incuriam*, as article 138(8)(b) of the Constitution only addressed three specific scenarios for the cancellation of an election:

1. When no person had been nominated as a candidate before the deadline for nominations;
2. When a candidate for President or Deputy-President died on or before the scheduled election date; or
3. When a candidate who would have been entitled to be declared elected as President died before being officially declared elected.

23. The withdrawal of a candidate from the electoral contest was clearly not one of the scenarios contemplated by the Constitution as grounds for the cancellation of an election. Consequently, the court needed to depart from the decision in question.

24. Neither the Constitution nor the Elections Act made provision for the withdrawal of a candidate from an election. The procedure for withdrawal of candidature was instead provided for under regulation 52 of the Elections (General) Regulations, 2017. A Presidential candidate who intended to withdraw could only do so within three days of the nominations by filling form 24a, and submitting the same to the returning officer, the 2nd respondent. Regulation 52 provided for withdrawal of a candidate within three days of the nominations. The said Regulation was, thus, not applicable to the situation herein. The nominations had long been conducted before the scheduled fresh election. That however did not mean that after the expiry of the three-day period, no candidate could withdraw from an election. One could not be forced to participate in an election, in which he or she had lost interest. The NASA candidate not only made a public announcement of his decision to withdraw from the elections, but addressed a formal letter to that effect, to the 1st respondent. Such actions, constituted a substantive and legally-effective withdrawal from the elections.

25. The withdrawal of the NASA Presidential candidate from the October 26, 2017 fresh Presidential election could not, in law, have occasioned the cancellation of the elections. The retention of the name of the withdrawn candidate on the ballot could not vitiate the election given that a candidate had the liberty to withdraw from the electoral contest even one or two days before the elections, when it would be quite impossible to remove his or her name from the ballot.

26. Article 38 of the Constitution carried various dimensions of political rights. For purposes of the issue at hand, the relevant parts of the article were clauses (2) and (3) the right to free, fair and regular elections based on universal suffrage and the right to vote by secret ballot. As to who should guarantee the right to vote, article 21(1) of the Constitution required the State and State Organs to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. The Constitution and statute law charged the IEBC, a State Organ established under article 88 of the Constitution, with the responsibility of safeguarding and guaranteeing the enjoyment of the political rights of the Kenyan people.

27. It was not left to the State and State organs to guarantee the right to vote. The obligation equally bound the voters themselves. On the basis of the evidence adduced, the violent demonstrations, actively orchestrated by certain political actors, prevented the conduct of the fresh Presidential election, threatened the lives of election officials, voters, electoral infrastructure and private property in certain parts of the country. Neither the State nor IEBC or any other State Organ failed to fulfil its duty to respect and guarantee the right to vote. To the contrary, the evidence adduced indicated that the State (particularly the Police and the Ministry of Interior and Co-ordination of National Government) took preventative action to safeguard the safety of election officials, voters, election material and infrastructure. It was also evident that there was also active correspondence between the security agencies and the 1st respondent, on securing the country for the conduct of the fresh Presidential election. The police, furthermore, made arrests, and charged suspects of various crimes during the demonstrations.
28. Neither the State nor the IEBC bore responsibility for failure of voting in certain regions of the country. Such failure ought to be attributed to unidentified private citizens and political actors, who actively caused the offending situations, directly or indirectly. The validity of the fresh election, however, could not be successfully challenged on that ground alone.
29. While the 3rd respondent had on various occasions expressed his dissatisfaction with the judgment delivered by the Supreme Court on September 1, 2017, there was no evidence of any judge of the Supreme Court being intimidated by the choice of words by the 3rd respondent, or of any voter being discouraged from voting on that account. It was not enough to reproduce the 3rd respondent's political statements, attribute an effect-upon-judges to them, and invoke the scenario of unidentified voters, then reach the conclusion that such statements had an intimidating effect. As stated in both the *Raila 2013* and *2017* decisions, the burden of proof, at all times lay on a petitioner, and generalized claims, without evidence that met clear threshold, were of no value.
30. The actions by the Cabinet Secretary to bar anti-IEBC demonstrations from the Central Business Districts (CBDs) of Nairobi, Mombasa and Kisumu could not have had any bearing on the validity of the Presidential election. The 2nd and 3rd petitioners had not shown the nexus, if any, between the actions of the Cabinet Secretary and the low voter-turnout. Further, the allegation that the State, headed by the 3rd respondent, withdrew police security personnel attached to the NASA Presidential candidate, his running mate and other principals in that coalition, thus rendering his participation in campaigns in the Presidential election risky, leading to his withdrawal from the election altogether had also not been proved. Neither the Hon. Raila Odinga, nor his running mate, had sworn any affidavit to confirm the allegation, and even if it were true, there was no evidence that it had any impact on the Presidential election. There was also insufficient evidence placed before the court on whether the 3rd respondent had, in any way, used government advertisements during the 60 days leading up to the election, as a campaign tool.

31. The contention that the fresh election was not conducted by an independent and competent body in effect, argued against the very concept of legality under the constitutional process, thus negating the essential democratic values of constitutionalism and legal process. Such a stand was negative, retrogressive, and invited disapproval by the Court. Accordingly, the contention in question was devoid of merit.

32. Violence in any form, by any person or agency (private or State), against any person, community, institution or establishment, constituted a travesty of justice and of the rule of law. Violence undermined the democratic process and made a mockery of the pacific resolution of disputes which was one of the hallmarks of the progressive Constitution. Unchecked and unbridled episodes of violence were a sure recipe for the disintegration of a nation, and the destruction of the constitutional order. The court did not lend legitimacy to any acts of violence as a means of resolving disagreements.

33. Were any State agencies, such as the police who were allowed to resort to a limited measure of force to prevent crime, protect lives and property, and quell violent insurrection, to deploy excessive force resulting in injury, destruction of property or death, they certainly would be undermining the authority of the Constitution. By the same token, where civilians, for whatever reason, resort to acts of violence and intimidation, with the object of preventing others from exercising their democratic right to vote, or impeding election officials from executing their constitutional responsibilities, such civilians would engage themselves in the atavistic path of undermining the authority of the Constitution. Article 3(1) of the Constitution categorically declared that every person had an obligation to respect, uphold and defend the Constitution.

34. The terms of article 81(e) (ii) of the Constitution, read in proper context, had to be understood to mean that no person, candidate, political party, party agent or supporter, or State agency was to resort to acts of violence, intimidation, improper influence or corruption, to defeat the will of the people exercising their democratic rights to vote. The said provision could not be read as sanctioning or lending legitimacy to acts of violence and intimidation, to achieve the invalidation of an election. If it was to be held otherwise, the authority of the Constitution would be surrendered to cynical acts of violence: all that one would need to do, was to instigate violence in any corner of the Republic during a Presidential election, and thereafter petition the court to nullify the election. Those who intentionally instigate and perpetrate violence must not plead the same violence as a ground for nullifying an election.

35. The Presidential election could not be held in certain constituencies because of the threat of insecurity caused by violent demonstrations. In that regard, the IEBC invoked section 55B of the Elections Act, postponing the conduct of the repeat election to October 28, 2017.The IEBC was empowered by the Elections Act to postpone an election in a Constituency, County or Ward, in circumstances specified by the Act. However, there was *non-obstante* [a 'none-the-less' qualification] proviso to that provision; the Commission could, if satisfied

that the result of the elections would not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made.

36. Inherent in the foregoing, section 55B of the Elections Act includes several key points:

1. The Commission was a constitutional body established under article 88 of the Constitution, which mandated it to conduct elections in accordance with the Constitution and national legislation.
2. Article 82(1)(d) empowers Parliament to enact legislation for election conduct.
3. The long title of the Elections Act states it provides for elections for the President, National Assembly, Senate, County Governor, and County Assembly.
4. Section 55B gave the Commission discretion to postpone an election in an electoral unit if there wasa likelihood of serious breaches of peace. A low threshold was set for that discretion, meaning even the mere apprehension of violence could justify postponement. In the instance, there was an actual threat of violence, making the Commission's actions justifiable.
5. Therefore, section 55B of the Evidence Act served as a constitutional tool linked to article 82, aimed at facilitating the conduct of elections in line with the electoral principles and the right to vote outlined in articles 81 and 86 of the Constitution.

37. Section 55B bore a *non obstante* clause allowing the Commission to direct that a return of the election be made, if satisfied that the result of the election would not be affected by voting in the area in which voting remained outstanding. In terms of a Presidential election, that discretion was extended by regulation 87 of the Elections (General) Regulations, 2012.

38. The Commission made its declaration despite the electorate in the 25 Constituencies not having voted pursuant to article 138 of the Constitution, section 55B of the Elections Act and regulation 87 of the Elections (General) Regulations, 2012. On that basis, even though voters in 25 constituencies had not voted, the declaration of results by the Commission was in perfect accord with the terms of the Constitution.

39. The issue of changing percentages in terms of voter turnout did not in any way call into question the final tally announced by the 1st respondent at the time he declared the results of the presidential election. It was that final tally that ought to have attracted the attention of the petitioners.

40. Though the issue of appointment of the Constituency Returning Officers and their deputies was an issue pending in the Court of Appeal, the Supreme Court had an obligation to set the matter to rest. The Supreme Court was considering an electoral matter in which it took the first instance, and the ultimate instance. Its singular jurisdiction in the electoral matter was to be secured by holding that the current legal status of the said electoral officials, carried validity for now, and for the future: irrespective of such determination as may later be made by any other court on the matter. Guided by exigency, and by judicial notice which must be taken of the reality of discharge of the assigned mandate of the electoral agency, the officers in question lawfully held their positions, and duly discharged the constitutional mandate

devolving to them. That was also because on the election date, the stay orders granted by the Court of Appeal were firmly in place, and to state otherwise would be to negate the value of the validity of court decisions, unless and until they were overturned. The decision of the High Court, to that extent, could not be the basis for invalidating the October 26, election.

41. The allegation of arbitrary relocation of polling stations contrary to the law, as regards Kibra Constituency, had not been substantiated with any evidence showing that only 2 people voted at the polling station. No one had come up to say that he or she could not trace or find the polling station after it was moved. It was also admitted that the polling stations were moved as a result of violence that erupted, and that the 2nd respondent exercised the powers which were conferred on it under regulation 64(2) of the Elections (General) Regulations, 2012. In that regard, the allegations by the petitioners were in generality, and were not supported by any evidence and had been rebutted by the various returning officers.

42. The issue of a voters' register when raised in any election proceedings was a primary issue for determination. Registration of voters was also a constitutional imperative, by article 83 of the Constitution which outlined the prerequisites of voter registration. Registration facilitated the effectuation of the right to vote. Article 38(3)(a) decreed that every adult citizen had a right, without unreasonable restrictions, to be registered as a voter. As such, the right to vote could not be fully enjoyed if the registration of voters was not properly conducted.

43. Gazette Notice No 8751 suspended the registration of voters and revision of the voters' roll, until November 8, 2017. The import of that suspension was that the total number of registered voters contained in the Register used for the August 8, General Election was still in operation during the October 26, 2017 fresh Presidential election. According to the evidence provided by the 1st respondent, the total number of registered voters, according to Form 34C was 19,611,423 registered voters, which tallied with the number recorded in the Gazette Notice No 6250.

44. The 2nd and 3rd petitioners did not lead further evidence to prove the alleged changes in the number of registered voters, or that indeed, that affected the outcome of the fresh Presidential election. In any event, the existence of the differences was attributed to the inclusion of prisoners from the total numbers by *Kura Yangu Sauti Yangu*. The evidence adduced by the respondents, therefore, sufficiently discharged the Petitioners' allegations of an inconsistent voters register.

45. Part II of the Elections Act comprehensively covered registration of voters and determination of questions concerning registration. Section 8A (3) of the Elections Act placed a mandatory obligation on the Commission to engage a reputable firm to conduct an audit of the Register of Voters, for purposes of, *inter alia,* verifying the accuracy of the Register and updating the Register.

46. The voters' roll was the centrepiece of an electoral process. At the heart of the right to vote was the obligation of the State to ensure that the registration of voters was undertaken

and discharged properly. The Constitution addressed voter registration in four separate articles; articles 38(3)(a); 82(1)(c); 83; and, 88(4)(f)). Kenya's history of elections featured voter registration as one of the aspects that required intensive reform. When the court determined the *Raila 2013* case, the conclusion was that the Register was a product of several components. To consolidate those components into one central location, the KIEMS was introduced, which was a one-stop gadget, with three functionalities, being: voter registration; voter identification; result transmission. Each of those components was independent, yet they all reinforced the electoral process.

47. Voter identification addressed some of the fundamental issues that arose in earlier elections. According to the 2nd Respondent, it was an elaborate system of identification, structured in a way that did not negate any persons' right to vote. The composite of the voter identification designs was:

    1. Biometric identification;
    2. Alphanumeric search with reference to identification documents;
    3. Alphanumeric search with reference to physical keying in of the biographic data; Presiding Officer Authentication (Supervision mode); and
    4. Complementary identification.

48. With the checks guaranteed by those elaborate modes of identification, most of which were witnessed by voters, and visible in the eviRTSlogs provided by the 2nd respondent, the 2nd and 3rd petitioners had not met the dictates of proof to show that: dead persons participated in the election; unqualified persons voted; persons with special needs were denied the chance to vote or that the total number of registered voters was in doubt at the time of the election.

49. Section 2 of the Elections Act defined a register of voters to mean a current register of persons entitled to vote at an election, prepared in accordance with section 3, and included a register that was compiled electronically. As such, a print-out of the electronic register for purposes of the election was not in violation of the law. Regulation 61 (4) of the Elections (General) Regulations, 2012, required the Returning Officer to provide each polling station with both electronic and hard copy of the Register of Voters or such part thereof as contains the biometric data and alpha numeric details of the voters entitled to vote at a polling station.

50. The voters' roll was subject to periodic inspection as decreed by section 6 of the Elections Act. The discretion to determine when a Register was closed to inspection rested with the Commission. That was necessitated by the administrative needs that attached to electoral management and preparation. That continuous exercise, therefore, showed that the Commission was not under immediate obligation to act on the recommendations of KPMG. The voters' roll was a living document; with the addition of eligible persons entitled to vote, and the exit of others, its character also changed, necessitating regular updating. In that regard, section 8 of the Elections Act was very instructive.

51. The processes outlined by the law relating to registration, verification, inspection, audit, transfer of registration, and updating the Voters' Register, were all time-bound. The 3rd

petitioner questioned processes that occurred before the conduct of the General Election on August 8, 2017. The question of the Register was addressed by the court in paragraph 301 of the majority decision in *Raila* 2017, and the court was satisfied that the 1st respondent did not alter the Register as alleged by the 2nd and 3rd petitioners. All evidence adduced and analyzed led to a contrary position. As such, there was no effect to the alleged failure by the 1st respondent to address issues raised in the KPMG audit. Accordingly, the 2nd and 3rd petitioners' grounds on the Voters' Register, failed.

52. Not every irregularity or procedural infraction was enough to invalidate an election. The irregularities ought to be of such a profound nature as to affect the actual result, or the integrity of an election, for a court of law to nullify the same. While the petition made far-reaching allegations of irregularities, the same had been effectively rebutted, or explained away in replying affidavits, and submissions of counsel.

53. Examination of sample materials submitted to the court by the 1st and 2nd respondents (Forms 34A, 34B and Form 34 C), as against the ones attached to the petitioners' pleadings, lend credence to the explanations given to the court by the respondents. While the 2nd and 3rd petitioners made serious allegations of widespread malpractices having characterized the election, various counsel for the petitioners spent most of their allocated time addressing the court on collateral issues, instead of laying evidence, and discharging the burden of proof, by addressing the respondents' written submissions.

54. The petitioners had not discharged the burden of proof to the standard established by the court. At no time, did the burden shift to the 1st and 2nd respondents. By the same token, the respondents had not violated the applicable electoral law, in the management of the October 26, 2017 election.

55. At the time the cause of action arose, to wit, the October 26, 2017, the law then applying was the Elections Act. The amended laws did not become effective until November 2, 2017. In that context, the common practice was that legislation should be effected prospectively and not retrospectively; that is, laws should be forward-looking and should not apply backwards in time. Prospective application of legislation is based on ancient Roman and English common law. Prospectivity was also consistent with elemental notions of fairness.

56. It was a conventional rule of construction that, legislation must be addressed to the future, and a statute should not be given retrospective operation, interfering with antecedent rights. Legislation should bear only prospective effect, in the absence of special legislative signal to the contrary. Where a legislative body thus wished to change the law regarding a past event/action, its intent was to be clear enough. By that principle, where legislation was ambiguous or silent as to its effective date, it should be presumed to be prospective.

57. In the instance, when Parliament passed the amendment to section 83 of the elections Act, it did not state that the law should apply retroactively. In the instant matter, prospectivity could be presumed to avoid construing a new law that otherwise might have attached new [post-enactment] legal consequences to events completed before the law's enactment.

58. The applicable election law in respect of the conduct of the October 26, 2017 election was the Elections Act. The Elections Laws (Amendments) Act, 2017 (Act No 34 of 2017) had not yet come into effect at the time of that election and did not have retrospective application.

59. Being aware that the amended law was the subject of various pending causes before the High Court, there was no reason to take away the jurisdiction of other superior courts, and determining issues pending thereat. However, the position could be distinguished from a matter arising in the course of a Presidential election in regard to which the Supreme Court had unqualified jurisdiction, and where the issue essentially related to a petition before the court.

60. The overlapping jurisdiction between the High Court and the Supreme Court only arose when interpreting or applying the provision in so far as it related to the Presidential petition. Where however, the challenge to a statutory provision was directed as a ground in the context of a Presidential petition, the Supreme Court should not find any difficulty in addressing the same in the context of a Presidential petition. That did not exclude the power to refer the matter to the High Court, for its proper disposal, depending on the circumstances. The issue of the unconstitutionality or invalidity, or otherwise, of section 83 of the amended law would therefore be determined by the High Court, where the matter was under consideration. There was no prospect of the High Court making a finding that would affect the Supreme Court's determination of the instant Presidential election petition.

61. Kenyan elections had to be evaluated, in their general outlook, in the context of recognized legal practice; of the operative law and governance institutions; and of the profile of stable socio-political order and of economic dynamics that have sustained, and continue to sustain the community.

62. The term "credibility" was inherently subjective. It was the quality that made something worthy of belief. However, it was essential to consider whose perspective determined credibility. Credibility should be evaluated from the viewpoint of the general population, for whom dependability and sustainability were crucial in their daily lives. The purpose of the electoral process was to ensure reliable governance for the voting public. Although the assessment of credibility was largely subjective, the court's role was to base its findings on established standards of legality, rationality, and objectivity, while being guided by a professional understanding of the public interest.

63. Thus, in evaluating credibility in the context of the contested election, the Court must adhere to verifiable criteria, including:
    1. Whether there was a valid preparation for the election.
    2. Whether the elections took place.
    3. Whether the conduct of the election wasguided by the prescribed law.
    4. The existing scope of discretion within the law and whether it was duly exercised.
    5. Whether a candidate was duly declared elected.
    6. Overall, whether the constitutional task was accomplished.

64. Based on the proper understanding of legitimacy, it was untenable to claim that Presidential elections conducted in accordance with the Constitution, relevant statutes, and regulations; by the constitutionally designated authority and in strict compliance with valid Supreme Court order, lack legitimacy. Such elections were essential for sustaining the national governance process, as consistently acknowledged by the public. Only a failure in the conduct of those elections would result in a lack of legitimacy, creating uncertainty and a perception of crisis that would negatively impact the entire population in its social, economic, and political interactions.

65. From the perspective of legitimacy, the election would be viewed as credible unless there was clear evidence indicating significant failure in its conduct. That included instances where due procedures were not followed, where entities other than the Independent Electoral and Boundaries Commission (IEBC) conducted the election, where vote-counting procedures were disregarded, where false results were announced instead of the actual outcome, where voters were turned away from polling stations by the IEBC or state agencies, or where the processes of verification and announcement of vote outcomes were not adhered to. As earlier found, none of those factors were present or significant in the instant case.

66. In accordance with article 81(e) of the Constitution, the repeat election was conducted by secret ballot; it was free from violence (more particularly, such violence being initiated and prosecuted by the electoral body, or by State agencies); the voters were not influenced by intimidation or corruption; the management process was in the hand of IEBC; voting was transparently done; such voting proceeded transparently, efficiently, accountably, with precision and clear expression of voter-preference. Such election hence had to be judged to have been credible for the purposes of the Constitution, the law, and the national expectation.

67. The burden fell on the 2nd and 3rd petitioners not only to allege their claims but also to provide objective evidence supporting the legal basis of those claims. They had to present substantial evidence to substantiate each of their assertions. As previously demonstrated, some of their claims were too generic to provide a strong basis for the court to deviate from the initial perceptions of legitimacy and credibility. Ultimately, the elections held on October 26, 2017, met the constitutional standards of credibility and legitimacy, despite existence of certain anomalies.

68. The petitioners' concern with voter turn-out was that it should be an expression of the legitimacy of the election. They constructed the point around the right of every citizen to vote, and the effect of violence and non-voting, in certain constituencies, and its effect on the outcome of the election. Whereas the right to vote was guaranteed, the Constitution did not impose a mandatory obligation on a citizen to vote in an election. The ultimate yardstick for determining the winner in a Presidential contest was provided for under article 138 (4) of the Constitution. A candidate would be declared elected as President if the Candidate received:
    1. More than half of all the votes cast in the election; and
    2. At least twenty-five per cent of the votes cast in each of more than half of the counties.
69. Article 134(4) of the Constitution spelt out the minimum threshold required of a candidate, before being declared elected. The quantifying element was the outcome in the votes cast in an election and, consequently, if the safeguards of the right to vote were guaranteed, and the optimum environment adhered to within the confines of articles 81 and 86 of the Constitution, and of all the imperatives of a free, fair and credible election, the matter resolved to the question of 'votes cast', and the 'county threshold.' A candidate only needed to attract a modicum of voter support, to earn a positive declaration. Therefore, if the foregoing attributes for declaration were not affected by the voter turn-out, the validity of the declaration stood uncompromised.
70. Low voter turn-out, without more, was insufficient as a basis for invalidation. Where the threshold for declaration had been met, to set aside an election because of low voter turn-out would be to deprive citizens who voted, of the benefit of their franchise. There were various factors leading to the low voter turn-out. Re-running an election would generally have a negative impact on voter turnout. There was a proper basis, therefore, to find that voter turn-out had no direct connection to the validity of the declaration of a President-elect, even though, subject to article 138(4) of the Constitution, it remained important for as many people as possible to participate in a Presidential election.
71. Though the 2nd and 3rd petitioners urged persistently, that violence and intimidation were the factors that led to the low voter turn-out, and therefore compromised the credibility of the declared result, it was clear however, that such low voter turn-out was due to an amalgam of factors – including in particular, the active call for boycott, and the violent demonstrations, as well as voter-fatigue. Throughout the world, a call to boycott elections had the impact of lowering voter turn-out. Low voter turn-out was not an unassailable indicator of the want of credibility of an election.
72. Voter turn-out in a repeat election was generally low. Although there was a myriad of factors in the present case that led to the low voter turn-out, an election could not be tainted solely on the ground of voter turn-out. The factors that led to low voter turn-out, although politically tainted, and inviting political solutions, were not sufficient as a basis for impugning the electoral process.

73. From the emerging portrait of the issues in the case, the primary focus on the broad-textured concepts of "legitimacy" and "credibility" by the petitioners led them on a course of prolixity. That stood in contrast to the object of conscientious invocation of the judicial process – which brought before the court only a limited set of meritorious issues. That latter category had been duly answered, bringing the court to the clear conclusion that the petitioners' case lacked merit.

74. In both *Raila 2013* and *2017*, the Supreme Court took the view that, noting the substantial public interest accompanying Presidential election petitions, it would not be in the interest of justice to penalise a losing party, with the burden of costs. That reasoning could also apply to the instant case, especially as the petitioners had approached the court as registered voters (whether or not they voted in the recent election), with complaints that the processes leading to, and the conduct of the October 26, 2017 election did not meet constitutional or statutory thresholds, and that a further election ought to be held.

75. Although the petition did not succeed, the interests of justice would disincline the court to make an adverse order on costs. By no means did that rule out the possibility that, in a proper case, the court could dispense the penalty of costs upon a party, where such party brings forth a frivolous or vexatious case, or a case that distinctly aimed at settling political scores. In particular, the domains of *locus standi,* or public interest litigation, as those which in a proper case, would attract penalty in costs.

76. In both *Raila* 2013 and 2017 cases, the court determined that the substantial public interest in Presidential election petitions justified not penalizing a losing party with costs. That reasoning applies to the instant case, where the petitioners, as registered voters, raised concerns about the constitutional and statutory compliance of the October 26, 2017 election, despite the court disallowing their claims. The interests of justice lead the Court to decide against imposing adverse costs. However, the court could, in appropriate cases, impose costs on parties presenting frivolous or politically motivated claims, particularly concerning *locus standi* or public interest litigation.

Njoki Ndungu, SCJ concurring;

77. The instant concurring opinion was limited to two issues; (a) the applicability and (b) constitutionality of section 9 of the Election Laws (Amendment) Act, which amended section 83 of the Elections Act.

78. The Supreme Court's jurisdiction in relation to electoral disputes was broader than that of the other superior courts. That interpretation, and the language of the Elections Act and the Election Laws (Amendment) Act, placed section 83 of the Elections Act at the centre of any determination by an election court. The application of section 83 served as the court's determinate vector. Therefore, although the parties seemed to be in agreement that the constitutionality of that section was removed from the court's exclusive original jurisdiction and was the preserve of the High Court on the basis of a pending suit, the court's

determination of that issue was necessary to complete the mandate bestowed under article 163(3)(a) of the Constitution.

79. The court had previously held that issues pending before another Court would not be subject to determination before the Supreme Court but rather the Supreme Court would allow that other court having the jurisdiction to determine the matter in the first instance. The High Court, the Court of Appeal and the Supreme Court were all empowered to interpret the Constitution and that in ordinary circumstances; litigation on issues of constitutional interpretation would in the first instance fall for determination by the High Court. However, it was important to distinguish from previous judicial pronouncements, as those instances involved ordinary cases brought before the Court under Article 163(4)(a) or (b) of the Constitution, specifically appeals from the Court of Appeal and matters of constitutional interpretation or application that were integral to the issues raised in the superior courts.

80. Consequently, the Supreme Court typically defers to the superior court below it when that superior court held original jurisdiction over the matter. However, a question arose regarding whether the Supreme Court, when exercising its exclusive original jurisdiction, would address an issue of constitutional interpretation and application or if it would defer to the lower superior courts.

81. In a matter in which the court was exercising exclusive original jurisdiction as an election court, it was imperative for the Supreme Court to answer, in the first instance, such questions relating to interpretation and application of the Constitution that were so integrally linked to the determination of the validity or otherwise of the declared result.

82. Since the determination of a petition challenging the declaration of a Presidential election fell to the exclusive original jurisdiction of the Supreme Court, the legal implication of leaving main issues unresolved was the creation of a lacuna in the application of the law. Losing the chance to clarify it until such time as the jurisdiction of the Supreme Court would be invoked in another like matter or such time as the Legislature illuminated the penumbras occasioned therein. The grave occasion of the court's acceptance of the submissions of counsel to skip the central determination revolving around the constitutionality of section 83 of the Elections Act (as amended) left a matter properly before the court unresolved. The Constitution did not countenance a situation whereby the court made a partial determination on any matter, especially in an election cause.

83. In Kenya's Constitutional scheme, the jurisdiction of the Supreme Court was not as rigid as would have been in 1989 when the Court of Appeal rendered its opinion in the *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) on jurisdiction. There were rare instances, when the jurisdiction of the Supreme Court would engage the interpretation of an issue pending before a Superior Court. Where an issue was so integrally linked to the cause before the court in exercise of its duty under article 163(3)(a) of the Constitution, the court would address itself to that issue

notwithstanding its status before a lower court. The remarks relating to the mandate of the Supreme Court were not only applicable in exercise of its appellate jurisdiction but also in respect of its exclusive original jurisdiction.

84. The Supreme Court had on various occasions pronounced that it should utilize every opportunity that presented itself in the course of determination of matters before it to interpret the Constitution. In view of the requirement in section 3 of the Supreme Court Act, for the court to:

1. Assert the supremacy of the Constitution and the sovereignty of the people of Kenya;
2. Provide authoritative and impartial interpretation of the Constitution; and
3. Develop rich jurisprudence, among others.

85. The court could not shy away from determining conclusively all the issues relating to constitutional interpretation and application that arose within a presidential election so long as such issues were central to the determination of the question of validity of the declaration of the President-elect.

86. The resolution of a Presidential Election Petition fell to the court for determination in exercise of its exclusive original jurisdiction pursuant to article 140 of the Constitution. Failure by the Court, to determine an issue that was integral to the Petition would have the effect of leaving part of the dispute between the parties unresolved. In terms of section 83, it would have the effect of leaving undetermined, the fulcrum of the election cause itself. Consequently, the resultant decision would be one falling short of the explicit commands of articles 140 and 159(2) of the Constitution that justice should not be delayed and the purposes and principles of the Constitution should be protected and promoted. Such an incomplete decision would also be contrary to the distinct objects of the court set out in section 3 of the Supreme Court Act and the entire fabric of the Constitution.

87. In order for the court to determine, with finality, the question of validity of the declaration of the president-elect after the election held on October 26, 2017, it ought to inevitably, determine all the issues that crystallised for determination and the applicable electoral law in that respect. The court was charged to signal the law that it had relied on in arriving at its determination in any matter, more importantly, in determining the validity of a declaration in a Presidential election and for good reason. Firstly, it attracted enormous public interest. Secondly, other courts looked up to the Supreme Court to offer the guiding compass on interpretation and application of the Constitution and its interplay with other applicable laws, and thirdly, for certainty and predictability of Kenya's electoral jurisprudence.

88. The doctrine of presumption of constitutionality would be applicable in respect of section 83 of the Election Laws (Amendment) Act as long as that provision had not been adjudged unconstitutional by any court. The constitutionality of section 83 fell for the court's determination in the instant petition.

89. Section 83 of the Elections Act appeared in Part VII of the Act-Election Disputes Resolution, under the heading, 'Election Petitions.' More specifically, it addressed the conduct of the court after an election petition had been filed before it. In that instance, the determining cause triggering the application of the law was the cause presented for the court's determination. Section 83 contained the test to be applied by a court while determining an electoral cause before it. Therefore, it did not follow an electoral event, ie, the election, it followed the declaration by a judicial officer, of an election cause. Section 83 (as amended) was therefore, the applicable law not just in the petition, but in other election Petitions and appeals before other courts.

90. Any challenge of constitutionality or otherwise of any law, act or omission ought to be brought on the basis of inconsistency with the Constitution as directed under article 2(4). The role of a judge was to compare the impugned law or action with the provisions of the Constitution to determine consistency or otherwise. There should be more than an implied or incomplete argument touching on constitutionality to exhaustively determine a claim of inconsistency with the Constitution.

91. Inconsistency on the basis of statute and on the basis of conduct are distinguishable and ought to be comprehensively pleaded. It was not enough to plead inconsistency of a law with the Constitution as a tangential issue in a case. Claims of inconsistency should be well pleaded and argued by the parties and where the court determined that such a crucial question was given peripheral treatment, it could exercise its discretionary powers to ask the parties to delve deeper into it. The consideration of any law or conduct against the Constitution was central to any legal proceedings.

92. The resolution of the question of section 83 of the Elections Act (as amended) was very central to the matter before the court. That provision was a product of the mandate bestowed on Parliament vide article 82 of the Constitution. Parliament had the legislative authority to enact laws, including, legislation on elections. Having determined that the section, as amended, was the applicable law in determining the petition and having noted that it was the determinate vector while making a judicial determination in any election petition, interpretation of the section was therefore a vital component of the court's final determination.

93. Even where constitutional questions had not been presented concisely and clearly, the court was not to overlook a determination of that issue. In a proper case, the court ought not to defer the determination of a constitutional issue central to the cause before it to another forum.

94. A principle developed in deference to the separation of powers and more specifically, in light of the role of Parliament under article 94 of the Constitution was the presumption of constitutionality of statues. Any legislative action by Parliament was presumed Constitutional and the burden was on the person challenging the legislative act to show in what manner it breached the Constitution.

95. It was not apparent, either from the case by the petitioners by way of rebuttal of the presumption of constitutionality or following the application of the law, that the same violated the Constitution and more specifically, fundamental rights and freedoms. As such the constitutional qualification against that presumption, in the strict terms of article 24 (2) (4) of the Constitution, did not arise.

96. The finality of the Supreme Court as a judicial agency, and its role as the custodian of the Constitution militated, save for rare instances dictated by the circumstances of each case, against the blanket presumption of constitutionality without delving into a holistic interpretation of the constitutional *vis-a-vis*, the impugned law or conduct. The Judiciary in general and the Supreme Court in particular retained control over interpretation of the Constitution.

97. The petitioners claimed that the amendment compromised the independence of the Judiciary and was an attempt to review the Supreme Court's determination in *Raila Odinga,* 2017. The legislative authority of the Republic was vested in Parliament under 94 of the Constitution. Parliament was the only body with powers to make provision having the force of law unless otherwise provided by the Constitution or legislation. Therefore, at the outset, by enacting the Election Laws (Amendment) Act, Parliament was well within its constitutional mandate.

98. It was admitted that on the October 2-5, 2017 the Joint Select Committee of the National Assembly and Senate committees on Election Laws (Amendments) Bill, 2017 put in place avenues for public participation from the different stakeholders through the submission of proposals. That fulfilled the requirements of public participation as obliged under article 118 (1)(b) of the Constitution.

99. The amendment to section 83 of the Elections Act was not meant to undermine the independence of the Judiciary. The purpose of the Elections Act (Amendment) Laws was elaborated in the National Assembly. The purpose according to the excerpts from the Hansard of the 12th Parliament on October 10, 2017 was to harmonize the laws by clearing any ambiguities flowing from interpretation.

100. Parliament was in no way invasive into the judicial realm in amending the impugned section. The purpose of the Legislature was to clarify the law and bring it into conformity with international best practice. A law did not become unconstitutional simply because it went against the precedents of the Supreme Court or other courts. The legislative mandate afforded an opportunity for the courts to reconsider precedent and nurtures the development of constitutional law.

101. Article 81 of the Constitution outlined the principles of the electoral system while 86 provided the imperatives of voting; voting method, counting, tallying, announcement, and post-election safeguards. Those principles were therefore cross-cutting. A stricter dichotomy would separate those two principled provisions as bearing on process and outcome. Those two critical elements of an election were crucial in the determination of its validity. The

process gave rise to the outcome. Therefore, deviation from the process ought to be considered against its effect to the declared outcome.

102. Section 83 (as amended) provided a formula for evaluating the conduct of an election against the process and the outcome and was the product of article 82 of the Constitution. It also did not take away the powers of an election court to determine compliance of an election with the purpose and principles of the Constitution. Therefore, it was not inconsistent with the Constitution. In the upshot:

1. Section 83 of the Elections Act, as amended by the Election Laws (Amendment) Act, 2017, was the applicable law in the judicial determination of the instant Presidential Election Petition.
2. Section 83 provided the legal framework for election courts to adjudicate election cases and was also applicable to other election disputes in lower courts.
3. The question of consistency of the impugned provision with the Constitution was distinctive to that of other provisions in the same Amendment Laws. Section 83 did not follow the electoral event as did the substratum of the other provisions. Section 83 followed the declaration by a judicial officer, of an election cause. It was an electoral cause's determining vector.
4. There was no evidence that the amended section 83 of the Elections Act, its effect or its legislative process violated the Constitution, so that issue therefore ought not to be retried by the High Court.

Petition dismissed:

Orders

i. *Petition No.2 of 2017, Hon. John Harun Mwau v. Independent Electoral and Boundaries Commission & 2 Others), as consolidated, dismissed*

ii. *Petition No.4 of 2017, Njonjo Mue and Anor v. the Chairperson of the Independent Electoral and Boundaries Commission & 3 Others, as consolidated, dismissed.*

iii. *The Presidential election of October 26, 2017 upheld, as was the election of the 3rd Respondent.*

iv. *All parties to bear their costs.*

Citations

Cases

Kenya

1. *Aukot, Ekuru v. Independent Electoral and Boundaries Commission & Others* Petition 471 of 2017; [2017] KEHC 9390 (KLR) - (Followed)
2. *Katiba Institute and Another v. The Attorney-General and Another* Constitutional Petition 548 of 2017; [2018] eKLR - (Mentioned)
3. *Khalifa , Khelef & 2 others v Chairperson, Independent Electoral & Boundaries Commission & Independent Electoral & Boundaries Commission ; Adrian Kamotho Njenga (Intended Interested Party)* Petition 17 of 2017; [2019] KESC 78 (KLR) - (Mentioned)

4. *Mwau , John Harun v. Independent Electoral and Boundaries Commission & Others* Petition 514 of 2017; [2017] KEHC 9453 (KLR) - (Mentioned)
5. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 5 (KLR) - (Followed)
6. *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) - (Explained)
7. *Orange Democratic Movement v. Ekuru Aukot & Others* Civil Appeal No. 359 of 2017 - (Mentioned)
8. *Republic v Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & Hassan Abdi Abdille* Judicial Review 628 of 2017; [2017] KEHC 9447 (KLR) - (Explained)

Texts

Kenya National Commission for Human Rights (2017), *Mirage at Dusk: A Human Rights Account of the 2017 General Election*

Statutes

Kenya

1. Constitution of Kenya articles 10, 38, 47(1)(2); 73; 81(d); 81(e); 86; 88; 99(2)(f); 109; 115(6); 118; 137; 138(1)(2)(4); 138(10); 140 (3); 156; 248; 249 - (Interpreted)
2. Election Laws (Amendments) Act, 2017 - (Cited)
3. Election Offences Act
4. Elections (General) Regulations, 2012 (cap 7, Sub Leg) regulations 11, 12, 18, 19, 51, 51(3A); 52; 64A; 64(2); 87(3); part 4, 9, 13 - (Interpreted)
5. Elections Act (cap 7) sections 2, 4, 5, 6, 6A, 7, 8 , 8A, 10, 13, 14, 23, 27, 28, 33(1)(a); 39(1c); 55B; 55B(3); 83; 105 - (Interpreted)
6. Fair Administrative Action Act
7. Independent Electoral And Boundaries Commission Act (cap 7C) - (Interpreted)
8. Interpretation And General Provisions Act
9. Leadership And Integrity Act (cap 185C) section 23 - (Cited)
10. Public Holidays Act (cap 110) section 4 - (Interpreted)
11. Public Order Act (cap 56) - (Cited)
12. Retirement Benefits (Deputy President And Designated State Officers) Act (cap 197B) - (Cited)
13. Supreme Court (Presidential Election Petition) Rules (cap 9B, Sub Leg) rule 8 - (Cited)
14. Supreme Court Act

December 11, 2017, the Court delivered the following Judgment:

A. Two Presidential Election Petitions: Background

1. On August 8, 2017, Kenya held its second general election under its 2010 Constitution, the Hon. Uhuru Muigai Kenyatta, the 3rd respondent, being declared the winner of the Presidential election. The Hon. Raila Amolo Odinga and the Hon. Stephen Kalonzo Musyoka, who had contested as Presidential and Deputy-Presidential candidates respectively, challenged the election, in *Raila Amolo Odinga & Another v. The Independent Electoral and Boundaries Commission & 2 Others*, Presidential Election Petition No. 1 of 2017, (hereinafter Raila 2017). In a decision rendered on 1st September, 2017, with reasons reserved and delivered on September 20, 2017, this Court, by a majority of four-to-two, nullified that election and, pursuant to article 140(3) of the *Constitution*, directed the Independent Electoral and Boundaries Commission (IEBC) to conduct a fresh Presidential election within 60 days. IEBC conducted a fresh Presidential election on October 26, 2017 and on October 30, 2017 the Chairperson of IEBC declared the 3rd respondent as the winner, having garnered 7,483,895 out of the 7,616,217 valid votes cast.

2. On November 6, 2017, two petitions were filed challenging that election: Petition No. 2 of 2017 by Mr. John Harun Mwau (hereinafter, 1st petitioner) and Petition No. 4 of 2017 by Mr. Njonjo Mue together with Mr. Khelef Khalifa (hereinafter, 2nd and 3rd petitioners). These two petitions were on November 14, 2017 consolidated, with petition 2 of 2017 being the lead file.

B. Parties

3. The 1st petitioner describes himself as a patriotic Kenyan, a firm believer in the supremacy of the *Constitution*, the rule of law, justice, equality, equity, fairness, democracy and human rights. He describes himself as a stickler for the rule of law, who has never been involved, directly or indirectly, in any criminal activity.

4. The 2nd and 3rd petitioners describe themselves as voters in Lang'ata and Nyali constituencies, respectively; and they filed their petition in that capacity.

5. The 1st respondent, is an independent Constitutional Commission established under article 88, as read with articles 248 and 249 of the *Constitution*, and the *Independent Electoral and Boundaries Commission Act*, No. 9 of 2011 [the IEBC Act]. It is the constitutional organ charged with responsibility for conducting and/or supervising national referenda,

and elections for any elective body or office established by the *Constitution*, as well as other elections as prescribed by an Act of Parliament.

6. The 2nd respondent is the Chairperson of the 1st respondent, and is the officer mandated under article 138(10) of the *Constitution* to declare the result of a Presidential election, and thereafter deliver a written notification of the outcome to the Chief Justice and the incumbent President.

7. The 3rd respondent was at all material times a Presidential election candidate on a Jubilee Party ticket, and was declared as the President-elect, in the fresh Presidential elections conducted on 26th October, 2017.

8. The 1st interested party was at all material times a Presidential election candidate, on Thirdway Alliance Party ticket, and was enjoined as an interested party by a Ruling delivered by this Court on 14th November, 2017. The 2nd interested party is the Attorney-General of the Republic of Kenya, an office created under Article 156 of the *Constitution*, enjoined contemporaneously with the 1st interested party.

C. Causes

9. Petition No. 2 of 2017 is based mainly on one legal issue: that the 1st and 2nd respondents failed to conduct fresh nominations for the election of October 26, 2017, thus rendering the election null and void. Petition No. 4 of 2017 raises the following grounds:

> " (i) The 2nd respondent did not conduct any nominations of presidential candidates in accordance with the *Constitution* and the Law: the 3rd respondent was [thus] not validly, procedurally and/or lawfully nominated as a presidential candidate.
>
> "(ii) The election conducted by the 1st and 2nd respondents on October 26, 2017 failed to meet the general principles stipulated under Article 81(d) of the *Constitution* of Kenya: of universal suffrage based on the aspiration for fair representation and equality of vote.
>
> "(iii) The election conducted by the 1st and 2nd respondents on October 26, 2017 failed to meet the general principles stipulated under article 81(e) of the *Constitution* of Kenya of a free and fair election, which is (sic):
>
> (a) The election was not free from violence, intimidation, improper influence or corruption;

(b) The fresh election was not conducted by an independent body;

(c) The fresh election was not transparent; and

(d) The fresh election was not administered in an impartial, neutral, efficient, accurate and accountable manner.

"(iv) The fresh election was further marred by illegalities and irregularities; and

"(v) Given the prevailing conditions and circumstances, the 1st and 2nd respondents could not and should not have proceeded with the conduct of the fresh election on 26th October, 2017."

1. The Grievances

(a) The Issue of Nominations

10. The 1st petitioner contends that upon the nullification of the presidential election held on August 8, 2017, no process pertaining to that election had been saved, or carried forward: and consequently, all the documents, processes, including nominations of candidates, and issuance of nomination certificates became spent as at 5.00 pm on August 8, 2017, and were no longer usable in any other Presidential election; and in the circumstances, and as nomination was a mandatory requirement for any election, the 1st and 2nd respondents were obliged to carry out fresh nomination under article 137 of the *Constitution* as read with Sections 14 and 23 of the *Elections Act* as well as regulations 11, 12, 18, 19 and 51 of the *Elections (General) Regulations*, 2012; and the nominated candidates were also required to pay the requisite nomination fee of Kshs. 200,000/- and be issued with new nomination certificates to contest in the fresh Presidential election.

11. The 1st petitioner contends that, after omitting the nomination stage, the 1st and 2nd respondents, on September 5, 2017 published Special Gazette Notice No. 8751, Vol. CXIX-NO. 130 stating, inter alia, that there shall be no nominations for candidates participating in the fresh presidential election and that, pursuant to the decision of the Supreme Court in *Raila Odinga v. IEBC & Others*, Petition No.5 of 2013 (hereinafter *Raila 2013*), the fresh Presidential election to be held on October 17, 2017 would be a contest between the Hon. Uhuru Kenyatta with his running mate, Hon. William Samoei Ruto, and the Hon. Raila Amolo Odinga with his running mate Hon. Stephen Kalonzo Musyoka. By another Special Gazette Notice, No. 9800 Vol. CXIX—No. 145 of September 29, 2017, the 1st respondent

changed the election date from 17th October, 2017 to October 26, 2017, while also stating that the campaign period would run from September 15, 2017 to October 24, 2017.

12. The 1st petitioner further avers that despite the disqualification of Mr. Cyrus Shakhalaga Khwa Jirongo under articles 137 and 99(2)(f) of the *Constitution*, and the gazettement of that disqualification in Special Gazette Notice No. 10152 , Vol. CXIX—No. 153 of 13th of October, 2017, on October 24, 2017, barely 24 hours to the election, and without according him any time to campaign, the 1st and 2nd respondents reinstated that candidate, by Special Gazette Notice No. 10562 Vol. CXIX-NO. 160, for the fresh election of October 26, 2017.

13. He contends that the 3rd respondent not having been validly nominated as required by articles 137 and 138(1) and (2) of the *Constitution*, sections 14 and 23 of the *Elections Act*, as well as Part IV, IX, and XII of the *Elections (General) Regulations*, was not qualified to participate in the fresh Presidential election, nor capable of being declared elected under article 138(4) of the *Constitution*: and so, his election on October 26, 2017 was unconstitutional, and should be nullified once again.

14. In Petition No.4 of 2017, the 2nd and 3rd petitioners similarly contend that nomination under Section 14 of the *Elections Act* is a requirement for any election, including a Presidential election; and that a nomination certificate issued to a candidate under that Section is valid only for the election for which it is issued. Consequently, it is contended, the nomination certificates issued to the Presidential election candidates for the August 8, 2017 election expired upon the nullification of that election. It follows, in their view, that the 1st respondent was obliged to conduct the nomination of candidates for the fresh election held on the 26th October, 2017, and to issue them with new certificates. The petitioners urged that there was no basis for the fresh election held on October 26, 2017; and hence, the election of the 3rd respondent was invalid ab initio, is for annulment.

(b) Universal suffrage and fair elections

15. The 2nd and 3rd petitioners urge the point that universal suffrage denotes the right of every adult citizen to vote, which the 1st respondent is required to ensure, under Article 81(d) of the *Constitution*. They contend that if two or more Presidential election candidates are nominated, Article 138(2) of the *Constitution* requires that an election shall be held in each and every constituency. Their standpoint is that there had been a violation of this requirement, as such full-scale voting was not realized on October 26, 2017. They contend that, without any legal basis, and contrary to Article 47(1) and (2) of the *Constitution*, the 1st and 2nd respondents arbitrarily and unilaterally decided that no election would be conducted in certain constituencies: Alego-Usonga, Awendo, Bondo, Gem, Ugenya, HomaBay, Kabondo-Kasipul, Karachuonyo, Kasipul, Kisumu Central, Kisumu East, Kisumu West, Muhoroni, Ndhiwa, Nyakach, Nyando, Nyatike, Rangwe, Rarieda,

Rongo, Seme, Suba North, Suba South, Suna East, Suna West, Ugunja, and Uriri. They impugn this action as having denied many voters their right to vote. Besides, as regards Turkana Central and Fafi Constituencies, they claim that the election was conducted on October 28, 2017 while counting and tallying was already in progress in other constituencies, and that this degraded and undermined the quality of the vote in those two constituencies. Their specific argument is that Article 81(d) of the *Constitution*, as read with Article 138(2) thereof, was violated, and the election in question rendered a nullity.

(c) Free and fair election

16. In addressing the above issue, the 2nd and 3rd petitioners raised a number of sub-issues which are enumerated below:

(i) Effect of violence, intimidation, improper influence, and corruption

17. The 2nd and 3rd petitioners aver that, contrary to Article 38 of the *Constitution* which safeguards the right to free, fair and regular elections, based on universal suffrage and Article 81(e)(ii) of the *Constitution*, the election of October 26, 2017 proceeded amidst riots and violent demonstrations by people perceived as National Super Alliance (NASA) supporters in Western Kenya counties, Mombasa County and some areas of the Coast region, as well as in certain constituencies in Nairobi County: the effect being an extraordinarily low voter-turnout. In their perception, there were situations of threat and violence against IEBC's staff, which led to relocation of polling stations in Kibra in Nairobi, and the cancellation of elections in the said 27 constituencies.

18. On behalf of the 2nd and 3rd petitioners, Mr. Njonjo Mue made depositions to the effect that the 3rd respondent had, on September 2, 2017, launched a "Jubilee Women Brigade" whose members appeared publicly in military and police attire, with their leaders administering oaths on new members in places such as West Pokot, Nakuru, Mombasa and Nairobi, even as their leaders addressed some of the 3rd respondent's campaign rallies. On this averment, it was contended that there had been a "militarization" of the fresh Presidential election, with the object of having an intimidating effect upon voters who were not supporting the Jubilee Party, associated with the 3rd respondent's campaigns.

19. In her affidavit, of November 5, 2017, in support of petition No. 4 of 2017, Ms. Perpetua Adar, citing reports of election observers such as the European Election Observation Mission; the Election Observation Group (ELOG); Kenya National Commission on Human Rights (KNCHR) and the Independent Medico-Legal Unit (IMLU) and others, deposed that the election of 26th October, 2017 was held in a tense and polarized political environment characterized by violence, which involved cases of deaths in Nairobi, Busia, Migori, Kisumu and Athi River areas, getting to a total of 37. She further deposed that as a

result of the said violence and intimidation, only Jubilee Party election agents were present in most polling stations, posing a risk of vote-count error and manipulation.

20. Another deponent, Ms. Nasanga Aki averred that, due to the heavy police presence and to clashes, involving menacing and rowdy youths, there had been no voting in most parts of Western Kenya. She averred that at Keveye Youth Polytechnic, and Waluka Primary School polling stations, youths had barricaded the entrances to the stations, barring voters from accessing them. She deponed that at Majengo Shopping Centre, youths forcefully examined the fingers of passers-by, to confirm if they had voted; and that this scared off many voters, leading to low voter turn-out in Vihiga County.

21. The 2nd and 3rd petitioners contend that on election day, scenes of militia groups, increased administration, and taking of oaths, prayers, and practices previously associated with the secret Mungiki sect, had been witnessed. These petitioners attributed cases of violence, killings, rape and other atrocities in areas deemed NASA strongholds, to the police. The petitioners also alleged that police and persons dressed in police uniform had broken into houses in some parts of the country, beaten up and maimed men, and raped women, with the effect of provoking the voters in certain regions to resent voting in the fresh Presidential elections.

22. The 1st and 2nd petitioners further alleged that the 3rd respondent, as a candidate and as the incumbent President, had uttered words calculated to intimidate the Judiciary, and this Court in particular. It was alleged that such threats had the consequences of keeping off voters, who believed that a Presidential election being a process ending with dispute resolution by the Supreme Court, would be destined to favour the 3rd respondent.

23. The 2nd and 3rd petitioners also accuse the 3rd respondent and his Acting Cabinet Secretary for the Interior and Co-ordination of National Government, of abuse of their positions by declaring October 25, 2017 a public holiday, with the intention of interfering with the constitutional mechanism for the determination of Presidential election disputes, and frustrating the hearing of cases filed to challenge the fresh election. It was claimed that the declaration of public holiday had specifically frustrated the hearing of Supreme Court Petition No. 17 of 2017 *Khelef Khalifa & Others v.Independent Electoral and Boundaries Commission & Others* and Civil Appeal No. 359 of 2017, *Orange Democratic Movement v. Ekuru Aukot & Others* in the Court of Appeal.

24. The 2nd and 3rd petitioners furthermore accuse the 1st respondent of failure to ensure compliance with Regulations 3, 6, and 7 of the Code of Conduct for Political Parties, which forbid engaging in and/or condoning violence, intimidation, or misuse of public resources. They contend that the election of October 26, 2017 was marred by improper influence, and corruption. They accused the 3rd respondent of unlawful use of public resources,

by directing Cabinet Secretaries, Mr. Mwangi Kiunjuri, Ms. Sicily Kariuki, Mr. Eugene Wamalwa, Dr. Fred Matiang'i and Mr. Najib Balala and other Senior State officers, to play a role in his campaigns. They also accuse the 3rd respondent of publishing advertisement of Jubilee Party Government achievements in the electronic media, and the Government delivery portal, as a scheme of improper influence upon voters to support his re-election bid, contrary to law.

25. The 2nd and 3rd petitioners also aver that Members of Parliament of the Jubilee Party, with the concurrence of the 3rd respondent, passed the *Election Laws (Amendments) Act*, 2017, which amended certain provisions of the electoral laws and regulations which the Supreme Court had interpreted and relied upon in its 1st September, 2017 determination of *Raila 2017*. They contend that the consequence has been a scale-down of the use of technology during presidential elections, such as would expose elections to manipulation; and that this is a signal to the voters that it would not be possible to successfully challenge the results of a fresh Presidential election, even where the process was unconstitutional, unlawful or irregular.

26. In summary, it is the 2nd and 3rd petitioner's contention that the alleged acts of violence and undue influence had polluted the voting environment, and seriously undermined free voting in the fresh Presidential election in most parts of the country, so that the relevant election cannot be said to have been an election at all.

(ii) Independence and impartiality

27. It is the 2nd and 3rd petitioners' case on this issue that although the 2nd respondent, and all IEBC commissioners, are State Officers, bound by article 73 of the *Constitution* to demonstrate public confidence in their integrity and leadership, the 3rd respondent compromised their independence, right from the inception of the Commission. They claim that this is because, on October 10, 2016, the 3rd respondent appointed Mr. Evans Monari, an Advocate who acted for him in the *Raila 2017* case, and who also acts for the Jubilee Party, as a member of the selection panel that appointed the 2nd respondent, and the 1st respondent's Commissioners. They urge, in that regard, that the 3rd respondent's action aforesaid eroded the 1st and 2nd respondents' integrity in the conduct of the fresh Presidential election. These petitioners also contend that, Mr. Monari acted for the 1st respondent in the High Court case, *John Harun Mwau v. Independent Electoral and Boundaries Commission & Others*, Petition No. 514 of 2017, and that this indicates his influence on the decision making processes of the 1st and 2nd respondents.

28. The 2nd and 3rd petitioners further contend that, contrary to Article 81(e)(iii) and (v) of the *Constitution*, the administrative decisions of the 1st and 2nd respondents were taken under

the influence of the 3rd respondent and/or his political party. In his supporting affidavit, the 2nd petitioner deponed that, at the behest of the Cabinet Secretary for Education who is also the Acting Cabinet Secretary for Interior and Co-ordination of National Government, the 1st and 2nd respondents had scheduled the fresh presidential election to be held on October 17, 2017, purportedly so as not to interfere with the national schools' examination calendar, though, following public outcry on the short period given for the election, and upon the realization that the KIEMS Kits could not be reconfigured in time for an election on October 17, 2017, the election date was changed to October 26, 2017. Such a fact, it was urged, indicated that the 1st and 2nd respondents were not in control of the election calendar, contrary to expectations.

29. The 2nd and 3rd petitioners also claim that on September 5, 2017, the 2nd respondent wrote a letter to the CEO/Secretary to the 1st respondent, Mr. Ezra Chiloba, demanding answers to 12 questions, a resolution to which was necessary to guarantee a free and fair fresh election. However, the 3rd respondent's running-mate, as well as the Jubilee Party, allegedly defended the CEO/Secretary, and directed that the letter be not responded to, or acted upon; and thereafter, on September 7, 2017, five Commissioners of the 1st respondent issued a separate press statement alleging that the letter had not been sanctioned by the 1st respondent as a body; and so, to date, the issues raised in the letter have not been addressed.

30. The petitioners stated that, on September 5, 2017, the 2nd respondent had notified the public of the appointment of a seven member project team, excluding the CEO/Secretary and several other staff of the IEBC, to oversee the fresh election. This was followed, on September 6, 2017 by the 3rd respondent's party writing to the 1st and 2nd respondents, advising against the exclusion of seven members of staff from the conduct of the election¾on grounds of partisanship. In response, the 1st and 2nd respondents allegedly assured the public that the 2nd respondent "shall not be subject to direction or control by any person or authority". The project team idea was thereafter abandoned and the CEO/Secretary proceeded to oversee the preparation of the fresh election; and it was urged that the 3rd respondent had substantial influence on the decision-making processes of the IEBC, despite public statements to the contrary.

(iii) Neutrality, efficiency, accuracy and accountability

31. The 2nd and 3rd petitioners urge that IEBC's decisions have been unpredictable, capricious, and not based on or backed by law, or lawful authority. One of the instances they cite is that, in a press release on September 8, 2017, the 1st and 2nd respondents had notified the public that they were ready to hold fresh election on October 17, 2017, but later, this proved impracticable, and they switched to October 26, 2017. Another instance is that, on September 11, 2017, the 1st and 2nd respondents departed from the public

announcement of September 6, 2017 in respect of the project team which they had formed to conduct the election; and they now stated that it had "agreed to review and streamline the operationalization of the project team for purposes of efficient and effective delivery of the fresh election." The CEO/Secretary who had been relieved of certain tasks, would now lead the team, and would later respond to the 12-point letter from the Chairman.

32. It is part of the 2nd and 3rd petitioners' case that, there being no fundamental changes to the operations of the 1st respondent, in line with the National Super Alliance (NASA) Coalition of parties' "irreducible minimum" demands, before the fresh election was held, the NASA presidential candidate, the Hon. Raila Odinga, on 10th October, 2017 notified the 2nd respondent in writing that he had elected to withdraw from the fresh Presidential election. The petitioners claim, in that regard, that the said withdrawal had the effect of triggering the vacation of the fresh Presidential election scheduled for October 26, 2017, "by operation of law." They thus censure the 1st and 2nd respondents for going ahead and holding the election as scheduled, and moreover, with NASA's Presidential candidate's name included on the ballot paper, on the basis that the withdrawal was not made in Form 24A as required by law.

33. The petitioners censure the repeat Presidential election on the ground that the IEBC state-of-election preparedness address of October 25, 2017 was questionable; as the respondent was still grappling with critical issues affecting the election: such as the validity of the appointment of Returning Officers. They also stated that it had emerged that the 2nd respondent had made a significant change to the mode of transmission of election results, and that whilst the KIEMS had been reconfigured to transmit both text and images in the results-management process, it had now been decided that only the scanned images of the relevant result forms, without accompanying text, would be transmitted and posted on the portal. The 2nd and 3rd petitioners gave such a resolution by IEBC as evidence of uncertainty and unpredictability, prior to, and in the conduct of the election.

34. The 2nd and 3rd petitioners further censure the election process as abdicating Commissioner, one Ms. Roselyne Akombe, had flown out and made a speech in New York, on October 17, 2017, expressing herself on the issues and challenges that had afflicted the 1st respondent in the conduct of the October 26, 2017 election. It was alleged that Ms. Akombe's misgivings had been replicated in a press statement by the 2nd respondent ¾ and that this gave proof that he could not have conducted credible elections on 26th October, 2017.

35. As regards Dr. Ekuru Aukot, who was one of the candidates in the election of August 8, 2017 Presidential election, the 2nd and 3rd petitioners reprobated High Court Petition, No. 471 of 2017, *Dr. Ekuru Aukot v. Independent Electoral and Boundaries Commission & Others*, which allowed his petition, and ordered his inclusion in the fresh election, on October 13, 2017. But, on the basis of that Court's Order, the 2nd respondent published a corrigenda to

Gazette Notice No. 8751 of 2017, and included all the other candidates who had contested in the August 8, 2017 election, with the exception of Mr. Jirongo who had been barred on legal grounds from doing so. Mr. Jirongo's name was, however, reinstated on October 18, 2017¾a position also censured by the petitioners herein. The petitioners' stand is that the 2nd respondent, at all times, acted without direction, lacked partiality, was inefficient, and was not accountable to the people of Kenya, as required under the *Constitution*.

d. Illegalities and irregularities

36. The 2nd and 3rd petitioners contend that, apart from the failure to conduct nominations, the October 26, 2017 presidential election was fraught with illegalities and irregularities: these including several complaints that:

(i) the High Court, in Judicial Review Application No. 628 of 2017, *Khelef Khalifa & Hassan Abdi v. Independent Electoral and Boundaries Commission* had held that the appointment of ungazetted and undesignated returning and presiding officers was illegal, yet such officers still presided over the election;

(ii) ballot papers had as candidates the names of the Hon. Raila Odinga, who had withdrawn from the election, and Mr. Jirongo, who had been constitutionally disqualified;

(iii) there was arbitrary relocation of polling stations in Kibra, Kaloleni and Changamwe Constituencies;

(iv) there was dishonest posting of results in polling stations, such as St Mary's Polling Station in Mombasa County, where there was no voting at all; and

(v) there was tampering with the Voters Register.

37. On the issue of the Voters' Register, the 2nd and 3rd petitioners averred that, contrary to representations made by the 2nd respondent that it would put in place a biometric Voters Register that was secure and accurate, the averments of Mr. Billy Atudo's notes unexplained changes in the total number of registered voters, between June 30, 2017 (the date of gazettement of the Register, for purposes of the General Election) and 26th October, 2017. They contend that this is evidence that, contrary to Articles 10, 38, 86, 88 (4)(b) of the *Constitution*, and sections 4, 5, 6, 6A, 7, 8 and 8A the *Election Act*, the 2nd respondent had revised the Voters' Register less than 60 days to the election date. He further deposed that at least 28% of the people who turned out to vote in the fresh election could not be identified biometrically. The petitioners contended that, whereas in the KPMG Voters Register Audit, only 5,000 voters had been classified as lacking biometric records, in the 26th October, 2017 fresh presidential election, only 5,525,487 out of the 7,653,930 voters

were identified on the KIEMS kits by their fingerprints, and 1.6 million voters were not biometrically identified, while a total of 78,124 voters could not be accounted for in the KIEMS kit at all. The petitioners, furthermore, aver that, in some areas, the 2nd respondent deliberately, or otherwise, failed to use the biometric system of voter identification, in order to misrepresent the voter turn-out. These, together with the discrepancies noted between voter turn-out as recorded in Forms 34A and as captured/recorded in OT-Morpho's KIEMS Kits records/logs, in their view, bring to question the credibility of the election.

38. On the issue of alleged manipulation of election results, Mr. Billy Atudo deponed that an examination of Form 34A from Stream 1 polling station in Bura Ward of Fafi Constituency in Garissa County, as seen by Kura Yangu Sauti Yangu (KYSY) observers, recorded 115 votes for Mr. Uhuru Kenyatta, 2 votes for Mr. Abduba Dida, and 117 total valid votes while the one posted on the IEBC portal revealed that 415 votes were cast for Mr. Uhuru Kenyatta, and 2 for Mr. Abduba Dida; and the copy of that form had the KYSY agent's signature, while that posted on the IEBC portal did not have. The petitioners contend also that, due to violence and police presence, only 2 people voted in two polling centres in Kibra constituency (Sarangombe and KAG Olympic Educational Centre) with 3,158 and 3,588 registered voters respectively, and that with the relocation of those polling stations on voting day without notice, a total of 6,744 voters had been disenfranchised.

39. The 2nd and 3rd petitioners also urge that there was lack of transparency in the conduct of the 26th October, 2017 election, and that contrary to its many public assurances, the 2nd respondent failed to disclose the final voter turnout by the close of polling.

40. As examples of alleged obscurity on the part of the 2nd respondent, the 2nd and 3rd petitioners state that these include, gazettement of the names of only two presidential candidates at first, and then including other names later, changing the structure of electronic transmission of results; and announcing that elections in 25 constituencies had been postponed, and then cancelling them later.

e. Negative conditions and circumstances, during election

41. It is the 2nd and 3rd petitioners' case that the totality of the foregoing grounds, evidence and factors show that, from the onset, the election of 26th October, 2017 was illegal, null and void ab initio. It is claimed that, the environment before, and on the date of the election, was so polluted, marred and tainted with violence, intimidation, partisan interests, and undue influence, and it was quite clear and foreseeable, that the 1st and 2nd respondents could not conduct a free and fair election.

42. The foregoing perception rests on the fact that following the nullification of the August 8, 2017 Presidential election, the 2nd respondent had issued a press statement, calling on

the Director of Public Prosecutions (DPP) to investigate and prosecute any member of the IEBC who may have been involved in election malpractices; and that the 1st respondent would make internal changes to its staff, ahead of fresh Presidential election. It also rests on the statement that the 1st respondent's CEO/Secretary had issued a memorandum on September 1, 2017 to the 1st respondent's staff, contradicting the position taken in the said press statement.

43. The petitioners contended that the 2nd respondent had publicly admitted, a few days to the election that as he had no control over the 1st respondent (the IEBC), he was not able to guarantee a free and fair election; and that the 2nd respondent had left no doubt whatsoever that the electoral process of 26th October, 2017 was a waste of time, money and resources.

44. The 2nd and 3rd petitioners contend that the 1st and 2nd respondents did not make any diligent or reasonable effort to conduct a free, fair and credible election, as required of them; and that the environment and the circumstances in which they held the fresh election had, produced an absurd outcome, given the voter turnout of 38%.

2. Quest for Reliefs

45. On the basis of the foregoing averments and allegations, the 1st petitioner sought the following reliefs:

(a) a declaration that the acts of the 1st and 2nd respondents of failing to conduct the elections "strictly in accordance with the *Constitution* and electoral laws", as directed by the Supreme Court, amounted to disobedience of a Court Order;

(b) A declaration that the 1st and 2nd respondents' act of failing to publish the nomination day in the notice initiating the fresh Presidential election of October 26, 2017 was unconstitutional, illegal, invalid, irregular, and in violation of articles 88(4)(d)(f) & (K), (5), 82(1)(b), 137, 138(1)(2) and 8(a)of the *Constitution*, Sections 14 and 23 of the *Elections Act* and Regulation 11(1), and 12(1) of the *Elections (General) Regulations*, 2012;

(c) a declaration that the failure by the persons listed as candidates to deliver to the 1st and 2nd respondents, at least five days to the day fixed for nomination, the lists bearing the names, respective signatures, identity cards or passport numbers of at least two thousand voters registered in each of a majority of the counties, in standard A4 sheets of paper and in an electronic form for the fresh Presidential election of October 26, 2017 was unconstitutional, unlawful and a violation of Articles 137, 138(1)(2) and (8), of the *Constitution*, Section 23 of the *Elections Act*, and Regulation 18 of and part IV of the *Elections (General) Regulations*, 2012;

(d) a declaration that the acts of the 1st and 2nd respondents of deliberately failing to collect the prerequisite mandatory Presidential candidates' nomination fees of Kshs. 200,000/- was unlawful, illegal, irresponsible, a dereliction of duty, and in breach of Articles 88(4)(d)(f) & (K), (5), 82(1)(b), 137, 138(1)(2) and 8(a)of the *Constitution*, Section 23 of the *Elections Act*, and Regulation 19 of part IV of the *Elections (General) Regulations*, 2012;

(e) a declaration that the failure of the persons listed as candidates to pay the nomination fees for the fresh Presidential elections held on 26th October 2017 of Kshs.200,000/-, while nonetheless proceeding to participate as candidates, was illegal and in violation of Articles 137, 138(1)(2) and 8(a) of the *Constitution*, Section 23 of the *Elections Act*, and Regulation 19 and part IV of the *Elections (General) Regulations*, 2012;

(f) a declaration that a person who has not been validly nominated under Articles 137 and 138 (1) and (2) of the *Constitution*, Section 23 of the *Elections Act*, and Regulation part IV, IX and XII of the *Elections (General) Regulations*, 2012 is precluded from being a presidential candidate;

(g) a declaration that the fresh Presidential elections held on 26th October 2017 were held in clear violation of Article 138(2) of the *Constitution*, as no two or more persons were nominated;

(h) a declaration that a person who is not validly nominated cannot have his or her name validly printed on the ballot paper as a candidate, and this is clearly, a violation of Regulation 68(4) (a) of the *Elections (General) Regulations*, 2012;

(i) a declaration that the ballot paper at the Presidential election of 26th October 2017 containing names of individuals not validly nominated as candidates for presidential elections, was illegal, and contrary to Articles 137 and 138 (1) and (2) of the *Constitution*, Section 23 of the *Elections Act* and Regulation 68(4)(a) and part IV, IX and XII of the *Elections (General) Regulations*, 2012;

(j) a declaration that the ballot paper containing the names of individuals who are not nominated as candidates, is unconstitutional, illegal and invalid.

(k) a declaration that the acts of the 1st and 2nd respondents of publishing waiver of nomination of candidates via Special Gazette Notice No. 8751 Vol. CXIX-No. 130 of 5th September, 2017 was *ultra vires* and their mandate authority and powers and was therefore invalid null and void;

(l) a declaration that the acts of the 1st and 2nd respondents, of granting two persons listed as Presidential candidates a campaign period of 48 days from the

6th of September to the 24th of October, 2017 was unconstitutional, as it was discriminative, unfair, not transparent, and contrary to Constitution and applicable laws;

(m) A declaration that the acts of the 1st and 2nd respondents, of listing five persons as candidates for Presidential election (Gazette Notice No. 10152, Vol. CXIX-NO 153 of 13th October, 2017), without going through a nomination process and collecting the prerequisite fee was in violation of Articles 137 and 138 (1) and (2) of the *Constitution*, Section 14 and 23 of the *Elections Act*, and Part IV,IX and XII of the *Elections (General) Regulations*, 2012; precluded from being a presidential candidate;

(n) A declaration that the acts of the 1st and 2nd respondents of listing five persons as candidates for Presidential election 13 days prior to the election of 26th October, 2017 (Special Gazette Notice) No. 10152, Vol. CXIX-NO 153 of 13th October, 2017 violates Section 14 of the *Elections Act*, 2011, is irregular, illegal, unconstitutional and null and void;

(o) a declaration that the acts of the 1st and 2nd respondents of naming Shakhalaga Khwa Jirongo as one who does not qualify as a candidate for the 26th October 2017 fresh Presidential election under Article 137 and 99 (2) (f) of the *Constitution* (Special Gazette Notice) No. 10152, Vol. CXIX-NO 153 of 13th October, 2017 without going through a nomination process was deceitful, discriminative, illegal and irregular, as having published a Special Gazette Notice that there shall be no nomination, purporting to have carried out nomination for one person was discriminatory;

(p) a declaration that the acts of the 1st and 2nd respondents, of having the name of Shakhalaga Khwa Jirongo printed on ballot papers while they had already declared Special Gazette Notice No. 10152, Vol. CXIX-NO 153 of 13th October, 2017 that he was not qualified was not transparent, not fair, not accurate contrary to Article 81(e) of the *Constitution*;

(q) a declaration that acts of the 1st and 2nd respondents denying Shakhalaga Khwa Jirongo the statutory and mandatory campaign period is not transparent and is a violation of Article 38, and was also unfair, opaque and inaccurate, and in violation of Article 81(e) of the *Constitution*;

(r) a declaration that the act of the 1st and 2nd respondents publishing that Special Gazette Notice No. 10562, Vol. CXIX-No 160 of 24th October, 2017 listing one person by the name of Shakhalaga Khwa Jirongo as a candidate on 24th October,

2017, was an act that on its face appears to have rescinded their earlier position, but does not disclose the day when the campaign period closed which was 48 hours before elections also unfair, was opaque, inaccurate, and in violation Article 81(e) of the *Constitution*.

(s) a declaration that the acts of the 1st and 2nd respondents in conducting the elections of 26th October, 2017 without any person being nominated as Presidential candidate, were unconstitutional, a breach of the electoral law, irregular and un-procedural, for failing to enforce Article 138 (8)(a) and (9) of the *Constitution* and Regulation 51(3A) of the *Elections (General) Regulations*, 2012.

(t) a declaration that as a result of all these violations of the *Constitution*, *Elections Act*, *Elections (General) Regulations*, and proceeding to conduct fresh Presidential elections without nominated candidates, nominations without fees, and without giving persons listed as candidates equal campaigning period, the respondents' acts directly affected the conduct and results of the fresh Presidential elections of 26th October 2017;

(u) a declaration that the deliberate violation of Articles 81, 88(4)(d)(f) & (k), (5), 82(1)(b), 137, 138(1)(2) and 8(a)of the *Constitution*, Sections 14 and 23 of the *Elections Act* and Regulation 11(1), 12(1), 68(3)(4)(a) and part IV, IX and XII of the *Elections (General) Regulations*, 2012 by the 1st and 2nd respondents and all the persons who participated in the elections of 26th October, 2017 affected the conduct and results of the said election;

(v) a declaration that the election of the President-elect in the fresh Presidential election held on 26th October, 2017 pursuant to Article 140 (3) of the *Constitution* is invalid;

(w) the petitioner be awarded costs of the petition, together with interests at Court rates.

46. The 2nd and 3rd petitioners sought the following reliefs:

(a) immediately upon the filing of the petition, the 2nd respondent do avail all the election materials, including polling-day diaries, electronic documents, devices and equipment for the Presidential election, and the Forms 32A used in the complementary system within 48 hours;

(b) immediately upon the filing of the petition, the 2nd respondent do avail and deposit with the Court all the Secure Digital (SD) Cards from the KIEMS Kits that were used, unused or expected to be used in the fresh election, whether deployed or not;

(c) an Order that the 1st and 2nd respondents produce and give access to the petitioners to the full and un-redacted KPMG Audit Report on the Voter Register, including all sections of the Report that have not been made publicly available;

(d) a specific Order for scrutiny of all the Forms 32A and the polling day diaries prepared by the Returning Officers;

(e) an Order for scrutiny and audit of all the returns of the Presidential election including, but not limited to Forms 34A, 34B and 34C;

(f) a declaration that the non-compliance, irregularities and improprieties in the Presidential election were substantial and significant, and affected the result thereof;

(g) a declaration that the fresh election held on 26th October, 2017 was not conducted "in strict conformity with the *Constitution* and the applicable law" rendering the declared result invalid, null and void;

(h) a declaration that the 1st and 2nd respondents were obliged to carry out fresh nomination of candidates in order to conduct a fresh election under Article 140(3);

(i) a declaration that the 3rd respondent was not validly declared as the President-elect, and that the declaration is invalid, null and void;

(j) a declaration that Section 83 of the *Elections Act* (as amended) is unconstitutional and invalid, to the extent of its inconsistency with the *Constitution* of Kenya;

(k) an Order directing the 2nd respondent to organize and conduct a fresh Presidential election "in strict conformity with the *Constitution* and the *Elections Act*", and to commence the process by conducting fresh nominations;

(n) following a declaration of invalidity and issuance of an Order for the conduct of a fresh Presidential election, and in light of the twice-impugned conduct of the 1st and 2nd respondents, this Court do issue just, fit and appropriate Orders as the circumstances warrant;

(m) in the interest of the public, each party to bear their own costs of the petition; and

(n) any other Orders that the Court may deem just and fit to grant.

(a) Nominations: Respondents' Case

47. The 1st respondent filed a response to the petition dated 11th November, 2017, as well as a replying affidavit of even date, by Mr. Marjan Hussein Marjan, its acting Chief Executive Officer.

48. The 2nd respondent filed a response to the petition on 12th November, 2017 and an affidavit, of even date. He adopted the 2nd respondent's response, in totality.

49. The 2nd respondent further depones that he had declared the 3rd Respondent as President-elect on 8th August, 2017 in accordance with the returns made to the National Tallying Centre of the electoral process, but that this Court, in *Raila 2017*, on 1st September, 2017, invalidated his declaration, and ordered the 1st respondent to conduct a fresh Presidential election, "in strict conformity with the *Constitution* and the electoral laws."

50. It is the averment of the 1st and 2nd respondents that there were only 60 days to conduct a fresh Presidential election, following the annulment of the first Presidential election by the Supreme Court. They contend that time was of the essence, as fresh ballot papers and election material had to be procured. It is their case further, that the repeat Presidential election was organized and conducted "in strict conformity with the *Constitution*", the *Raila 2013* decision, the Ekuru Aukot decision and the applicable election laws, within the prescribed time-frame of 60 days.

51. The 2nd respondent, furthermore, states that no legislative framework has been put in place under Article 140 (3) of the *Constitution*, the *Elections Act*, and the *Regulations* thereunder, for the conduct of such a repeat election; and it thus became necessary for it to seek legal advice on which candidates should participate in the said election.

52. The 2nd respondent adds that the legal advice received by himself and the 1st respondent was that the Supreme Court, in Raila Odinga 2013, had interpreted Article 140 (3) of the *Constitution* (at paragraphs 289-294 of the Judgment) and determined that, where a Presidential election was invalidated, there would be no need for fresh nominations, and candidates would be limited to the President-elect, and those persons who had contested the first election.

53. The 1st respondent states in the above context that it would have been impracticable to conduct fresh nominations, as the repeat election had to be conducted within 60 days – the relevant factors being the lack of time for:

    (a) submission of nomination rolls by a political party to the Commission at least six months to the date of party primaries pursuant to Section 27 of the *Elections Act*;

    (b) submission of party membership lists by a political party to the Commission at least 120 days to the elections under Section 28 of the *Elections Act*, 2011;

    (c) resignation of a political party member from a political party who wishes to contest elections as an independent candidate at least 3 months from the date of the election under Article 85 of the *Constitution* and Section 33(1)(a) of the *Elections Act*;

(d) submission of a symbol to the Commission by an independent candidate in the election at least 21 days before the nomination day;

(e) party primaries, which include a political party nominating a candidate for elections at least 90 days to the date set for elections under Section 13 of the *Elections Act*, 2011; and

(e) registration of candidates for elections, which has to be done at least 60 days to the date set for elections under Section 2 of the *Elections Act*, 2011.

54. It is further deponed that one candidate, Dr. Ekuru Aukot, had also sought interpretation of the provisions of Article 140 (3) of the *Constitution* in this Court, in Supreme Court Application No. 1 of 2017, but the Court struck it out on grounds of lack of jurisdiction; this compelled him to move the High Court, by Petition No. 471 of 2017, in which he successfully challenged Gazette Notice No. 8751 of 5th September, 2017 whereby only two candidates had been gazetted.

55. It is deposed that, just before the High Court could give Judgment, one of the said two candidates, the Hon. Raila Odinga, issued a letter on 10th October, 2017 stating that he was withdrawing from the fresh Presidential election already scheduled for 26th October, 2017.

56. It is the 1st respondent's case that before it could consider Hon. Odinga's said letter, the High Court rendered its Judgment, on 11th September 2017, and directed the 1st respondent to include the name of Dr. Aukot as a candidate, by gazetting an addendum to Gazette Notice No. 8751 of 5th September, 2017, or issuing a new notice.

57. The 1st respondent confirms that it took guidance from the High Court decision: that those who had contested in the invalidated election, duly qualified to participate in the fresh election. The 1st respondent, thus, issued an addendum to Gazette Notice No. 8751 of 5th September, 2017, and issued Gazette Notice No. 10152 of 13th October, 2017, setting out the names of the five additional candidates who qualified.

58. The 1st respondent, in addition, deposes that it did not include the name of Mr. Jirongo in this Gazette Notice because as at that date, he was constitutionally ineligible to participate in the election, by dint of a Court Order in Insolvency Cause No. 3 of 2017 of 4th October, 2017.

59. It is also the 1st respondent's case that, out of abundance of caution, and in the knowledge that Mr. Jirongo's advocates had applied for a stay of the bankruptcy Orders, it left his name on the Presidential election ballot papers, as it would have been easier, in view of the limited time, to remove it, than to include it. As such, when the Order of the Court in the insolvency cause was stayed, the Commission (by Gazette Notice No. 10562 of 24th October, 2017)

issued an addendum, listing him as a candidate who would participate in the election of 26th October, 2017.

60. In these circumstances, it is deponed that the unequal campaign periods accorded the candidates, arose by operation of the law, and would not pass as discrimination, or violation of the terms of Article 38 (2) of the *Constitution*.

61. It is the 2nd respondent's further testimony that it did not conduct a new nomination exercise for all the eight Presidential-election candidates, as such nomination was not required, as confirmed by the High Court decision in the EkuruAukot Case, and in view of the limited time-frame.

62. It is urged that, in the circumstances, the 2nd respondent was under no obligation to deliver nomination papers for the election of 26th October, 2017 nor was the 3rd respondent, or any other candidate, under an obligation to pay the nomination fees of Ksh. 200,000. It is deponed that the 1st and 2nd respondents were, therefore, under no obligation to issue nomination certificates to any of the candidates participating in the fresh election of October 26, 2017.

63. The 1st respondent furthermore avers that Section 2 of the *Elections Act*, which is enacted pursuant to Article 82 of the *Constitution*, defines 'Presidential election', but in a manner that excludes fresh Presidential election under Article 140(3) of the *Constitution*.

64. It is thus the 1st respondent's stand, that Regulation 89 of the *Elections (General) Regulations*, 2012 accords it a discretion as to which rules to apply, in relation to repeat Presidential election, and with regard to such modifications or adaptations as may be proper.

65. The 1st respondent deponed that, by Gazette Notice No. 9795 of 2September 9, 2017, it had varied the election date from October 17, 2017 to 26th October, 2017, on the basis of its service-provider advice, that more time was required for reconfiguring the KIEMS transmission system, to assure the settings for verifiability.

66. The 1st respondent also urges that there was no need to seek an advisory opinion from the Supreme Court on nominations, as the High Court, in the Ekuru Aukot Case had already pronounced itself on the matter. Further, it is deponed that the 1st respondent had an obligation to abide by this Court's Order, to conduct the fresh election within 60 days, in accordance with the *Constitution* and the law – and it duly complied.

67. On his part, the 3rd respondent filed a response and a replying affidavit by Mr. Davis Kimutai Chirchir (the 3rd respondent's Chief Agent), sworn on 12th November, 2017.

68. The 3rd respondent avers that, after this Court determined that he was not validly declared as the President-elect, on the basis of the elections of 8th August, 2017, the 2nd respondent was

ordered to conduct a fresh Presidential election, "in strict conformity with the *Constitution* and the applicable laws," within 60 days.

69. t is the 3rd respondent's further testimony that the 1st and 2nd respondents published Gazette Notice No. 8751 on 5th September, 2017, listing the 3rd respondent and the Hon. Raila Odinga, and their running mates, as the candidates eligible to contest in the election then scheduled for 17th October, 2017, but later varied to 26th October, 2017.

70. The 3rd respondent deposes that the said Gazette Notice was issued pursuant to the decision of the Supreme Court in *Raila 2013*, which had stated in part that "There shall be no nominations for Candidates participating in the fresh elections." It is urged in that regard, that the 1st respondent, in conformity with the said judicial authority, duly acquitted itself under the law, by notifying the public, that no new nominations would take place.

71. It is also the 3rd respondent's case that the High Court, in the Ekuru Aukot Case, had duly followed *Raila 2013*, and had found that there was no need for fresh nominations, and that all Presidential election candidates who had participated in the 8th August, 2017 election were entitled to participate in the fresh Presidential election.

72. It is the 3rd respondent's case that no one challenged the Aukot finding, save for the petitioner, who did so nine days to the fresh Presidential election – his petition being struck out by the High Court on the eve of the election.

73. The 3rd respondent further urges that a nomination is not a condition-precedent, in a fresh Presidential election held under Article 140(3) of the *Constitution*; he contends that, the fact that nominations were not conducted afresh, prior to the fresh Presidential election, did not cause prejudice to any person who desired to be a candidate, as such person would probably have stood up and expressed a differing voice, through the Courts.

74. For greater effect, the 3rd respondent urges that no gazetted Presidential election candidate did complain, or has complained, about the differential campaign timelines available to candidates.

75. It is also the 3rd respondent's case that it would be highly prejudicial to him, to annul the election on the issue of nominations, as he was not at fault. It is urged on his behalf that a grave injustice would also be caused to the Kenyan taxpayer, at whose expense the repeat Presidential election had been conducted, at a cost of over 14 billion shillings.

76. It is the 3rd respondent's further case that the High Court's Ekuru Aukot decision has been subjected to appeal in Civil Appeal No. 359 of 2017, and that the appeal is still pending in Court. It is, in the circumstances, urged that this Court should exercise restraint, in pronouncing itself on the issue of fresh nominations.

(b) Time-frame for Holding Nominations: Respondents' Case

77. As regards the question as to whether it was necessary to conduct nominations, and the timing of the nominations, the 2nd respondent deponed that the timelines prescribed in Section 14 of the *Elections Act* are untenable, as Section 14(2) provides that a notice for holding a Presidential election shall specify the nomination day, which is defined in Section 2, as a day gazetted at least sixty days before an election.

78. It is the 1st respondent's case that the election laws do not contemplate the withdrawal of a candidate, other than as provided under Regulation 52 of *Elections (General) Regulations*, 2012.

79. The 2nd respondent further disputes the petitioners' claims that it fell into error by taking such advice as it did, and then proceeded to issue Gazette Notice No.8751 of 2017, dated 5th September, 2017, bearing notice of fresh election to be conducted on 17th October, 2017 with the names of two candidates.

80. The 2nd respondent further urges that, contrary to the petitioners' averments, the elections held on 26th October, 2017 were in conformity with the *Constitution* and in particular, with Articles 3(1), 10 and 38(3)(c) thereof, as well as the relevant electoral laws, and the Supreme Court's express directions.

81. It is also the 2nd respondent's case that the Presidential election conducted on 26th October, 2017 was an election sui generis, which required no fresh nominations. The 1st respondent further urges that it would be incorrect to interpret the *Constitution* as requiring nominations in both the general election, and the repeat Presidential election.

82. The 1st respondent places reliance on Rule 8 of the *Supreme Court (Presidential Election Petition) Rules*, 2017 which sets out distinct grounds upon which the outcome of a Presidential election may be contested. It contends that this rule presupposes that, unless the validity of nominations is specifically pleaded, and a determination made invalidating the nominations, the same must remain valid for the purposes of a fresh Presidential election, as ordered pursuant to Article 140(3) of the *Constitution*.

83. The 1st respondent, in addition, states that after the High Court rendered its Judgment on 1st September, 2017, it had deliberated upon the letter it received, purporting to withdraw the candidature of Hon. Raila Amolo Odinga and Hon. Kalonzo Musyoka (as his running mate) from the fresh Presidential election; and it informed them of the proper withdrawal procedure, which was through the use of Form 24A. This, the Commission states, was not done; and hence, the attempted withdrawal from candidature had no legal effect.

84. It is the 2nd respondent's case, in conclusion on this issue, that this Court decreed no particular nomination process, and thus, there was no basis for fresh nominations. The 2nd respondent, furthermore, disagrees with the petitioners' contention that nominations should have been conducted within 21 days of the fresh polls. The 1st respondent avers that, on the contrary, the law specifies different instances and timelines, within which such nomination may be conducted.

(c) Alleged Disobedience of Court Orders: Respondents' Case

85. The 1st respondent filed a response to the petition dated 12th November, 2017, as well as a replying affidavit of even date, sworn by Mr. Marjan Hussein Marjan. The deponent averred that the fresh Presidential election held on the 26th of October, 2017 was conducted in accordance with the *Constitution* and the electoral laws, as well as the Judgment of this Court in *Raila 2017*.

86. It is deponed in that context, that the 1st respondent had undertaken appropriate measures to ensure conformity with the *Constitution*. For instance, the public and the stakeholders (Civil Society Organizations; Governors; Representatives from the Government of Kenya; Religious Groups; the Commission's own staff; international and domestic election observers; political parties; Presidential election candidates; youth groups; and members of the public) were informed of the proposed measures, and how the 1st respondent intended to implement these, with periodic updates thereafter. Annexed to the affidavit sworn by Mr. Marjan Hussein Marjan, is correspondence inviting the said stakeholders to various consultative engagements. Such engagements are listed as Development Partners' Engagement Forum on 28th and 29th September, 2017; National Observer Briefing on 13th and 14th October, 2017; IEBC-Youth engagement forum held on 16th October, 2017; IEBC National Stakeholders Town Hall Forum held on 17th and 18th October, 2017; and Women leaders engagement forum on 18th October, 2017.

87. It is deponed in addition that, following such stakeholder deliberations, the 1st respondent developed a Legal-Compliance Matrix, setting out the observations made by the Supreme Court as against the measures to be taken. The Legal-Compliance Matrix was implemented as follows: modification of the Results Transmission System ("RTS"), to enable transmission in compliance with the Court's decision; boosted network coverage, by availing Safaricom SIM cards on all KIEMS kits, to ensure maximum 3G network availability; putting in place a complementary system for results transmission; following Mr. Justice Mativo's decision (Ekuro Aukot case); modification of the KIEMS kits to include the other six candidates; and development and deployment of a scheme for tallying and display of verified results at the National Tallying Centre. A copy of the Legal-Compliance Matrix was annexed as evidence, to the replying affidavit sworn by Mr. Marjan Hussein Marjan.

88. It is the 1st respondent's further case that it revised the Election-Results Path, to align it with Article 138(3)(c) of the *Constitution*, and duly gazetted the same: particularly, the submission of Forms 34A together with Forms 34B, by the Constituency Returning Officer to the National Tallying Centre; the Chairperson to verify the physically submitted Forms 34B against the physically-transmitted Forms 34A; generation of Forms 34C after verification from Forms 34B and 34A; and the chairperson upon verification, to record any errors noted on Forms 34B, and to publicize the same. This Election-Results Path, and the complementary mechanism for results transmission, was published in Gazette Notice No. 9978, and is annexed to the affidavit of Mr. Marjan Hussein Marjan, marked as "MHM-8."

89. It is in addition averred that the 1st respondent revised its training manuals, especially those for instruction to all Constituency Returning Officers, to ensure that they fill the hand-over section of Forms 34B, and physically deliver these forms at the National Tallying Centre, where the Chairperson would sign the take-over section. The various revised training manuals are attached in the affidavit of Mr. Marjan Hussein Marjan.

90. It is the 1st respondent's further case that it took steps to develop a complementary mechanism for results transmission, in case electronic transmission failed. It avers in that regard that, it also put in place a mechanism to ensure that the elections were carried out in a simple, accurate, verifiable, secure, accountable and transparent manner. It is deponed, on the 1st respondent's behalf, that it ensured all forms used in the election were standardized: in particular, Form 34C was redesigned, to indicate all polling stations.

91. The 2nd respondent also testified that it had conducted the fresh Presidential election in strict conformity with this Court's detailed Judgment, and in full compliance with Regulation 87(3) of the *Elections (General) Regulations*, 2012.

92. For the purpose of ensuring transparency, the 1st respondent avers, it had invited the office of the Director of Public Prosecutions, to investigate any possibility of illegalities having been committed within the Commission; and such investigations are still in progress, to-date.

93. It was furthermore deposed, for the 1st respondent, that there was no guidance-reference on the listing of candidates for the repeat election, save for that found in the *Raila Odinga 2013*; hence the gazettement of the 3rd respondent and Hon. Raila Odinga as the only candidates. Subsequently, it was deponed, the decision to gazette 5 candidates (Gazette Notice 10152 on October 13, 2017) was informed by the Ekuru Aukot decision, whereby the High Court directed that all candidates in the invalidated election be allowed to vie in the fresh election. The 1st respondent then proceeded also to include Mr. Jirongo's name on the ballot, through Gazette Notice No. 10562 of 24th October, 2017, on account of new judicial stay Orders on a declaration of bankruptcy against him. Consequently, it was deponed, the gazettement of

all the Presidential-election candidates who had participated in the 8th August, 2017 General Election, was not on a whim.

94. In response to the contention that the Presidential election candidates were accorded unequal campaign periods, the 2nd respondent testifies that, the time available unfolded strictly by operation of the law, and entailed no practice of discrimination against any of the six candidates, nor violated the provisions of Article 38(2)(a) of the *Constitution*. On the contrary, it is deposed that the Gazette Notices were meant to secure the candidates' rights under Article 38 of the *Constitution*.

95. In response to Dr. Akombe's allegation on 17th October, 2017 that the 1st respondent was ill-prepared and unable to conduct credible, free and fair elections, it is the 2nd respondent's deposition that these were personal views, and did not represent the standpoint of the 1st respondent. In addition, it is averred that the 2nd respondent's decisions are taken by consensus, or by vote: and there is nothing to show that Dr. Akombe's statements relate to any of the decisions of the 2nd respondent.

96. On allegations about illegal Returning Officers presiding over the October 26th election, it is the 2nd respondent's case that, contrary to the petitioners' allegations, the Judgement of Odunga J., in JR No. 628 of 2017, *Republic v. IEBC ex parte Khelef Khalifa and Another*, did not invalidate the appointment of Constituency Returning Officers and Deputy Constituency Returning Officers, for the election.

97. Nonetheless, it was averred, the Judgment in question had been stayed on October 25, 2017 by the Court of Appeal, which ordered as follows:

> "for avoidance of doubt, this Order means that the constitutional and statutory functions of the Returning Officers and their deputies relating to the Presidential elections slated for October 26, 2017 are not invalid."

(d) Withdrawal of Candidature by One Candidate: Respondents' Case

98. In response to the issue of withdrawal of candidature, it is the 1st respondent's testimony that, save for withdrawal of a candidate within 3 days of nomination, the law carries no other provision for withdrawal; and the applicable law is that contemplated in Regulation 52 of the *Elections (General) Regulations*, 2012: and so, Hon. Raila Odinga's intention to withdraw had no legal effect, having not been made in the prescribed format and instrument.

99. Further, it is deponed that the 1st respondent had communicated through a Press statement, on the need for any withdrawal to be in compliance with the law; though no notice of withdrawal came forth from any of the candidates in the fresh election.

100. On this issue, the 3rd respondent states that such withdrawal, expressed through an ordinary letter, has no effect, as the election falls under Article 140(3) of the *Constitution*, and not under Article 138, and Section 14 of the *Elections Act*.

101. Mr. Chirchir, on behalf of the 3rd respondent, deponed that the withdrawal of the NASA candidate from the Presidential election had no effect in law, as the withdrawal-window lapsed three days after the nomination, pursuant to Regulation 52 of the *Elections (General) Regulations* 2012. He deponed that such withdrawal would entail the withdrawal of nomination status, a process regulated by the *Elections (General) Regulations* 2012: yet there was a failure of compliance with those Regulations; and that, consequently, the name of the NASA candidate remained on the list of nominated candidates.

102. The deponent further deposes that the withdrawal of candidature in the manner adopted by the NASA candidate, has no effect, as Article 138(8) of the *Constitution* envisages cancellation of an election only upon the death of a candidate, or where no candidate has been nominated; and no such circumstance applied in this instance.

(e) The Postponement of Election in Some Constituencies: Respondents' Case

103. On the issue of postponement of election, and its effect on the validity of the process, the 2nd respondent avers that the decision to postpone election in 25 constituencies was necessitated by serious breaches of the peace in those constituencies. The postponement of elections in the said constituencies, from October 26, 2017 to October 28, 2017 was thus made to enable the 1st respondent to reorganize the election infrastructure, and allow the security agencies time to put in place adequate safety measures to guarantee a free and fair electoral process. It is averred that, due to unabated breach of the peace, it proved impossible for the 1st respondent to deploy staff, and provide the necessary infrastructure for the conduct of the polls in the affected areas.

104. In response to the affidavit sworn by Mr. Nasanga Aki, the 1st respondent depones that it is aware there had been pockets of violence and intimidation in some other electoral areas, but, save for the 25 constituencies in which voting was postponed, voting took place in all other constituencies of the country.

105. In response to the petitioner's affidavit of Ms. Perpetua Adar and Mr. Edwin Othira Aomo, it is deposed that the elections conducted all over the country, save for the said 25 constituencies, was in keeping with the principles of election, as provided for under Article 81 of the *Constitution*.

106. It is averred furthermore, that the postponement of election in the said 25 constituencies, was done pursuant to Section 55B of the *Elections Act*, as read with Regulation 64A of the

Election (General) Regulations, 2012 which allow for such a postponement, where there is reason to believe that a serious breach of the peace is likely to occur if the election is held on the appointed date, or that there has been an occurrence of electoral malpractice of such a nature as to make it impossible for an election to proceed.

107. To affirm the assertion that elections were, in certain cases, postponed due to breach of the peace such as made it impossible to conduct the process, the 1st respondent relies on the affidavits of the Constituency Returning Officers within Kisumu County, one of the affected areas: Dennis Obara Omare in Kisumu West Constituency; John Ngutai Munyekho of Kisumu Central Constituency; Yvonne Okeyo of Kisumu East Constituency; Alice Cherono Cheruiyot of Muhoroni Constituency; George Onyango Jobando of Nyakach Constituency; Carol Kangala Omoto of Nyando Constituency, and Evalyne Joyce Asiko of Seme Constituency.

108. In addition to Kisumu County, the 2nd respondent relies upon depositions from Returning Officers in Siaya, Migori and Homa Bay Counties, detailing the particulars of breaches of the peace hindering the conduct of election.

109. It is the 1st respondent's case in addition, that section 55B(3) of the *Elections Act* allows it to enter a return of the election, if satisfied that the results will not be affected by possible voting outcomes in areas where election has been postponed. It is deponed, consequently, that the declaration of results, notwithstanding the lack of voting in the said 25 constituencies, was well within the law.

110. In response to the allegation that the 1st respondent had degraded voters in Turkana and Fafi Constituencies, by conducting elections in those areas while counting of votes elsewhere was already ongoing, it was deposed for the respondents, that the fresh election in these constituencies was conducted on 28th October, 2017, on account of heavy rains and flooding which had afflicted those areas two days earlier.

(f) Relocation of Some Polling Stations on Election Day: Respondents' Case

111. As regards the relocation of polling stations in Kibra Constituency, it was averred, for the respondents, that Regulation 64(2) allows Presiding Officers to transfer polling from one facility to another, as necessitated by the exigencies of the occasion. It is averred further, that some stations were transferred because of instances of violence, such as barricading of roads leading to polling stations, or danger to voters.

112. It was furthermore averred that, in all instances, notice of relocation of polling stations was displayed at conspicuous places outside the polling station, and on that account, the petitioners were well aware of the transfer. Ms. Beatrice Saki Muli, the Returning Officer for Kibra Constituency, in her affidavit, depones that the transfer was not arbitrary, but was

done to ensure the safety of voters, the polling station being re-positioned next to the Deputy County Commissioner's office, where security had been enhanced.

113. In the case of Kaloleni and Changamwe Constituencies, the 1st and 2nd respondents have attached the affidavit of Ms. Luciana Jumwa Sanzua, the Returning Officer for Changamwe Constituency, in which she depones that no polling station was set up in any ungazetted area, and that there was no relocation of polling station. Of relevance in this regard is the affidavit by Ms. Nuru Faraj Maftah, the Returning Officer for Jomvu Constituency, in relation to the occurrences at St. Mary's Primary School, Bangladesh.

114. Ms. Nuru Faraj Maftah averred that there had been a barricading of the entrance to the polling station, occasioning an unconducive environment for the voting process. It was agreed with the Presiding Officers, in the circumstances, to open polling stations in an open field adjacent to the perimeter wall of St. Mary's Primary School, which was within the 400m radius of the previous polling stations, and was safe and practical.

115. In response to Mr. Njonjo Mue's averments, Dr. Kibicho for the 3rd respondent, deponed that two polling stations in Kibra Constituency had been relocated by the 1st respondent on security considerations; and that the security agencies provided adequate security for the new sites as required, and voting proceeded uninterrupted thereafter.

(g) Impartiality, Neutrality, Efficiency, Accuracy and Accountability: Respondents' Case

116. In response to the allegation that the 2nd respondent's electronic servers were not transparent, it was deponed for the respondents that, contrary to the petitioners' allegations, the said servers, as applied in the 26th October, 2017 Presidential elections, were, and are accessible to all stakeholders.

117. As regards the technological set-up and the transmission of election results, the 1st respondent relies on the affidavit of Mr. Silas Njeru, its manager for ICT services, sworn on 12th November, 2017. This affidavit responds to the petitioners' supporting affidavits by Mr. Brian Otieno, Mr. Billy Atudo, and Ms. Adhiambo Opondo, on all depositions touching on the use of ICT during the repeat Presidential election. Mr. Njeru depones specifically that after the Court nullified the 8th August, 2017 elections, the Commission configured the KIEMS kits to transmit results for only two candidates; but after Mativo J. ordered the inclusion of Dr. Aukot on the ballot on 11th October, 2017, there was need to reconfigure the KIEMS kits, to accommodate all potential candidates. Such reconfiguration to include other persons, would have taken more than a month; hence the KIEMS was reconfigured to accommodate such a prospect.

118. In response to the affidavit of Mr. Boniface Otieno, on the resolution and quality of the forms uploaded to the RTS results-portal, Mr. Njeru deposed that the resolution of an image

is subject to various factors, including the amount of light in the environment; distance; position; positioning of camera lens from the image; and settings of the device, such as zoom, and even cleanliness. He averred that it was impossible that an image taken from a device other than a KIEMS kit, could find its way into the transmission system.

119. Mr. Njeru further averred that some of the security parameters entailed in the KIEMS system were as follows: only authorized, pre-determined tablets (KIEMS) were so configured as to be able to transmit and relay results into the Commission's servers, and in this regard, the KIEMS kits used in all polls were station-specific, and each could be traced from the source; the network was quite secure, with twin high-level firewalls¾and the only information that could enter was the permitted one, through these filters; there was pre-encryption of results before transmission; and then, transmission was done in a secure, virtual, private network (VPN) provided by all the three mobile telephone operators, through unique, specialized SIM cards.

120. He further deponed that the transmission system only allowed access to authorized users, and not by use of biometrics; and also permitted users with distinct, but interdependent roles, at different levels, and a single person could not perform an end-to-end operation in the system, nor could such a person detect any SIM not in the system, and block it.

121. Mr. Njeru, in addition, averred that such detailed security features were designed to ensure that there was no penetration of the system; and this ensured security through constant monitoring of alerts, upon unusual activity in the system; and any attempted intrusions would be filtered away by the firewalls, with all incidents of attempt, being recorded.

122. Accordingly, the deponent averred, it was impossible for any prescribed image captured by any device other than the KIEMS kit, to be uploaded, or find its way into the result transmission system in KIEMS.

123. On voter identification, Mr. Silas Njeru denied Mr. Billy Atudo's statement that voter turn-out had been misrepresented. He deponed that any variance in voter numbers had a credible explanation. He averred, in that context, that Section 10 of the *Elections Act* allowed biometric identification of a voter, and 5,525,487 voters were identified in this way, in the fresh Presidential election. There was also alpha-numeric search, with reference to identification documents, and finger-print reader – which process identified 348,839 voters. There was, as well, the use of alpha-numeric search, with physical keying-in of biographic data, using the voters' identification number. This identified 1,490,034 voters.

124. Mr. Njeru, in addition, deposed that there were voters whose details would be retrieved, even though identification through fingerprints, and alpha-numeric search failed; resort would then be to the Presiding Officer Authentication (i.e., the supervision mode)¾with

the presiding officer inviting the agents to bear witness, and then allowing the voter to vote under supervision; and 211,446 voters had been identified this way.

125. He deponed further that there were instances when complementary identification was employed through search in the register of voters in the KIEMS, for the relevant polling station. He averred that 78,124 voters had been identified this way.

126. Mr. Njeru furthermore, deponed that voter turn-out had been recorded as being 38.84% of the registered voters; and that the numbers given by the 1st respondent were the actual numbers of voters who turned out, in relation to various KIEMS kits which were actively transmitting results¾voters whose numbers were bound to vary at various times, depending on the number of KIEMS kits transmitting results at the time updates were given.

127. Mr. Njeru denied the allegations in Mr. Billy Atudo's affidavit, that there was alteration in the Register of Voters. He averred, instead, that there had been proper liaison with the Registrar of Persons, in respect of dead voters whose names were expunged during clean-up of the register, before closing it. He also denied the claim that there had been a duplication of identity cards, and stuffing of ballot boxes, using the names of dead voters.

128. The deponent denied tampering with the register, or changing it and also denied the alleged inconsistencies and errors in the Voters' Register. He deponed instead that the register had been certified and duly published in the Kenya Gazette, on 27th June, 2017, indicating the number of registered voters as 19,611,423.

129. In response to the alleged suspect, supersonic speed on counting, tallying and transmission of results, Mr. Njeru deponed that, all the Forms 34A had been transmitted, totalling 37,187, and posted in the 1st respondent's portal. He averred that, this having been a single election, the process was faster, and took a shorter time to count and tally the votes, as compared to the earlier election¾especially in stations where the registered voters were few.

130. As regards form-endorsement by agents, the deponent averred that only agents who were present were allowed to sign: and that there was no evidence of an agent in attendance, who failed, refused and/or was denied the opportunity to sign. He further averred that it was the duty of each party to deploy agents, to observe the election; and so the 1st respondent was not answerable for the high turn-out for agents of one party over the other, at the vote-counting centres.

131. As regards the allegation that there were discrepancies, irregularities and illegalities on the statutory Forms, Mr. Njeru denied that there were 6 Forms 34B which did not have serial numbers, and deponed that all Forms 34B had serial numbers on all pages, and were duly signed by respective Constituency Returning Officers, as uploaded at the constituency level, and were properly handed over at the National Tallying Centre. He averred that none of

the Forms 34A, B and C were forgeries, or bore mathematical errors, or were altered. He deposed also that no censurable form had been produced, to enable him to comment on it in specific terms.

132. The 2nd respondent, on the issue at hand, filed a response to the petition dated 12th November, 2017 as well as a replying affidavit of even date. The responses are materially similar to those of the 1st respondent, save for the following additional elements: the 2nd respondent avers that while he had publicly cautioned against attempts at political influence upon the Commission, he did not cast doubt on the 1st respondent's preparedness and ability to deliver a credible, fresh election. He deponed that, as a National Returning Officer, with the obligation of ensuring transparency in the electoral process, he had made the statement of 18th October, 2017 outlining the 1st respondent's preparedness with regard to technical, operational and logistical arrangements, which the 1st respondent had put in place in preparation for the fresh election. He depones that, subsequent to his said statement, certain critical events assured his conviction as to the ability of the 1st respondent to conduct a free, fair and credible election. In his own words:

> "On 19th October, 2017, the Commissioners approached me in my office and informed me of a resolution by certain secretariat staff to proceed on leave, thus allowing the identified project team for the fresh Presidential elections to carry on the preparations for the elections unhindered;
>
> > "Thereafter, I separately met the two leading Presidential candidates for the fresh elections. In the said meetings, the candidates assured me that they would do all that was possible to diffuse political tension in the country.
> >
> > "Further, through correspondence with the Inspector General of Police, I received assurance that sufficient security will be provided across the country, as well as to each candidate, to superintend the holding of the fresh Presidential election."

133. He deponed that, in the context of such assurances, in his statement of 25th October, 2017 he did not doubt the preparedness of the 1st respondent and he was later vindicated, as he affirmed in his statement of 30th October, 2017, that the Commission had "done everything that was required...to ensure that every Kenyan would have an opportunity to exercise their...rights under Article 38 of the *Constitution*, without interference, hindrance, threat or intimidation"; and that he was "satisfied that we were able to meet conditions that have enabled the Commission to deliver free, fair credible presidential election."

134. Ms. Winnie Guchu for the 3rd respondent, also made depositions in response to Mr. Billy Atudo's averments, on several matters including the Register of Voters. She deponed that there was real consistency in the number of registered voters, totalling 19,611,423 as evidenced by Forms 34C, as shown in the results of both elections. She averred that names of dead voters had not been used to stuff the ballot boxes, and that the register had been duly cleaned up.

135. Ms. Guchu deponed, as regards the allegation of low voter turn-out, that this was true only in respect of the NASA-dominated areas, where Hon. Raila Odinga is popular. She denied the allegation that voter-turnout was not representative of the Kenyan populace, averring that in Kenya, there was no mandatory voting requirement.

136. On the issue of electronic transmission of election results, she states that the law had guided the 1st respondent, in all respects: counting and tallying was done in the presence of agents; 37,187 Forms 34A were uploaded in the public portal, and a copy of these forms posted at the entrance of each polling station. She denied the allegation that results for 266 constituencies from tallying centres differed from those transmitted pursuant to Section 39(1c) of the *Elections Act*. She deponed that, provisional results were transmitted electronically, as required by law. She further averred that the original Form 34A and 34B were delivered to the National Tallying Centre manually, and no credibility-complaint was received; and that copies of the said forms have been delivered to this Court in accordance with the law, together with Forms 34C. She furthermore stated that the petitioners were not justified in founding a complaint upon the enhanced pace at which the results were transmitted, as this is a clear improvement on the earlier position.

137. With regard to Mr. Atudo's allegations of irregularities on Forms 34A, 34B and 34C, Ms. Guchu deponed that most Forms 34A were signed by the Jubilee Party agents, and that the Forms did not generally manifest any irregularities: she annexed in her affidavit copies of the forms complained of. She deposed further that it was not mandatory for party agents to be in attendance, as Regulation 79 provides for those instances in which agents are not in attendance; and so, absence of agents does not in and of itself, invalidate the results announced. She particularly deponed that no single Form 34B was without a serial number on any of its pages; that all Forms 34B were filled in, and/or completed; that all Forms 34A, 34B and 34C were standardized, verifiable, accurate and authentic.

138. Ms. Guchu in addition, denied the allegation in Mr. Billy Atudo's affidavit, that 28% of the voters could not be identified by their finger-prints on the KIEMS kit, while 78,124 voters could not be accounted for during the fresh Presidential election; and she denied the allegation that there had been non-compliance with the electoral laws, by the 1st and 2nd respondents.

139. Mr. Brian Gichanga Omwenga, a Technology Advisor of the Jubilee Party, made averments in reply to the affidavit of Ms. Opondo, in relation to the images taken by the KIEMS kits. He was concerned, firstly, with the qualification of Ms. Adhiambo Opondo, who allegedly extracted the KIEMS-kits images. He deponed that a KIEMS kit is capable of changing its resolution-settings as to photo-size and quality, and on this account, the allegations of single option for picture-size is not factual. He deponed that a resolution is the number of pixels, and the width and height of an image. He avers further that DPI (Dots-Per-Inch) is the same in all pictures, and not subject to change. On that basis, he avers that the disputed Forms 34A are not fake, but only blurry, and invisible in the web-portal; and he annexes the same copies which are now visible. He avers furthermore that these Forms 34A are similar to carbon copies in possession of the 3rd respondent, and of other parties who participated in the election. In his depositions, he explains the causes of blurred images: smudge lens; poor focus; poor lighting; movements of a photographer when capturing image; and dirty lens. He finally deponed that 'blurs' can occur on any camera, and that images are also dependent on the skill of the photographer, and environment.

(h) Appointment of Vice Chairperson of IEBC as the Deputy Presidential Returning Officer: Respondents' Case

140. In response to the allegation that his appointment of the vice-chair of the Commission as a deputy returning officer was unlawful, the 1st respondent disagreed, and explained that the appointment was informed by the dictates of good practice, and that the law had not limited the constitutional, regulatory mandate of the Chairperson.

(i) Petitioners' locus standi in Matter of Public Interest: Respondents' Case

141. With regard to the issues of locus standi, the 3rd respondent filed a response dated November 11, 2017, denying the petitioners' assertion that they are advancing a public-interest agenda, in contesting the outcome of the 26th October, 2017 Presidential election. He perceives the petitioners as mere mouthpieces for the NASA candidate, and as anything but bona fide defenders of the public interest. He also views the petitioners as lacking locus standi under Article 140(3) of the *Constitution*, since they had not exercised their rights as provided for under Article 38 of the *Constitution*. The 3rd respondent further states that the NASA candidate, together with his supporters, had deliberately set out to ensure there would be no elections as scheduled for 26th October, 2017, by the express Orders of this Court.

(j) Free, Fair and Credible Elections: Respondents' Case

142. In response to the statement made in New York by the former Commissioner, Dr. Akombe on 17th October, 2017, calling for postponement of the Presidential election, the 3rd

respondent thus states: there had been a plurality of Court claims on the Presidential election, including those by the petitioners and their allies, seeking to stop the fresh Presidential election; Dr. Akombe had not shown any basis for contesting the legal advice rendered to the 2nd respondent; the petitioners were in possession of confidential, privileged information belonging to the 2nd respondent, and to which they are not entitled in law; the agitations that Dr. Akombe alluded to, in her misgivings about the fresh election, were, in truth, violent demonstrations, which were instigated and promoted by NASA, and the petitioners were among the protesters.

143. The 3rd respondent remarks the point, from evidence, that Dr. Akombe's statement is in remarkable departure from her own reassuring comments to Kenyans earlier, on 13th and October 14, 2017, on the 2nd respondent's decisive preparedness for a credible conduct of the elections.

144. In further response to Dr. Akombe's statements, regarding the Commission's state of preparedness for the fresh Presidential election, Mr. Chirchir averred that the former Commissioner had spoken well outside the context of duty, and her opinion was purely personal. He deponed, in addition, that Dr. Akombe's resignation, departure and self-confinement abroad, were within her personal rights of choice, and she was at liberty to express her own opinion, save that such opinion was unrelated to the state of fact, as to the operations of the Commission in holding elections in Kenya. He added that the Commission takes decisions by way of majority stand-point and, in the absence of a unanimous decision, differing opinions are contemplated. He averred that Dr. Akombe's statements made abroad, were contrary to the diverse public statements she had earlier made while in Kenya, to the effect that the Commission was ready to manage and supervise the fresh election.

145. Mr. Chirchir deponed, in relation to the negative portrayal of the Commission's appointment of Returning Officers and Deputy Returning Officers, that the High Court Judgment endorsing such a view, had been put on hold by a Court of Appeal decreeing a stay thereof.

(k) Universal Suffrage, Fair Representation, Equality of the Vote: Respondents' Case

146. The 3rd respondent states that the petition lacks merit, as it distorts and misrepresents the factual situations attending the fresh Presidential election; negatively portrays the 1st and 2nd respondent; and withholds and suppresses material facts readily found in the public domain, pertaining to the unlawful, disruptive and violent actions taken by NASA, to subvert the said election. The 3rd respondent denied the allegation that he had interfered with the independent operations of the 1st and 2nd respondents; and asserted that it was precisely NASA that had sought to interfere with the 1st and 2nd respondents' independence: by

holding demonstrations against them; imposing "irreducible minimums"; attacking officials of the 2nd respondent who were preparing for the election; and barricading polling stations.

147. In relation to the allegation that the Presidential election lacked a basis in universal suffrage, the 3rd respondent denies the claim of violation of Articles 38 and 81, which provide for the rights of voters, in relation to the 27 named constituencies. He asserts in that regard that the 1st and 2nd respondents had taken all practical, rational and judicious steps, to ensure that a fresh Presidential election was conducted in accordance with the Orders of this Court: but that these efforts were beleaguered by the NASA leaders and their supporters who had resolved not to vote. The 3rd respondent submits that a forcible election was thus not tenable, especially in view of the legal principle of not compelling one to do the impossible¾lex non cogit ad impossibilia. He urges that when an act is impossible of performance, the deed must be treated as dispensed with.

148. The 3rd respondent submits, furthermore, that the 1st and 2nd respondents had given all the registered voters an opportunity to participate in the fresh Presidential election, by virtue of Section 55B of the *Elections Act*, as read with Regulation 64A of the *Elections (General) Regulations*, 2012; but the same was postponed in 25 constituencies, because of the security situation obtaining there. It is the 3rd respondent's case, therefore, that a prudent application of Article 138 involves taking into account Section 55B of the *Elections Act*, so as to safeguard the political rights of the majority of citizens under Article 38 of the *Constitution*: that failing this, a perverse incentive avails itself for some, to sabotage Presidential elections, by simply making it impossible to hold elections in just one constituency, even if the outcome therein would have no effect on the overall result.

149. The 3rd respondent, however, acknowledges that there was a lower voter turn-out in the fresh election held on 26th October, 2017 than at the elections of August 8, 2017, even as he observes that voter turn-out in Kenya, in general, averages 70% of the registered voters; and that voter turn-out in repeat-elections is generally lower than in first-round elections: though in this instance, there was intimidation and violence by NASA, which occasioned low voter turn-out. He deponed that the 3rd respondent's difference in votes in the 8th August 2017 election and the repeat Presidential election was a mere 719,395 votes.

150. Ms. Guchu also responded to Mr. John Paul Obonyo's affidavit on violence at St. Mary's Primary School, Bangladesh in Mikindani Ward, Jomvu Constituency. She avers in that regard, that the deponent had not availed any evidence to show that he was performing the role of an accredited observer; and that some of the matters raised by Mr. Obonyo were extensively reported by the media. She deposed that the accounts from accredited media observers stood in contradiction to the contents of Mr. Obonyo's affidavit, regarding the events of the day as reported in the dailies. She deponed that a presiding officer at St. Mary's Primary School, Bangladesh polling centre had made remarks in the comments section of

Forms 34A: that some of the polling streams were closed early due to violence; in Stream 2, no votes were cast at all, and the returning officer made a nil return; in other streams, voter turn-out was low, averaging about 3 persons; and in some streams, voting was shifted to a temporary polling station; but that, notwithstanding such hiccups, voting still took place.

151. In response to the claim that the Presidential election was marred by illegalities and irregularities, the 3rd respondent avers that the election was conducted by duly-appointed Returning and Presiding Officers; and that the 2nd respondent complied with his obligations under the *Elections Act* and the applicable Regulations: the 2nd respondent publicly and transparently provided all necessary information on matters relating to the electronic infrastructure used in the fresh election, including voter identification through the KIEMS kits, the complementary mechanism, the Voters Register, and voter turn-out numbers.

152. Mr. Chirchir deponed that a Kenya National Commission for Human Rights report of 3rd November, 2017 confirms that, while the 3rd respondent had embarked on campaigning for the fresh Presidential election, NASA embarked on demonstrations, calling for reforms, as a pre-condition for elections to be held at all. The said report, Mr. Chirchir averred for the 3rd respondent was also not acknowledged by a statement from the civil society agency, the Independent Medico-Legal Unit (IMLU), which made unsubstantiated claims of injuries and fatalities to unnamed parties. He deponed further that, by the reports made on the fresh election, ELOG observers in Nyali, Kibra, Kilifi and Ruaraka (NASA's stronghold) were attacked by demonstrators, and had to withdraw. He concluded by stating that NASA supporters had engaged in violence even on polling day, and prevented genuine and willing voters from accessing the polling stations.

(l) Video Evidence Adduced by the Petitioners: Respondents' Case

153. The deponent rebuts all the video evidence produced by Mr. Njonjo Mue, by way of the 'Bungoma Video': the 3rd respondent avers that the narrative does not relate to him, but is directed at the Police. He deponed, however, that it confirms that the Bungoma youth had been rowdy on the occasion of the fresh Presidential election¾but were properly kept under control by the Police. He avers that the 'Kondele Video' does not relate to the 3rd respondent, but to NASA's protestors clashing with the Police. These protestors were threatening IEBC officials, and chanting that there would be no election taking place.

154. On the 'video of Kids Hospitalised After Police Teargas,' Mr. Chirchir deponed for the 3rd respondent, that the incident was a consequence of Police engaging NASA supporters who were protesting against the 1st respondent, and that it does not relate to the 3rd respondent, and does not link him to violence.

155. As regards the accusatory content of the 'Video of 8-Year-old shot in Mathare', Mr. Chirchir avers that this relates to protests against the outcome of the 8th August, 2017 election, and was taken on the night of 11th August, 2017. He deponed that the video does not relate to the campaigns for the 26th October, 2017 election, and that it does not indict the 3rd respondent, as he was not the cause of the violence. Likewise, he deponed that the 'Video of Baby Pendo' relates to protests against the outcome of the said August 8th elections, and the 3rd respondent had no role therein.

156. As regards all the other videos proffered by the petitioners, Mr. Chirchir deponed that they do not relate to the 3rd respondent. He avers instead that some of the videos are not specific on areas where they were recorded, and thus, bear no objective signal against the 3rd respondent.

(m) Violence, Intimidation, Improper Influence and Corruption: Respondents' Case

157. It is the 3rd respondent's case that the Governors for Kisumu, Siaya, Homa Bay and Migori Counties had conducted campaigns of violence and threat, against any member of the public daring to vote and/or participate in the fresh Presidential election, and that this was the direct cause of the failure of the electoral process in the constituencies of those Counties.

158. As regards observance of peace and calm during the fresh Presidential election, the deponent for the 3rd respondent averred that, relative peace and calm had prevailed in the entire country, save for the said four counties: Kisumu, Homa Bay, Migori and Siaya.

159. On the attribution of violence during election preparations, the 3rd respondent denies having caused violence, voter intimidation, voter influence, or corruption. He urges that, to the contrary, it was the NASA leader who instigated violence and intimidation, especially in parts of Kisumu, Siaya, Homa Bay and Migori Counties. He states that the allegation about the activities of the "Jubilee Women Brigade" operating at his behest, is misrepresented and misleading, and states that the said organization was a lawful and legitimate lobby, formed to encourage Kenyans to come out and vote in the repeat Presidential election. He denied any knowledge of oath-taking by this, or any other group, and averred that no evidence had been adduced showing otherwise. He also states that there was no violence, killings, rape or other atrocities, as alleged by the petitioners, attributable to him. He further states that the petitioners' allegations regarding remarks made by the acting Cabinet Secretary for the Interior and Co-ordination of National Government in Kisii, were misleading, and taken out of context. He asserts that, contrary to the petitioners' interpretation, the acting Cabinet Secretary had called on the Kisii community to co-exist harmoniously with other Kenyans, and to turn out in large numbers to vote.

160. Dr. Karanja Kibicho, on his part, swore an affidavit denying allegations that the 3rd respondent had intimidated the Judiciary, in his address of 1st September, 2017. He deponed

that the 3rd respondent's address was all conscientious, and given in the aftermath of a briefing from the National Security Council. He deposed in that regard, that the 3rd respondent's main message had accepted the Court's verdict, and had appealed to all Kenyans "to remain their brother's keeper"; the 3rd respondent had made a public tour of Nairobi, appealing for calm and restraint, in the wake of the unprecedented Judgment that had been issued.

161. The 3rd respondent further denied the veracity of the allegation that the NASA Presidential candidate and his running mate had been denied State security; he averred that these candidates still enjoy their security detail, pursuant to the terms of the *Retirement Benefits (Deputy President and designated State Officers) Act*.

162. Ms. Rachel Shebesh, on her part, made depositions in the capacity of co-convener of the "Jubilee Women Brigade", in response to Mr. Njonjo Mue's affidavit. She expressed agreement with Mr. Davis Chirchir's testimony, in relation to the women brigade. She denied that the brigade had been engaged in any oath-taking activities.

163. Of the "Jubilee Women Brigade", Mr. Chirchir has deponed that it engaged in no violence, intimidation or threatening behaviour; members do not carry weapons, or use derogatory words or language; and no member of the brigade had been summoned, or prosecuted by the police for causing violence, or intimidating voters. He averred that there was no evidence that the Women Brigade had ever attempted to take over functions of the Kenya Defence Forces; and that their attire was commonly found in clothing shops, and the designation 'brigade' was used widely by groups such as: boys and girls brigade of the Presbyterian Church of East Africa; Anglican Church Boys and Girls Brigade; Scouts movements, etc.

164. Her deposition was supported by the averments of Dr. Karanja Kibicho, in his capacity as the Principal Secretary, State Department of Interior, in the Ministry of Interior & Co-ordination of National Government, who denied the allegation of oath-taking by members of the 'Jubilee Women Brigade', averring that their attire was quite distinct from the uniform ordinarily worn by Police or military. He denied the allegation of men supporting Jubilee Party in Nairobi, having been dressed in military and Police uniforms, and that there were such persons occasioning violence, killings or rape. He averred further, that the army was never deployed in the conduct of the electoral process; and he deponed that the deployment of the security agencies was a matter regulated by statutory law. As regards one motorist, Mr. George Gichimu Muriuki, who had run over two people with his motor vehicle, on 9th October, 2017 along Kenyatta Avenue, he deponed that this incident was reported and booked at the Central Police Station, and the file forwarded to the Director of Public Prosecutions for appropriate action.

165. He also denied allegations of the 3rd respondent's supporters dressing in military fatigues, deponing that, to the contrary, it was NASA's principals and supporters who adorned military-type fatigue, and publicly declared the formation of a National Resistance Movement, and then engaged the Police in running battles.

166. Mr. Davis Chirchir, in an affidavit sworn in his capacity as Chief Agent of the 3rd respondent on 5th November, 2017, had specific averments to make in relation to certain depositions made on behalf of the petitioners. On the issue of violence and intimidation at election time, he deponed that Ms. Aki, with regard to Vihiga County, had misrepresented facts, and relied on hearsay, as she failed to identify the persons she had interviewed. He averred that there was no documentary evidence of Ms. Aki being accredited as an observer, in any event.

167. Mr. Chirchir further deponed that the alleged instances of violence and intimidation were attributable to the call for 'boycott of elections and resistance thereto', by NASA. He stated that Police presence before or during voting could not be typified as intimidation, as under Section 105 of the *Elections Act*, Police officers are deemed as election officers. He deposed that the averments by Ms. Aki, with allegations of Police destroying property, are scandalous and unsubstantiated, and devoid of veracity.

168. Mr. Chirchir in addition, deponed that the actions taken by the Police did not amount to excessive force; and that the NASA supporters perpetrated violence in Migori, Siaya, Homa Bay and Kisumu Counties. He further averred that the 1st respondent's call for peace, to facilitate voting in the four counties on 27th October, 2017, was negated by the NASA Chief Executive Officer, Mr. Norman Magaya, with violence actually escalating.

169. The deponent furthermore averred that the Cabinet Secretary for Interior and Co-ordination of National Government, Dr. Matiang'i, in barring public demonstrations in Nairobi, Kisumu and Mombasa, was only performing his mandate to protect people and property, in accordance with the *Public Order Act*; but he added that such functions were independent of the 3rd respondent's duties and functions. He deponed that the violence caused was directly attributable to NASA, even though Ms. Adar had preferred to assign blame to the Police responses. He thus deposed that NASA supporters were rowdy and unruly, threatening breach of the peace; and the Police were forced to disperse them. In illustration, he produced video evidence marked "DKC3", "DKC4" and "DKC6".

170. Mr. Chirchir responded to Ms. Perpetua Adar's affidavit and stated that Ms. Adar was not a neutral human rights crusader, but a passionate supporter of NASA. He averred that Ms. Adar's affidavit portrays an emerging trend whereby civil society groups treat transgressions by NASA and allied groups with kid-gloves, while demonising the Police, who restore order and protect life and property, including their own.

171. In response to Ms. Adar's allegations on missing agents at polling stations which she visited, Mr. Chirchir deposed that NASA had not appointed any agents for the 26th October election; hence allegations of missing agents at polling stations lacked a credible foundation.

172. Mr. Boniface Onyango, a registered voter in Kisumu County, responded to Mr. Njonjo Mue's averment on electoral violence, deposing that he was unable to vote due to intimidation by goons behaving raucously, who hindered the 1st respondent from delivering ballot papers.

173. Mr. Joram Odhiambo Abayo, in his capacity as the Jubilee Party Presidential chief agent for Kisumu West Constituency, made depositions in response to those of Mr. Njonjo Mue on the same issue. He deposed that he had been attacked by goons, and subjected to death threats by NASA supporters, for his affiliation to the Jubilee Party.

174. Mr. Daniel Ouma Jobel, a registered voter in Homa Bay County, deponed in response to Mr. Njonjo Mue's affidavit on violence in that county, and stated that the NASA supporters had denied him his right to vote, on the ground that he was a known Jubilee supporter.

175. Ms. Rose Atieno Kiserem, in response to Mr. Njonjo Mue's averment on the same issue, deponed that, while she was going to check on her agents in Karachuonyo Constituency, she was accosted by goons, and sexually harassed, for being a Jubilee supporter. She depones that she was forced to flee her home, and seek safety in a different place.

176. Ms. Rosemary Rumo deposed, in response to Mr. Njonjo Mue's averments, that at her base in Homa Bay, she had successfully trained all agents at their respective polling stations, but was falsely accused of accommodating members of the "Mungiki Sect", and subjected to prolonged intimidation, threats, mental and physical harassment.

177. Ms. Caren Wambui Kiarie deposed, in response to Mr. Njonjo Mue's averments, that she had been the Jubilee Party Presidential election chief agent for Nyando Constituency, in Kisumu County. Arrangements for the training of agents had been done outside the constituency, out of fear of violence, and due to constant threats and intimidation from leaders of the Orange Democratic Movement, a NASA member, within Kisumu County – the deponent averred. She further deponed that there had been a blockage of roads leading to all polling stations in the area, intended to prevent the delivery of voting materials. She was unable herself, she averred, to vote, on account of fear, threats and intimidation.

(n) Independence of the Electoral Agency: Respondents' Case

178. In response to the allegation that the 1st and 2nd respondents had acted unlawfully by allowing the Cabinet Secretary for Education to direct that the fresh election should be held on 17th October, 2017, the 3rd respondent stated that the 2nd respondent uses

public schools as polling stations, and must of necessity, consult the Cabinet Secretary for Education, to ascertain the availability of such facilities for elections. He stated that the Cabinet Secretary for Education did not participate in the decision-making process of the 2nd respondent and that consultations between the 2nd respondent, and the Cabinet Secretary for Education is a statutory requirement, pursuant to Regulation 8(1)(a) of the *Elections (General) Regulations*, 2012.

179. Responding to the affidavit by Mr. Njonjo Mue, Mr. Chirchir denied allegations that the 3rd respondent had acted in concert with the 1st and 2nd respondents, in setting the date for the fresh Presidential election. He deponed that all the allegations made against an Advocate, Mr. Evans Monari, in that context, were false.

180. In response to the allegation that the 3rd respondent had compromised the independence of the Judiciary, by declaring 25th October, 2017 a public holiday, the 3rd respondent stated that the declaration of a public holiday on 25th October, 2017 was guided by the object of facilitating travel for voters at the fresh Presidential election. The 3rd respondent also denied having had a hand in the management of the Supreme Court sitting of 25th October, 2017 which did not take place owing to lack of quorum. He also denied playing any role in the Court of Appeal sitting to hear Civil Appeal No. 359 of 2017, which also did not take place as originally scheduled.

181. Mr. Chirchir further denied the allegation that the declaration of a public holiday on 24th October, 2017 by the Dr. Matiang'i was meant to frustrate the hearing of election-related cases by the Courts. He deposed that, in the past, public holidays have been declared as necessary, to commemorate special occasions, such as the election of Mr. Barrack Obama as President of the United States of America.

(o) State Resources and Election Campaigns: Respondents' Case

182. With regard to the allegation of misuse of State resources to support his campaigns, the 3rd respondent averred that such was not the case, and the petitioners had wrongly perceived normal operations of government, as service delivery to the public was not suspended during the election period. It was stated that Government motor vehicles were only employed for the purpose of sustaining Police mobility, and facilitating quick response to emergencies and incidents.

183. As regards the claim of abuse of State offices and resources, in connection with the election, the 3rd respondent denied having abused public resources in political campaigns and activities; he perceived the claims that Cabinet Secretaries and other public officers participated in campaigns, as imprecise, and short on particulars meriting response; he stated that Cabinet Secretaries have exercised, and continue to exercise their mandates as outlined

in the *Constitution*, and in relevant legislation. Of the activities of Cabinet Secretaries, the 3rd respondent stated that Section 23 of the *Leadership and Integrity Act* exempts them from the requirement of political neutrality. He further denied that he had caused any advertisements of government achievements, so as to advance his cause in the fresh election. As regards allegations regarding the Government's Delivery Unit, the 3rd respondent stated that this had been set up by the government, to monitor, report and publicize the initiation, progress and attainments of government programmes and projects, by virtue of the terms of Article 35 of the *Constitution*, regarding the right to information.

184. The deponent for the 3rd respondent further denied allegations that Cabinet Secretaries had made any promises regarding measures of development, in exchange for votes for the 3rd respondent. He averred that, following the High Court's Orders suspending public access to the Presidential Delivery Unit web-portal, in which advertisements were run on TVs and Radios, or shown in print and social media, there has been no further publication in that web-site.

(p) Amendment of Election Laws: Respondents' Case

185. Mr. Adan Barre Duale, Member of Parliament representing Garissa Township, and Majority Leader in the National Assembly, responded to Mr. Njonjo Mue's deposition, on the issue of amendments to the Election laws. He averred that the amendments were meant to bring clarity to the enabling law and the regulations, and were made in accordance with Articles 10, 109 and 118 of the *Constitution*. He deponed in that regard, that the Bill was processed in accordance with the House's Standing Orders, and that public participation, indeed, took place; and consequently, the new law entered into force by operation of law, in accordance with Article 115(6), upon gazettement on the 2nd November, 2017.

186. As regards the constitutionality of Section 83 of the *Elections Act*, the deponent averred that this is an issue pending determination before the High Court, and has to await determination by that forum. He nonetheless perceived that Section 83 as amended, is not unconstitutional.

187. On his part, the 3rd respondent, as regards the charge of illegality attributed to the recent Election Laws (Amendment) Bill, avers that the amendments had been duly passed by Parliament, in accordance with the lawful procedure. He thus deponed that the legislative process had been preceded by public participation, even though NASA elected not to express any alternative view. He deponed further that the amendments had been necessitated by the striking down of several electoral-law provisions in Court.

188. The 3rd respondent, lastly, avers that the constitutionality of Section 83 of the *Elections Act*, which is questioned by the petitioners, is an issue pending determination before the

High Court, in High Court Petition No. 548 of 2017, The *Katiba Institute and Another v. The Attorney-General and Another*, filed on 1st November 2017. He submits that, without prejudice to the foregoing, there exists a presumption of constitutionality of statute, which gives the starting point for any Court. He submits, therefore, that the pending matter arose when this statute was in force, and so, its state of continuance currently, represents the valid law.

(q) The Stand of the Interested Parties

(i) Nominations in fresh elections

189. The 1st interested party filed a replying affidavit dated 15th November, 2017, sworn by Dr. Ekuru Aukot, in his capacity as party leader of the Thirdway Alliance Kenya.

190. Dr. Aukot denied allegations that: the repeat Presidential election was not conducted in accordance with the *Constitution* and the law, or that the 3rd respondent was not validly, procedurally and/or lawfully nominated as a Presidential candidate.

191. Dr. Aukot further contested allegations that nomination was a condition-precedent to the conduct of fresh election. He also contested the claim that the *Raila Odinga 2013* decision represents the true position in law: that where a candidate withdraws from the race, the elections are effectively annulled by operation of law.

192. He testified that when this Court annulled the election of 8th August 2017, the 1st respondent, in reliance upon *Raila Odinga 2013*, only gazetted the 3rd respondent and the NASA Presidential election candidate, as persons eligible to participate in the fresh Presidential election, to the exclusion of the other candidates in the invalidated election.

193. Dr. Aukot averred that he was aggrieved by the said exclusion, and sought redress in this Court. The Court declined to hear the matter on the basis that it had no jurisdiction, directing the deponent to the High Court. In the High Court, Mativo J. rendered a decision in the Ekuru Aukot Case, the effect of which was to Order the inclusion of the deponent, as well as all the candidates who had participated in the 8th August, 2017 elections, if they had not formally withdrawn. He deponed that this decision was complied with by the 1st and 2nd respondents, and stands as final authority, unless and until it is successfully contested in the appropriate forum.

194. It is in Dr. Aukot's averment that, in light of the High Court decision, he and the National Executive Committee members of the Thirdway Alliance, met with the 1st and 2nd respondents on 13th October, 2017, and discussed the weaknesses identified in the electoral system, as cited in the Raila 2017 decision. This forum of deliberations considered the mitigation measures adopted to avert a repeat of the irregularities attributed to the

8th August, 2017 poll. He deponed that he and his fellow party members were issued with a report of the safety measures, and received assurance from Prof. Ghuliye, an IEBC Commissioner, that the Commission had engaged with Safaricom, as the main data transmission service-provider.

195. Dr. Aukot deponed further, that these ameliorative measures were adopted during the fresh Presidential election, making the exercise more effective, and he witnessed their application first-hand. He states that, as a registered voter at Kapedo Constituency, he was unable to be identified by the KIEMS kit finger-print system, and had to go through an alpha-numeric search, which proved successful, and he was able to cast his vote.

196. It is Dr. Aukot's evidence on nominations, that nomination of candidates was not mandatory in the repeat elections, due to impracticalities occasioned by constitutional time-frames; and he believed that the question of nomination of candidates in a repeat Presidential election had been settled by the Ekuru Aukot decision, and would not now be a subject for further litigation.

197. Dr. Aukot, lastly, averred that there is a pending appeal on the Ekuru Aukot decision, before the Court of appeal at Nairobi (being Civil Appeal No. 359 of 2017); he perceived that the petitioners are acting in bad faith, by inviting this Court to adjudicate over an issue that is on appeal.

(ii) State resources, and State interference in elections

198. On behalf of the 2nd interested party, Dr. Fred Matiang'i swore an affidavit, in his capacity as Cabinet Secretary, Minister of Interior & Co-ordination of National Government, dated 13th November, 2017. He responds to the issues raised in relation to alleged acts or omissions by State or Public Officers, in the run-up to the fresh Presidential election. It is his testimony that the 1st respondent had duly collaborated, through the multi-agency team, in election security-preparedness.

199. He deponed that this team had been charged with the responsibility of mapping out violence hot-spots, all over the country, for the purpose of ascertaining deserving cases, in the deployment of security measures. The deponent denied the petitioners' averments that the defence agency was deployed in certain particular areas, so as to occasion demonstrations and disruptions, during the fresh Presidential election.

200. The deponent further denied the allegation that Police officers had participated in the disruption of a NASA rally in Meru. He depones in addition, that the disruption was due to political rivalry between Jubilee and NASA supporters, manifested at a rally organized without prior notice to the Police.

201. The deponent averred that, in the run-up to the fresh Presidential election, there had emerged clear instances of threat and intimidation directed at officers of the 1st respondent, which merited effective security response, and in respect of which the Police officers did act, proportionately and professionally. He furthermore denied the particulars of fatalities portrayed in the Human Rights Commission report, "*Mirage at Dusk: A Human Rights Account of the 2017 General Election*", which reported 37 fatalities. He averred to the contrary, that the National Police Service Commission records depict 13 fatalities, in the commotions of the pre-election period.

202. The deponent also averred that the Inspector General of the National Police Service had informed him that only eight Police officers had been injured in the line of duty, contrary to the allegation that the relevant figure is 13, coming from the petitioners.

203. In response to the allegation of undue influence, in the declaration of October 25, 2017 as a public holiday, the deponent stated that he invoked his mandate, under Section 4 of the *Public Holidays Act*, to declare public holidays. He averred that he had exercised this power reasonably and legitimately; and that the declaration was not intended to subvert the judicial process, insofar as this related to the fresh Presidential election.

204. The deponent, in response to the allegation that he had banned anti-IEBC demonstrations, averred that on the 12th of October, 2017, following a resolution by the committee entrusted with security matters, he had issued a directive pursuant to the *Public Order Act* (Cap.56, of the Laws of Kenya), restricting public demonstrations within the Central Business District of Nairobi City County, Mombasa and Kisumu, to forestall the imminent threat of destruction of private property, and the potential impacts on the enjoyment of economic rights. This, he averred, did not amount to a ban on anti IEBC demonstrations.

(iii) Relocation of polling stations

205. The 2nd interested party deposed that the relocation of polling stations in Kibra Constituency had been occasioned by insecurity and that, it is thanks to advantages flowing from such relocation, that essential security was provided which facilitated the process of voting. He denied the allegation that the Police had suppressed reporting on violence, and the gathering of evidence of human-rights violations, by destroying cameras and beating-up photographers.

(iv) The responses to petitions: overview

206. The foregoing is a detailed account of the respondents' and interested parties' cases, and the evidentiary material which they proffer, to counteract the petitions lodged against them. From this account, we have taken note of the main factor in a contest which, essentially,

stands or falls on the evidence. We are now in a position to undertake an analytical appraisal, such as will lead us to the ultimate verdict of this Court.

D. Issues for Determination

207. An unusual feature in the petitioners' causes is, without a doubt, their boundless multiplicity of grievances: a condition that poses a clear challenge to the very design of judicial redress. It is hardly surprising, hence, that the parties failed to come to mutual agreement on issues that truly merit this Court's intercession. In the circumstances, each party was granted, at the pre-trial conference of November 14, 2017 the liberty to file and make submissions on manifold issues, subject to the terrains of the pleadings on record. From the resulting maze, the Court has been able to extract the following as the main questions for determination:

i. what is the *locus standi* of the petitioners? are their causes being pursued in the public interest?

ii. did the 1st and 2nd respondents conduct the Presidential election held on October 26, 2017 in conformity with the *Constitution* and the applicable laws?

iii. what is the legal effect of the withdrawal of a Presidential election candidate before election? did any of the candidates validly or properly withdraw from the Presidential election held on October 26, 2017?

iv. did the election conducted on October 26, 2017 meet the constitutional threshold of a free and fair election under Article 81 of the *Constitution*?

v. what are the legal consequences of not holding a Presidential election in each constituency under Article 138(2) of the *Constitution*?

vi. was the Presidential election held on October 26, 2017 "marred with illegalities and irregularities?" if so, what are their effects on the validity of the election?

vii. what is the effect of the *Election Laws (Amendment) Act*, 2017 on the conduct of the Presidential election held on 26th October, 2017? is Section 83 of the *Elections Act* (as amended) unconstitutional?

(viii) was the election held on 26th October, 2017 and its results, legitimate and credible, both in fact and in law?

(ix) what Orders should the Court issue, including Orders on costs?

1. Petitioners'locus standi and Public Interest Litigation

(i) What is the locus standi of the petitioners? Are their causes being pursued in the public interest?

208. This issue of *locus standi* was raised by the 3rd respondent (paragraph 4 of the response to Petition No. 4 of 2017). It was contended that, 'the petitioners are not entitled to file a petition under Article 140(3), as the persons contemplated in the said Article 140(3) are not persons who have exercised their rights under Article 38.'

209. Subsequently, the 3rd respondent's counsel submitted in Court that the petitioners had only demonstrated that they were registered voters, but failed to demonstrate that they had exercised the right to vote¾hence they failed the test for filing a petition under Article 140(1). They argued further that participation in an election gives a person locus standi under article 140(1) and that a person must have exercised the right under Article 38 to attain the locus standi. We now proceed to determine whether the petitioners herein have the requisite locus standi to prosecute their respective causes.

210. This Court's jurisdiction to hear and determine a Presidential election petition is provided for under Article 140 (1), which provides that "A person may file a petition in the supreme Court to challenge the election of the president-elect within seven days after the date of the declaration of the results of the Presidential election." Who is "a person" under Article 140(1)? Article 260 of the *Constitution* defines a person to include a "company, association or other body of persons whether incorporated or unincorporated."

211. In that context, locus standi to file an election petition has been alluded to by this Court, in the Advisory Opinion in, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Advisory Opinion No. 2 of 2012, with the Court thus stating [paragraph 69]:

> " Article 140(1) of the *Constitution* provides:
>
> > 'A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election.'
>
> It is clear that the aggrieved, in such a case, may be a candidate in the election, or indeed, any other person."

212. Guided by the terms of Articles 140 and 260, as well as the above- cited pronouncement, it can be concluded that "a person" under Article 140 of the *Constitution*, includes both a

natural and a juristic person. There is no requirement for participation in an election, under Article 140. The 3rd respondent did not, in our view, effectively affirm his submission to the effect that Article 140 (1) bestows locus standi only upon persons who have exercised their rights to vote under Article 38. Therefore, we hold that the petitioners have the legal standing under Article 140 (1), to file the Petition.

(ii) Are the petitioners' causes being pursued in the public interest?

213. Closely related to the issue of locus standi is whether the petitions before us can be characterized as public interest litigation causes. Towards this end, the 2nd and 3rd petitioners (paragraph 2 of Petition No. 4 of 2017) stated that the petition was instituted in their own interest, and in the interest of the public pursuant to Article 258 as read with Article 22 of the *Constitution*. The 1st and 2nd respondents did not respond to the issue of public interest litigation; but the 3rd respondent in his response to this petition (paragraph 4), contends that far from advancing any public-interest agenda as alleged in the petition, the petitioners come as no more than surrogates, agents, and mouth-pieces of the 4th respondent and its leaders; masquerade as bona fide defenders of the public interest.

214. The petitioners in response, contended that the petition was indeed filed in a personal capacity and in the interest of other aggrieved voters, without the intention of advancing any political interest. In addition, the petitioners submit that the matter is of great public interest and, any allegations to the contrary are misplaced. The petitioners assert their right to come to court as Kenyans, in their individual capacities, under the *Constitution*. They deny that they are a front for any political party.

215. In urging the Court to dismiss the petition, counsel for the 3rd respondent submitted that this Court should put a stop to all abuses of the process of public interest litigation.

216. Counsel called in aid the Supreme Court of India case, of *Ashok Kumar Pandey v. State of West Bengal* AIR 2004 SC 280 in which caution was sounded, in relation to public interest litigation, on the basis that the true interest of litigants ought to unfold:

> "Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking... As indicated above,the Court must be careful to see that a body of persons or a member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations...The Petitioners of such busybodies

deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

217. Learned counsel urged the Court to partake of this opportunity, and issue clear guidelines for the pursuit of public interest litigation at the various levels of judicial forum.

218. We note that, at the level of principle, this Court already has pronounced itself on the elements of public-interest-litigation, notably in Civil Application No. 29 of 2014, *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Other,* [2014] eKLR, as follows:

> " Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the *Constitution*'s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice..."

219. We would have no doubt that the subject-matter of the petitions before us, does meet the criteria to be characterized as being in the category of public-interest litigation. Public-interest litigation is a "public right", enshrined in Articles 22 (1) (c) and 258 (2) (c) of the *Constitution*. It is a veritable vehicle for the vindication of public rights, such as extend beyond the constraints of the common law doctrine of locus standi. Since public interest litigation, as it sounds currently, has elicited considerable judicial insight from the High Court, this is not the time, in our view, for this Court to lay down hard and fast rules or guidelines, for the admittance of relevant cases, as we should not, inadvertently, constrain the creativity of other superior Courts.

220. The general guiding principle in public interest litigation should always be that, the suit must be brought in the broad "public interest". It should not be a veil for private, commercial, partisan or other "non-public" interests. The detailed contours of the applicable law will continue to unfold, through the works of the superior Courts.

221. We would regard the proliferation of issues raised in this matter as symbolic of parties aggrieved, and as presenting a real cause for judicial resolution.

2. Fresh Election: The Question of Compliance with the *Constitution* as Regards Nominations

(i) Did the election conducted on 26th October, 2017 meet the constitutional threshold of a free and fair election under Article 81 of the *Constitution*?

222. This Court, on 1st September, 2017 ordered the 1st respondent to conduct a fresh election "in strict conformity with the *Constitution* and the applicable laws"; and the petitioners have

now posited that, without adhering to the law regarding nomination of candidates prior to a fresh election, under Article 140(3) of the *Constitution*, that edict would not have been complied with. Were nominations, therefore, a necessary part of the fresh election?

223. In answering the above question, we note that the very core of the 1st petitioner's case, is the question as to whether, the 1st respondent ought to have conducted fresh nominations following the annulment of the presidential election held on 8th August, 2017 and before the holding of the fresh election on 26th October, 2017. As the 2nd and 3rd petitioners share that view, the three petitioners are in unanimity that nominations of presidential candidates ought to have preceded the election of 26th October, 2017. According to the 1st petitioner, specifically, nomination is such a critical process in an electoral contest that, a lack of it vitiates any election thereafter conducted.

224. According to the 1st petitioner, Articles 137 and 138 of the *Constitution* require that nominations do take place in every Presidential election. According to the 1st petitioner, all Presidential elections, other than an election conducted pursuant to Article 138(5), must be preceded by the nomination of candidates. He further submitted that the only sui generis Presidential election is an election conducted pursuant to Article 138(5), as in such a case, the *Constitution* itself 'nominates' the two candidates who participate in that election¾ which is required to take place within 30 days.

225. The 1st petitioner urged the Court to derive lessons from elections held after the nullification of County or Parliamentary elections, in respect of which nominations are a prerequisite for any fresh election. According to him, if nominations must be conducted afresh, upon the nullification of such elections, then the same measure should apply for a fresh Presidential election. Such is the position too, of the 2nd and 3rd petitioners. The three petitioners took the position that, since the 1st respondent did not conduct any nominations for the election held on 26th October, 2017, contrary to the *Constitution* and the governing laws, the declaration of the 3rd respondent as the winner of that election was null and void.

226. The 1st respondent, however, takes the position that though lack of, or improper nomination of candidates is one of the grounds under Rule 8 of the *Supreme Court (Presidential Election Petition) Rules*, 2017, upon which a Presidential election may be vitiated, the petitioners in Raila 2017 did not challenge the nomination process prior to the 8th August, 2017 election; and neither did the Supreme Court find any fault with the said process. Consequently, the 2nd respondent urges that all the processes leading to the conduct of the 8th August, 2017 election remain valid, and are not required to be repeated before a fresh Presidential election is held under Article 140(3) of the *Constitution*.

227. The 1st respondent set out in detail some of the crucial processes, including preparation and certification of the register of voters and nominations, that occur before a General

Election is held, and which processes according to him, need not be repeated if there is a fresh Presidential election under Article 140(3) of the Constitution¾especially where such processes had not been impugned. As the Supreme Court only nullified the election held on 8th August, 2017 for lack of, or improper result transmission, and left the nomination process intact, it was urged, a repeat of that process when holding a fresh election, pursuant to Article 140(3) of the *Constitution*, would have been superfluous, and an improper claim on time and public resources.

228. This position is also adopted by the 3rd respondent, who urges the point that when the Supreme Court invalidated the Presidential election held on 8th August, 2017, it did not annul the nominations which had taken place on 28th and 29th May, 2017. Consequently, he contends that the IEBC acted in accordance with the law, in gazetting the identified candidates as duly nominated to participate in the election. At any rate, it was urged, prior to the 26th October, 2017 election, no political party, or candidate, or any other person, had complained about the publication of the special gazette notice, without the preliminary step of nominations of candidates. The 3rd respondent, thus, maintains that he was validly nominated as a Presidential candidate, and his inclusion on the ballot paper during the fresh election held on 26th October, 2017 was lawful, as was also the inclusion of all other candidates.

229. The 1st and 3rd respondents' position was that *Raila 2013* decision was the applicable law, with regard to the conduct of nominations, in for a fresh Presidential election held following the nullification of such an election. Pursuant to that decision, they urged, it was not necessary to conduct nominations, as a repeat Presidential election would be between the candidates who had contested the election of the President-elect and the candidate whose election was nullified.

230. Relevant issues on this question may be identified as follows:

(a) what is the purpose of nominations in a Presidential election?

(b) should the 1st and 2nd respondents have conducted nominations of candidates in preparation for the Presidential election held on 26th October, 2017? were the Presidential candidates who took part in the fresh election validly nominated?

(c) what is the place of the *Raila 2013* decision, and the Ekuru Aukot Judgment, in the conduct of the fresh election held on 26th October, 2017?

(a) Purpose of nomination in a Presidential election

(ii) Was the nomination process properly conducted, prior to the holding of the election of 26th October, 2017?

231. The nomination process is deeply rooted in the *Constitution*, which recognizes that an electoral contest must be preceded by the nomination of candidates to vie for elective positions. Article 137 specifies the qualifications and disqualifications of a Presidential candidate, in the following terms:

> "(1) A person qualifies for nomination as a presidential candidate if the person??
>
> (a) is a citizen by birth;
>
> (b) is qualified to stand for election as a member of Parliament;
>
> (c) is nominated by a political party, or is an independent candidate; and
>
> (d) is nominated by not fewer than two thousand voters from each of a majority of the counties.
>
> (2) A person is not qualified for nomination as a presidential candidate if the person??
>
> (a) owes allegiance to a foreign state; or
>
> (b) is a public officer, or is acting in any State or other public office.
>
> (3) Clause 2(b) shall not apply to??
>
> (a) the President;
>
> (b) the Deputy President; or
>
> (c) a member of Parliament."

232. Article 138(8)(a) also underscores the centrality of nomination, by decreeing that a Presidential election shall be cancelled if no person has been nominated as a candidate before the expiry of the period set for the delivery of nomination papers. Nomination, therefore, is not just a formality, or an exercise in futility, nor can it be dispensed with, save

for lawful cause. Besides, not everyone qualifies to be nominated as a contestant, as this can be deduced from the phraseology of Article 137(1) and 137(2), which respectively, thus signal: 'a person qualifies for nomination..."; and 'a person is not qualified for nomination...'. the *Constitution* thus provides the yardstick within which the nomination exercise is to be conducted, and it is only where a person meets the threshold set under Article 137, that such a person will have been duly nominated.

233. Article 138 goes further to signal the process set in motion, upon the conclusion of a nomination exercise. Article 138(1) and (2) thus provides:

> "(1) If only one candidate for President is nominated, that candidate shall be declared elected.
>
> (2) If two or more candidates for President are nominated, an election shall be held in each constituency."

234. In summary, therefore, at a general level, nomination is depicted as a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they seek. It is a critical component of an electoral process, without which there would be no election.

(iii) Presidential election of 26th October, 2017: was nomination required?

235. The *Constitution* of Kenya, 2010 contemplates various instances in which a Presidential election may be held. These are as follows:

(i) at a General Election pursuant to Article 136(2)(a) of the *Constitution*;

(ii) whenever a vacancy occurs in the office of the President, as provided for under Article 146 of the *Constitution*;

(iii) an election conducted pursuant to Article 138(5) of the *Constitution*, where no Presidential candidate attains the constitutional threshold necessary before being declared elected to have been elected;

(iv) where a President-elect dies before assuming office as provided for under Article 139 of the *Constitution*;

(v) where the Supreme Court determines the election of the President-elect to be invalid, pursuant to Article 140(3) of the *Constitution*.

236. All such elections are unique, and take place under different circumstances. As such, it is essential that they be appraised separately, and perceived in their distinctive contexts. We note, in this context, that we have been referred to Section 14 of the *Elections Act*, as a

foundation for holding a nomination before all Presidential contests, and particularly in the case of an election conducted pursuant to Article 140(3). In that regard, indeed, Section 14 provides the manner in which a Presidential election is initiated, in the following terms:

> "(1) Whenever a presidential election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in electronic and print media of national circulation—
>
> (a) in the case of a general election, at least sixty days before the date of the election; or
>
> (b) in the case of an election under Article 138(5) of the *Constitution*, at least twenty-one days before the date of the election;
>
> (c) in any other case, upon the office of the President becoming vacant.
>
> (2) The notice referred to in subsection (1) shall be in the prescribed form and shall specify—
>
> (a) the nomination day for the presidential election; and
>
> (b) the day or days on which the poll shall be taken for the presidential election, which shall not be less than twenty-one days after the day specified for nomination."

237. Though the use of the phrase, 'whenever a presidential election is to be held' signals a wide scope of application, the substantive provision, nonetheless, confines the application of Section 14 to just three kinds of Presidential election, these being: a general election; an election conducted under Article 138(5); and, whenever a vacancy occurs. In all those instances, the nomination process is identified as an imperative step, before the conduct of any such election. The only Presidential election not specifically mentioned therein, is a fresh election conducted pursuant to Article 140(3) of the *Constitution*. It is apparent to us that, the failure to recognize the need for nomination in an election under Article 140(3), was not out of oversight, or inattention, on the part of the drafters of the *Constitution*, but arose from a proper appreciation of the law.

238. We would note in that context, that though Section 14 requires nominations to be conducted for an election under Article 138(5), the *Constitution* itself restricts the candidates who may participate in such an election, to only the candidate, or candidates with the greatest number of votes, and the candidate, or candidates, with the second greatest number

of votes. Consequently, nominations would be pointless, as the *Constitution* itself establishes with specificity who the participating candidates should be.

239. It is clear that an election held under Article 138(5) is not a stand-alone election, but rather, one anchored on an 'initial' election that had been conducted and where no candidate met the constitutional threshold, for being declared elected. Similarly, a fresh election conducted pursuant to Article 140(3) is anchored upon the nullification of a Presidential election, which could have been part of a general election; an election upon a vacancy occurring in the office of the President; or an election held under Article 138(5) of the *Constitution*. It is therefore not a stand-alone election, devoid of a historical foundation.

240. On the basis of the foregoing reasoning, the election held on 26th October, 2017 was the outlaw of the nullification of the Presidential election held on 8th August, 2017. The election of 8th August, 2017 was itself a General Election, which is held every second Tuesday in August of every fifth year. It was also the second national election held under Constitution of 2010. It is our perception that, an objective appreciation of the fresh Presidential election held on 26th October, 2017 can only be achieved if it is seen in context, rather than in isolation from the General Election of 8th August, 2017 and the processes leading to that earlier election.

241. It is of relevance that Article 140 confers upon the Supreme Court jurisdiction to determine the validity of a Presidential election, upon a contest hinged on any of the grounds provided for under Rule 8 of the *Supreme Court (Presidential Election Petition) Rules*, 2017 as follows:

(i) the validity of the conduct of a presidential election;

(ii) the validity of the qualification of a President-elect;

(iii) the commission of an election offence as provided under the *Election Offences Act* (No. 37 of 2016);

(iv) the validity of the nomination of a Presidential candidate or

(v) any other ground that the Court deems sufficient, provided such ground shall not be frivolous, vexatious or scandalous.

242. A clear view of the election petition in *Raila 2017* would show that it revolved around the question of results transmission, irregularities, and illegalities touching on the conduct of the election held on 8th August, 2017. Thus, in the majority decision, the following passage occurs [paragraph 303]:

> " We find that the 2017 presidential election was not conducted in accordance with the principles laid down in the *Constitution* and the written law on elections in

> that it was, inter alia, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation we have given to Section 83 of the *Elections Act*, we have no choice but to nullify it."

243. Upon making that finding, the Court directed the IEBC to conduct a fresh election "in strict conformity with the *Constitution* and the applicable election laws." It has not been disputed in the present petition that the nullification of the election held on 8th August, 2017 was occasioned by the acts or omissions of the IEBC during the conduct of that election. The nomination exercise that had taken place prior to the election, was not the subject of any contest, and so it remained, and remains valid¾and therefore, was a proper basis for the conduct of the fresh Presidential election of 26th October, 2017. It emerges from this analysis that, a fresh election under Article 140(3) is not a disjointed phenomenon, but one lodged within the motions of the previous electoral contest. The fresh election held on 26th October, 2017 only happened because the August 8th 2017 election, in view of the Raila 2017 decision, did not culminate in its logical conclusion, that of determining who the winner was. The purpose of the 26th October, 2017 election, therefore, was to concluded a 5-year electoral cycle, which would have ordinarily ended on 8th August, 2017, and to initiate another electoral cycle of 5 years, ending on the second Tuesday in August, of the next fifth year. From this timing scenario, it would not, in our view, be logical that a person who was not a Presidential candidate for the election held on 8th August, 2017 be a contestant in a repeat election, and subject candidates to a fresh nomination¾when the issue arose neither in the petition challenging that election, nor in the final Orders of this Court.

244. The above position may be perceived alongside the possible scenario of an election held pursuant to Article 139 (in case of death of a President-elect, before assuming office), or one under Article 146 (where a vacancy arises in the office of the President, and the Deputy-President's office is vacant, or the Deputy-President is unable to assume office). In these two scenarios, a nomination process is but a logical contemplation, of the law, as there would be no other way of identifying a candidate.

245. In our appraisal of the law relating to the nomination of candidates for Presidential election, we would prefer the purposive standpoint, predicated on the *Constitution*'s intent of assuring unbroken governance process. This leads us to hold that the nominations for Presidential-election candidates which took place on 28th and 29th May, 2017, remained valid and no other nomination was required for the purposes of the fresh Presidential election held on 26th October, 2017. We affirm, therefore, that all the Presidential candidates in the election held on 26th October, 2017, were validly nominated, and it was proper for the 2nd respondent to include them in the ballot papers as Presidential candidates.

246. What of the inclusion of Mr. Jirongo in the ballot? We find no fault in the IEBC decision to do so, because the initial decision to exclude him was based on the fact that the High Court had on 4th October, 2017, in H.C. Insolvency Cause No.3 of 2017, adjudged him to be bankrupt, thus automatically disqualifying him, by dint of Article 137 of the *Constitution* as read with Article 99 thereof, from being a Presidential candidate.

247. However, although the said decision should have settled the matter, on 16th October, 2017, Mr. Jirongo made an application to the High Court seeking a stay of the Order which had adjudged him bankrupt. By a Ruling dated 23rd October, 2017, the High Court stayed the Bankruptcy Order, pending the hearing and determination of that application. By virtue of that stay Order, Mr. Jirongo became effectively qualified to contest in a Presidential election, and hence the IEBC decision to include him in the ballot, through Gazette Notice No. 10562 Vol. CXIX No. 160 dated 24th October, 2017. We are unable to understand why the petitioners did not appreciate such a development of definite legal consequence.

(b) The Raila Odinga 2013 & Ekuru Aukot 2017 decisions: what standing on fresh Presidential elections?

248. An issue was raised, regarding the application of Raila 2013, in terms of the identification of candidates for fresh election conducted pursuant to Article 140(3) of the *Constitution*. Of relevance in that decision are paragraphs 291 and 292, which read as follows??

> " Barring the foregoing scenario, does the 'fresh election' contemplated under Article 140(3) bear the same meaning as the one contemplated under Article 138(5) and (7)? The answer depends on the nature of the petition that invalidated the original election. If the petitioner was only one of the candidates, and who had taken the second position in vote-tally to the President-elect, then the 'fresh election' will, in law, be confined to the petitioner and the President-elect. And all the remaining candidates who did not contest the election of the President-elect, will be assumed to have either conceded defeat, or acquiesced in the results as declared by IEBC; and such candidates may not participate in the 'fresh elections'.
>
> > " Such, indeed, is the situation in the instant case. It follows that if this court should invalidate the election of the 3rd and 4th respondents, only the 1st petitioner would participate as a contestant in the "fresh election" against the President-elect. And the candidate who receives the most votes in the fresh election would be declared elected as President."

249. The 1st respondent urges that it fully relied on the above decision, in deciding to have only two Presidential candidates in the fresh election, being the successful petitioner and the President-elect in the invalidated election. It is clear that the decision in Raila 2013 had limited the number of candidates who would participate in a fresh Presidential election, in the context in which the issue was raised in that petition. We have already in this decision, however, stated our position, with the object of clarifying the law.

250. We do take note of the context in which the Judgment in Ekuru Aukot was given, directing the IEBC to include the name of Dr. Ekuru Aukot as a Presidential candidate for the fresh election held on 26th October, 2017. While being in agreement with the petitioners, that the High Court had directed the inclusion of Dr. Aukot as an additional Presidential candidate, but without mentioning the status of the other potential candidates, it is clear to us that the Court's reasoning (paragraph 73) had contemplated the availability of an opportunity for every other person who had been a Presidential candidate in the elections of 8th August, 2017, to participate in the fresh election. This is manifestly from the passage in that Judgment, that¾

> " ...the logical construction which to me would serve public interest is that those who participated in the invalidated election do qualify to contest in the fresh election." [emphasis added].

251. In all the circumstances, we find no fault with the 1st and 2nd respondents' decision not to conduct fresh nominations; it was a decision fully in keeping with Raila 2013, and later, the Ekuru Aukot decision: this position, as correctly argued by counsel for the 3rd petitioner, binding on them at the time.

252. In conclusion, therefore, it is our finding that the 1st and 2nd respondents, and indeed the 3rd respondent as well as all the other presidential election candidates, bear no fault as regards nominations, and the inclusion of all the August 8th candidates on the ballot paper.

3. Voluntary Withdrawal of Candidate, Before Election

(i) What is the legal effect of the withdrawal of a Presidential election candidate before election? Did any of the candidates validly or properly withdraw from the Presidential election held on 26th October, 2017?

253. The attribution of illegality to IEBC's retention of the Hon. Raila Odinga's name on the ballot, after he wrote a letter withdrawing his candidature, was a subject of submissions by all the petitioners.

254. In response, the 1st and 2nd respondents relied on Regulation 52 of the *Elections (General) Regulations*, 2012, submitting that, save for a withdrawal by a candidate in any election three days after nominations, the election laws do not contemplate withdrawal. And consequently, the Hon. Raila Odinga's letter of withdrawal as a Presidential election candidate, amounted to just a mere intention to withdraw, with no legal effect, as it had not been communicated on the prescribed form.

255. The 1st respondent, besides, stated that he had issued a press statement after the letter by Hon. Odinga was received, emphasizing the need to file Form 24A, in compliance with the law; but he did not receive any such notice of withdrawal from Mr. Odinga. Supporting that view, the 3rd respondent submitted that the NASA Presidential candidate had abandoned the electoral contest outside the framework of the law, and so should not be regarded as having withdrawn his candidature; and his name had properly remained on the ballot.

256. The 2nd interested party, on his part, submitted that the applicable law has since changed from the position in *Raila 2013*, by virtue of the subsequent introduction of Regulation 52 of the *Elections (General) Regulations*, which requires a candidate seeking to withdraw from an election, to do so within three days of the nomination, by filling in a Form 24A.

257. The question calls for an answer: what is the effect of the alleged withdrawal by the NASA Presidential candidate, on the elections? This entails interpretation of the *Constitution*, and the applicable laws as well as the effect of *Raila 2013*, in that context.

258. The NASA Presidential candidate had written a letter addressed to the 1st respondent, dated October 10, 2017 (annexure NM6 to the affidavit of Njonjo Mue), bearing the following content:

> " Re: Withdrawal of Candidature in the Fresh Presidential Elections
>
> "The above matter refers.
>
> "Following the nullification of the presidential election held on 8th August, 2017 and the subsequent gazettement by the Commission of the undersigned as presidential candidate and running mate for a fresh election that you have scheduled for 26th October, 2017, we hereby withdraw our candidature with immediate effect."

259. Subsequently, on 11th October, 2017 the 1st respondent in response to the said letter of withdrawal, issued a press statement in which he cited the legal requirement of Form 24A

being filled by a candidate, as proof of withdrawal. The transcribed press statement, in part, thus reads:

> " The Commission cannot compel a candidate to participate in an election. The law allows a candidate to withdraw his/her candidature by delivering to the Commission a duly filled Form 24A. This Form is provided by the Elections (General) Regulations.
>
> We note that the Rt. Honourable Raila Odinga and his running mate sent a letter dated 10th October, 2017 indicating that they had decided to withdraw from the fresh presidential election. They however have not submitted the statutory Form 24A. Once the Commission receives the requisite Notice from any of the candidates it will process the same in accordance with the requisite provision of Law" [emphasis supplied].

260. We note that, neither the *Constitution* nor the *Elections Act* makes provision for the withdrawal of a candidate from an election. The procedure for withdrawal of candidature is, instead, provided for under Regulation 52 of the *Elections (General) Regulations*, 2017 which provides that:

> " (1) A candidate who has been nominated may withdraw his or her candidature by delivering to the respective returning officer a notice to that effect in Form 24A not later than three days after nomination.
>
> (2) Where there are only two nominated candidates and one candidate withdraws, the remaining candidate shall be declared duly elected in accordance with regulation 53."

261. It is thus, under the law, plain that a Presidential candidate who intends to withdraw can only do so within three days of the nominations by filling Form 24A, and submitting the same to the Returning Officer ¾ in this case the 2nd respondent.

262. It was the petitioners' standpoint, however, that Regulation 52 is not applicable to fresh election, because no nominations had been conducted prior to that election. They urged the Court to rely upon Raila 2013, for guidance on the issue. In that decision, this Court, (paragraph 290), held that if a candidate who took part in an original Presidential election abandons the fresh election, scheduled under Article 140 of the *Constitution*, "...the provisions of Article 138(8) (b) would become applicable, with fresh nominations ensuing."

263. The petitioners in petition No. 4 of 2014 submitted, besides, that the withdrawal from and/or abandonment of candidature by the NASA presidential candidate, ought to have

occasioned the vacation of the fresh Presidential election date of 26th October, 2017, by operation of law.

264. The respondents, for their part, contended that there was no effective withdrawal from the fresh election by the NASA Presidential candidate, such as would lead to cancellation of the fresh election. They submitted that a candidate could only withdraw pursuant to the provisions of Regulation 52, and failure to do so would render a withdrawal ineffective, and of no legal effect.

265. In determining the legal effect of withdrawal by a candidate before an election, what guidance is to be drawn from the pronouncements of this Court in *Raila 2013*? The operative paragraphs are 289- 290 where the Court thus stated:

> " 289. It is clear that a fresh election under Article 140(3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme Court, following a successful petition against such election. Since such a fresh election is built on the foundations of the invalidated election, it can, in our opinion, only involve candidates who participated in the original election. In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest.
>
> 290. Suppose, however, that the candidates, or a candidate who took part in the original election, dies or abandons the electoral quest before the scheduled date: then the provisions of Article 138(8) (b) would become applicable, with fresh nominations ensuing."

266. These two paragraphs have assumed judicial prominence since the nullification of the Presidential election of 8th August, 2017 by this Court. Not only have they been subject to contradictory interpretations by parties to the petitions before us, they have also elicited varying "expert" comment from many quarters.

267. In the High Court, before Mativo J. in the *Ekuru Aukot* Case, the question arose as to whether the Supreme Court's pronouncements constituted ratio decidendi, and were therefore binding on him, or whether they were obiter dicta.

268. The situation is more complex, as the Ekuru Aukot case is now on appeal pending determination before the Court of Appeal. This is significant, in view of this Court's general policy of staying its hand in a matter that is pending before another superior Court.

269. The relevance of such questions in this instance, calls for a consideration of the point whether the above paragraphs in the *Raila 2013 case*, are of binding authority. The second

question is whether this Court should, notwithstanding the fact that the matter is pending on appeal, proceed to determine this issue. The third question is whether it is necessary for the Court to make a clarification of the meaning of the said paragraphs, in view of the contradictory interpretations attendant upon them.

270. To the first question, it is not in doubt that in making some of the pronouncements it made, the Supreme Court was responding to hypothetical questions that had been expressed before it by the Attorney- General, in his capacity as *amicus curiae*. The questions were not essential for the determination of the two petitions before the Court; and the answers to them could not, therefore, constitute the ratio decidendi of *Raila 2013*.

271. To that extent, therefore, the pronouncements in those and other related paragraphs, were *orbiter dicta*, and thus, not binding on other Courts. Mr. Justice Mativo, in his carefully thought-out Judgment in Ekuru Aukot, is not, therefore, to be faulted for having characterized the said statements as such.

272. As to whether this Court should determine this matter while it is pending on appeal, it is apparent to us that this is no ordinary matter, resolution to which can await the appellate process. The petitions now before us could stand or fall, on the basis of how we determine the twin issues of withdrawal of candidature, and nominations. As the Supreme Court, in this instance, is exercising its original and exclusive jurisdiction under Article 140 of the *Constitution*, an abnegation of its task is not tenable; and the responsibility devolves to it to resolve the relevant questions, without reservation. The Court's task is to determine the Presidential election petition.

273. To the third question, in ordinary circumstances, having declared paragraphs 286-290 of the *Raila 2013 decision* obiter dicta, there would be no need to clarify their meaning, since they are of no binding effect. They are of no precedential value. However, though obiter, these pronouncements hold special stature, emanating as they do from the apex Court.

274. It is proper, in the circumstances, to consider the content of paragraphs 289 and 290, as the "suppositions", today, have a live face before us.

Paragraph 289 thus reads:

> " It is clear that a fresh election under Article 140 (3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme Court, following a successful petition against such election. Since such a fresh election is built on the foundations of the invalidated election, it can, in our opinion, only involve candidates who participated in the original election."

275. Thus far, it is clear to us that the foregoing statement represents the correct legal position. But the paragraph also reads:

> "In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest."

276. The foregoing statement is only correct to the extent that it refers to the nullification of an election of the President-elect, where the issue of "nomination of candidates" was not the basis for the nullification of the election. In the petitions before us, the nomination of candidates was not the basis for the nullification of the election of 8th August 2017. But if an election is nullified on the basis of flawed nominations, it is clear that the ensuing fresh election cannot be conducted on the basis of the same flawed nominations. Fresh nominations would, in the circumstances, have to be conducted.

Paragraph 290, which appeared more conjectural in its cast, thus reads:

> "Suppose, however, that the candidates, or a candidate who took part in the original election, dies or abandons the electoral quest before the scheduled date: then the provisions of Article 138 (8) (b) would become applicable, with fresh nominations ensuing."

277. It is clear to us, with the benefit of hind sight, that, had the foregoing pronouncement not been made obiter; had it been a ratio, it would have been made per incuriam, since Article 138 (8) (b) of the *Constitution* only contemplates three scenarios of a cancellation of an election, namely: where no person has been nominated as a candidate before the expiry of the period set for the delivery of nominations; where a candidate for election as President, or Deputy-President, dies on or before the scheduled election date; or a candidate who would have been entitled to be declared elected as President, dies before being declared elected as President. Withdrawal of a candidate from the electoral contest is clearly not one of the scenarios contemplated by the *Constitution*, as a basis for the cancellation of an election. In the circumstances, this Court would have to depart from the decision in question.

278. Our immediate question is: did the Presidential candidate for NASA withdraw from the 26th October, 2017 electoral contest? It has been submitted by the respondents that, because he did not effect his withdrawal by the prescribed statutory Form 24, the Hon. Raila Odinga's "purported" withdrawal was of no legal effect. On the other hand, the petitioners urge that the withdrawal was effective, as it was notified through a letter, and as Regulation 52 was inapplicable to this particular case.

279. It is clear, in the above context, that Regulation 52 provides for withdrawal of a candidate within three days of the nominations. The said Regulation is, thus, not applicable to the

situation herein. The nominations had long been conducted before the scheduled fresh election. Does this mean that after the expiry of the three-day period, no candidate can withdraw from an election? We don't think so, as one cannot be forced to participate in an election, in which he or she has lost interest. The NASA candidate not only made a public announcement of his decision to withdraw from the elections, but addressed a formal letter to that effect, to the 1st respondent. Such actions, in our perception, constituted a substantive, and legally-effective withdrawal from the elections.

280. What legal effect did the withdrawal of the NASA candidate have on the elections of 26th October, if any? It was submitted by the petitioners that the withdrawal should have led to the cancellation of the elections. In view of our observations in the foregoing paragraphs, it emerges clearly that, the withdrawal of the NASA Presidential candidate from the 26th October, 2017 fresh Presidential election could not, in law, have occasioned the cancellation of the elections. Did the retention of the name of the withdrawn candidate on the ballot, vitiate the election? The answer is in the negative, given that a candidate has the liberty to withdraw from the electoral contest even one or two days before the elections, when it would be quite impossible to remove his or her name from the ballot.

4. Was this Free and Fair Election, as Required under Article 81 of the *Constitution*?

281. On the basis of the pleadings in Petition No. 4 of 2017, this issue, in our view, does not stand on its own, but is inextricably intertwined with other issues and questions requiring resolution, these being:

(i) was every adult citizen afforded the right to vote, without unreasonable restrictions? if so, what is the effect on the entire electoral process?

(ii) was the election free from intimidation, improper influence or corruption? did the 3rd respondent and his supporters, or any political party, instigate or encourage violence during the election period? were any electoral offences committed by the 3rd respondent?

(iii) did the 3rd respondent use public resources as campaign tools? did Cabinet Secretaries and State/Public officers engage in political campaigns and activities? what is the implication of such actions on the validity of the election?

(iv) did the 3rd respondent advertise Government achievements during campaign time?

(v) was the election conducted by an independent and impartial body, and was it administered in an impartial, neutral, efficient, accurate and accountable manner?

(i) Voting without unreasonable restrictions

282. It is the 2nd and 3rd petitioners case that the 1st and 2nd respondents violated the constitutional right to universal suffrage by failing to provide an opportunity for every person to vote in the fresh Presidential election held on 26th October, 2017. They urge in that regard that due to violence and intimidation, the 1st respondent chose not to conduct the election in 27 constituencies, thereby disenfranchising a significant part of the electorate.

283. On its part, the 1st respondent submitted that it provided the requisite infrastructure in all the polling stations across the country, and every effort was made to train the electoral officials in all the 290 constituencies, for the conduct of the 26th October 2017 election: save that it was prevented from taking electoral materials to certain polling stations, a matter beyond its control; and so, it was unable to hold elections in 27 constituencies, on the election date.

284. Like the 1st respondent, the 3rd respondent and the 2nd interested party submitted that every opportunity had been given to voters in the affected regions to exercise their right to vote. However, the insecurity witnessed on the voting day, prevented some voters from exercising their right.

285. Article 38 of the *Constitution* carries various dimensions of political rights, such as: (i) the right to political choice (Art.38(1)); (ii) the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors (Art.38(2)); and (iii) the right to be registered as a voter, to vote by secret ballot and to be a candidate for public or political office, without unreasonable restrictions (Art. 38(3)). For purposes of the issue at hand, the relevant parts of that Article are Clauses (2) and (3) thereof which guarantee the right to vote in the following terms:

> "(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free....
>
> "(3) Every adult citizen has the right, without unreasonable restrictions:
>
> (a) .....
>
> (b) to vote by secret ballot in any election or referendum....."

286. The dimensions of this right, and the corresponding obligations to effectuate it, have been extensively set out locally and in other comparative jurisdictions. In the case of *Moses Masika*

Wetangula v. Musikari Nazi Kombo & 2 Others, Supreme Court Petition No. 12 of 2014, [2015] eKLR this Court held [at para 112] that:

> "The overriding objective of the *Elections Act* is to functionalize and promote the right to vote. This requires a broad and liberal interpretation of the Act, so as to provide citizens with every opportunity to vote, and to resolve any disputes emanating from the electioneering process....."

287. The Constitutional Court of South Africa echoed a dimension of this right in *New National Party v. Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999), in the following terms:

> "(11) the *Constitution* effectively confers the right to vote for legislative bodies at all levels of government .... But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.
>
> (12) ...This means that the regulation of the exercise of the right to vote is necessary so that ... deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote.
>
> (13) the *Constitution* recognises [the necessity] to regulate the exercise of the right to vote so as to give substantive content to the right...."

288. As to who should guarantee the right to vote, Article 21(1) of the *Constitution* requires the State and State Organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. the *Constitution* and statute law charge the IEBC, a State Organ established under Article 88 of the *Constitution*, with the responsibility of safeguarding and guaranteeing the enjoyment of the political rights of the Kenyan people.

289. This is the position in other jurisdictions as well. In the case of *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC, the Constitutional Court of South Africa thus observed:

> "The right to vote by its very nature imposes positive obligations upon the legislature and the executive... this right which is fundamental to democracy requires proper arrangements to be made for its effective exercise. This is the task of the legislature and the executive which have the responsibility of providing the legal framework, and the infrastructure and resources necessary for the holding of free and fair elections."

290. It is not left to the State and State organs to guarantee the right to vote. The obligation equally binds the voters themselves. Thus in the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others*, S.C. Petition No. 2B of 2014; [2014] eKLR [Munya 2B], in a concurring opinion at paragraphs 247, 248, and 249, Mutunga CJ & P (as he then was), expressed this view in the following terms:

> "Constitutional provisions are by themselves not enough.The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the Constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote.... Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved:that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The electionbelongs to everybody, and it is, therefore, in everybody's collective interest, and in everybody's collective and solemn duty, to safeguard it" [emphasis supplied].

291. The Supreme Court of Ghana, in *Nana Akufo-Addo & 2 Others v. John Dramani Mahama & 2 Others*, Writ No. J1/6/2013 held that: "beyond the individual's right to vote is the collective interest of the constituency and indeed of the entire country in protecting the franchise."

292. On the same line of principle, the Inter American Court on Human Rights stated in the case of *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), that "the Court's task is to determine whether the [alleged] violation is the result of a State's failure to fulfil its duty to respect and guarantee those rights...." Thus, the question in the instant case is whether the State, IEBC and other State Organs, failed to take necessary action to ensure that the electorate, in the affected areas, were accorded an opportunity to vote.

293. From the affidavit evidence presented by the 2nd respondent, it is clear that between 21st and 27th October 2017, the 1st respondent and the Police exchanged correspondence on the security of not only the IEBC staff, but also that of the voters, in several parts of the country. The 1st respondent in particular sought urgent Police intervention to protect its staff from attacks of goons wielding pangas, rungus, stones and other crude weapons, who were disrupting training sessions for poll officials in Migori, HomaBay, Kisumu, Vihiga and Siaya Counties. Following meetings of the National Security Advisory Committee, the County Commanders were directed to liaise with the IEBC County Co-ordinators, and ensure that elections took place in the affected Counties. In particular, they were directed to ensure adequate security was provided for: election officials, escort for materials to and from the polling stations, and safe passage for voters as well as IEBC Officials to polling stations, and escort for all election materials. Other such measures included: rapid response from

the police, in case of threat to the safety of voters or officials; additional security personnel deployed to reinforce existing deployment; emergency evacuation procedures in case of threats to safety or natural disaster; and in high security areas, Joint Operation Centres had been activated, to allow quick coordination on emergencies.

294. On voting day, Police were called to restore order at St. Mary's Polling Station in Mikindani Ward Jomvu Constituency, and Kasikeu CAW in Kilome Constituency. In Kibra Constituency, under Police supervision, polling had to be relocated from the original Polling Centres to others.

295. On the basis of the evidence adduced, it is clear to us that violent demonstrations, actively orchestrated by certain political actors, prevented the conduct of the fresh Presidential election, threatened the lives of election officials, voters, electoral infrastructure and private property in certain parts of the country. Contrary to the petitioners' assertions, it is our further finding that neither the State nor IEBC or any other State Organ failed to fulfil its duty to respect and guarantee the right to vote. To the contrary, the evidence adduced indicates that the State (particularly the Police and the Ministry of Interior and Co-ordination of National Government) took preventative action to safeguard the safety of election officials, voters, election material and infrastructure. It is also evident that there was also active correspondence between the security agencies and the 1st respondent, on securing the country for the conduct of the fresh Presidential election. The police, furthermore, made arrests, and charged suspects of various crimes during the demonstrations.

296. Who, then, bears responsibility for the denial of the right to vote in the affected areas? We may find insight from the Constitutional Court of South Africa, in the case of *South African Transport and Allied Workers Union and Another v. Garvas and Others* (CCT 112/11) [2012] ZACC 13; [paragraphs 67 and 68] in which the Court thus observed:

> " The fact that every right must be exercised with due regard to the rights of others cannot be overemphasised....For this reason, the decision to exercise the right to assemble [and/or to picket] is one that...the organizers must ... always reflect on and reconcile themselves with the risk of a violation of the rights of [others]."

297. In a nutshell, it is our finding that neither the State nor the IEBC bears responsibility for failure of voting in certain regions of the country. Such failure ought to be attributed to unidentified private citizens and political actors, who actively caused the offending situations, directly or indirectly. The validity of the fresh election, however, cannot be successfully challenged on that ground alone.

(ii) Impediments: violence, intimidation, improper influence, corruption

298. It is the 2nd and 3rd petitioners' position that following the delivery of the Supreme Court decision on 1st September, 2017, the 3rd respondent addressed a public rally in Nairobi, in which he threatened 'to deal with' and 'sort' the Judiciary. These petitioners also contend that on 2nd September, 2017, the 3rd respondent had a meeting with Jubilee members of Parliament, and allegedly repeated his threat to Supreme Court Judges. They allege that such 'threats' were intended to send a message to the voters that the 3rd respondent would not allow the Court to freely determine disputes arising from a fresh Presidential petition, should a petition be filed again.

299. While being alive to the fact that the 3rd respondent has on various occasions expressed his dissatisfaction with the Judgment delivered by this Court on 1st September, 2017, we note, contrary to the 2nd and 3rd petitioners' position, that there is no evidence of any Judge of the Supreme Court being intimidated by the choice of words by the 3rd respondent, or of any voter being discouraged from voting on that account. In our view, it is not enough to reproduce the 3rd respondent's political statements, attribute an effect-upon- Judges to them, and invoke the scenario of unidentified voters, then reach the conclusion that such statements had an intimidating effect. As stated in both in the Raila 2013 and 2017 decisions, the burden of proof, at all times, lies on a petitioner: and generalised claims, without evidence that meets clear threshold, are of no value. Consequently, we find no basis for the petitioners' claim in this regard, and we dismiss the same.

300. The 1st and 2nd petitioners attributed acts of intimidation to the decision of Cabinet Secretary Dr. Matiang'i, to bar anti-IEBC demonstrations from the Central Business Districts (CBDs) of Nairobi, Mombasa and Kisumu. We are unable to see how the said actions of the Cabinet Secretary could have had any bearing on the validity of the Presidential election. The 2nd and 3rd petitioners have not shown the nexus, if any, between the actions of the Cabinet Secretary and the low voter-turnout. In the circumstances, we dismiss the allegation.

301. The 2nd and 3rd petitioners also submitted that sometime in October, 2017, during the campaigns, the State, headed by the 3rd respondent, withdrew police security personnel attached to the NASA Presidential candidate, his running mate and other principals in that coalition, thus rendering his participation in campaigns in the Presidential election risky, leading to his withdrawal from the election altogether. This allegation has also not been proved. Neither the Hon. Raila Odinga, nor his running mate, has sworn any affidavit to confirm the allegation, and even if it were true, there is no evidence that it had any impact on the Presidential election. That claim therefore fails.

302. The 2nd and 3rd petitioners claimed that on 2nd October, 2017, the 3rd respondent met 10,000 women supporters at State House, Nairobi, and officially launched a group known as the 'Jubilee Women Brigade; and adorned in Police and military uniforms, that group later went on to recruit and administer oaths to new members in areas such as West Pokot, Nakuru, Mombasa and Nairobi. According to the petitioners, the act of dressing in military regalia was meant to, and did intimidate voters who were not supporting the Jubilee Party. Such allegations, as we find, are made without any proof at all. We have no choice but to dismiss them. It is not enough to plead such a grave matter, without tangible evidence of its bearing upon the electoral process.

(iii) Public resources: to what extent did these feature in the conduct of election?

303. The 2nd and 3rd petitioners alleged that the 3rd respondent unlawfully used public resources, by involving Cabinet Secretaries and other senior State Officers in his political campaigns. They accuse the 3rd respondent of using and abusing State resources, including State House facilities such as vehicles and other public resources, in his political campaigns and activities. However, they cited names of Cabinet Secretaries who allegedly participated in the election campaigns, but without particulars showing the mode of the abuses, or the particulars which have had impacts on the elections.

304. We have noted that the role of Cabinet Secretaries is the subject of regulation under Section 23 of the *Leadership and Integrity Act*, and, even if the 2nd and 3rd petitioners had sufficient evidence, the alleged actions of the named Cabinet Secretaries cannot be challenged without first examining the governing law¾ a matter which was not brought before us. The complaint in that regard is without merit, and must fail.

(iv) Advertisement of Government achievements: what role in the electoral process?

305. The 2nd and 3rd petitioners contend that following the nullification of the Presidential election results for the election held on August 8, 2017, and throughout the campaign period, the 3rd respondent caused to be published by way of advertisement, the achievements of the Government, in the electronic media and in the Government delivery portal. According to them, the said advertisement was meant to exert improper influence upon voters to support the 3rd respondent's re-election bid, contrary to law.

306. We note that the same issue arose during the hearing of Raila 2017, and we observed that the issue of advertising by Government during campaign time was then under litigation in the High Court. Consequently, we restrained ourselves from delving into the merits of that issue, to allow the High Court, to proceed and determine it. Subsequently, on October 19, 2017, the High Court made a determination of the issue, in the case of *Apollo Mboya v.*

Attorney General & 15 Others, Petition No. 162 of 2017; [2017] eKLR. The High Court thus determined the matter:

> "(a) A declaration is hereby issued that the Kenya Government Delivery Portal/website www.delivery.go.ke to advertise the achievements by the National Government on various programmes and project undertaken across the country in the last four (4) years is unlawful as it was made in violation of Section 14(2) of the *Election Offences Act*, No. 37 of 2016 and against Articles 10 and 81(e) of the *Constitution* and therefore is null and void.
>
> (b) ....
>
> (c) An order of permanent injunction is hereby issued restraining the national Government whether by itself, agents, servants proxies and/or any other person acting under its or their authority or direction from advertising achievements by the national government of any programmes and or projects undertaken across the country in the last four (4) years in the Kenya government, delivery portal or in any other print media electronic media or by way of banners or hoardings in public places during the election period."

307. We note that, the High Court gave a clear determination on the said issue, and forbade the Government (not the 3rd respondent in any capacity) from advertising its achievements using State resources during campaign time. This decision was delivered on 19th October, 2017 just a week before the repeat Presidential election was held on 26th October, 2017, and it specifically related to events and actions prior to the election of the 8th August, 2017. The 2nd and 3rd petitioners do not indicate whether the 3rd respondent was in violation of the High Court Orders prior to the 26th October, 2017 election, or was specifically held liable for any advertisements by the Government prior to 8th August, 2017. They have also not indicated any specific instances where the Government, through the print and electronic media, advertised its achievements, during the campaign period for the election held on 26th October, 2017.

308. Consequently we find that there is insufficient evidence placed before us, on whether the 3rd respondent had, in any way, used government advertisements during the 60 days leading up to the election, as a campaign tool; and we have no option but to dismiss the petitioners' claims, in that regard.

(v) Impartiality and Independence: to what extent were these observed, during the election?

309. The 2nd and 3rd petitioners contended that the fresh election was not conducted by an independent and competent body, and that the record of this petition is replete with evidence that the 1st respondent, some of its commissioners, and its Secretariat were not independent of political influence, and neither were they impartial, fair or neutral. From that contention, they proceed to make the inference that 1st respondent was not competent in the conduct of the election and, that, consequently, the election was rendered a sham.

310. Such is a bare contention, which, besides, implicitly denigrates the very constitutional and legal process which has entrusted the conduct of election to but one, duly appointed agency – the IEBC. The contention, in effect, argues against the very concept of legality under the constitutional process, thus negating the essential democratic values of constitutionalism and legal process. Such a stand is negative, retrogressive, and invites disapproval by this Court. Accordingly we hold the contention in question to be devoid of merit.

5. Postponement of Election in some Constituencies: What effect?

311. Apart from the pleadings and submissions before Court, we take judicial notice of the fact that, there was violence experienced in some parts of the country, on October 26, 2017. The violence was more pronounced in the 25 constituencies where it was not possible to conduct an election. These 25 constituencies are considered and/or perceived as the strongholds of NASA, whose candidates had opted to not only withdraw from the elections, but also promoted the slogan, "No Reforms, No Elections", rallying their supporters to boycott the election. We take judicial notice of the fact that, in those constituencies, as well as parts of Nairobi, officials of the 2nd respondent were physically prevented from accessing the polling stations to which they had been assigned for the purpose of conducting the election.

312. In response to our question as to the cause of the said violence, Ms. Julie Soweto, counsel for the 2nd and 3rd petitioners, submitted that "it did not matter who caused the violence." In counsel's view, the fact that violence occurred in certain parts of the Country was enough to vitiate an election.

313. It was not, in our view, a meritorious response by learned counsel. Violence in any form, by any person or agency (private or State), against any person, community, institution or establishment, constitutes a travesty of justice and of the rule of law. Violence undermines the democratic process and makes a mockery of the pacific resolution of disputes which is one of the hallmarks of our progressive Constitution. Unchecked and unbridled episodes of violence, are a sure recipe for the disintegration of a nation, and the destruction of the constitutional order. This Court stands not for lending legitimacy to any acts of violence, as a device for settling disagreements.

314. Were any State agencies, such as the police who are allowed to resort to a limited measure of force to prevent crime, protect lives and property, and quell violent insurrection, to deploy excessive force resulting in injury, destruction of property or death, they certainly would be undermining the authority of the *Constitution*. By the same token, where civilians, for whatever reason, resort to acts of violence and intimidation, with the object of preventing others from exercising their democratic right to vote, or impeding election officials from executing their constitutional responsibilities, such civilians will engage themselves in the atavistic path of undermining the authority of the *Constitution*. Article 3(1) of this vital charter categorically declares that "every person has an obligation to respect, uphold and defend this Constitution."

315. The terms of Article 81(e) (ii) of the *Constitution*, read in proper context, must be understood to mean that no person, candidate, political party, party agent or supporter, or State agency is to resort to acts of violence, intimidation, improper influence or corruption, to defeat the will of the people exercising their democratic rights to vote. The said provision cannot be read as sanctioning or lending legitimacy to acts of violence and intimidation, to achieve the invalidation of an election. If we were to hold otherwise, the authority of the *Constitution* would be surrendered to cynical acts of violence: all that one would need to do, is to instigate violence in any corner of the Republic during a Presidential election, and thereafter petition this Court to nullify the election. Those who intentionally instigate and perpetrate violence must not plead the same violence as a ground for nullifying an election.

316. The right to vote is enshrined in Article 38 of the *Constitution*, which provides that:

> "(1) ...
>
> (2) ...
>
> (3) Every adult citizen has the right, without unreasonable restrictions??
>
> a) to be registered as a voter;
>
> b) to vote by secret ballot in any election or referendum; and,
>
> c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office" [emphasis supplied].

317. The operationalising statute, the *Elections Act*, thus provides in Section 3:

> "(1) An adult citizen shall exercise the right to vote specified in Article 38(3) of the *Constitution* in accordance with this Act.
>
> (2) A citizen shall exercise the right to vote if the citizen is registered in the Register of Voters."

318. We have already established that the Presidential election could not be held in certain constituencies because of the threat of insecurity caused by violent demonstrations. In that regard, the IEBC invoked Section 55B of the *Elections Act*, postponing the conduct of the repeat election to 28th October, 2017. The IEBC is empowered by the *Elections Act* to postpone an election in a Constituency, County or Ward, in circumstances specified by the Act. However, there is a *non-obstante* [a 'none-the-less' qualification] proviso to that provision; the Commission may, if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made. Section 55B of the *Elections Act* spells out that mandate in the following terms:

> "(1) The Commission may, where a date has been appointed for holding an election, postpone the election in a constituency, county or ward for such period as it may consider necessary where??
>
> (a) there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;
>
> (b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,
>
> (c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.
>
> (2) Where an election is postponed under subsection (1), the election shall be held at the earliest practicable time.
>
> (3) Notwithstanding the provisions of this section, the Commission may, if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted dates have been appointed, direct that a return of the elections be made" [emphasis supplied].

319. Inherent in the foregoing statutory provisions are certain vital points:

(a) the Commission is a constitutional body established under Article 88 of the *Constitution* to conduct elections. In particular, Article 88(5) mandates the Commission to "exercise its powers and perform its functions in accordance with the *Constitution* and national legislation;

(b) Article 82(1)(d) of the *Constitution* empowers Parliament to enact legislation to provide for the conduct of elections;

(i) the long title to the *Elections Act* describes it as "an Act of Parliament to provide for the conduct of elections to the office of the President, National Assembly, Senate, County Governor and County Assembly.....";

(ii) Section 55B of the *Elections Act* confers upon the Commission a discretion to consider the circumstances necessitating postponement of an election in an electoral unit, such as: the likelihood that a serious breach of the peace is likely to occur if the election is held on that date. There is a low threshold placed upon the Commission, in exercising its discretion to postpone an election for one reason or the other. Mere apprehension of breach of the peace may trigger the exercise of this power. In the instant case, there was actual, not imagined, threat of violence in the affected areas. Therefore, the Commission's actions were not outside the contemplation of this provision;

(iii) it follows, that Section 55B of the *Elections Act* is a normative constitutional derivative, annexed to Article 82 of the *Constitution*: to aid the conduct of elections, in line with the principles of the electoral system, and the prerequisites of voting pursuant to Articles 81 and 86 of the *Constitution*, and the right to vote.

320. Section 55B bears a non obstante clause that allowing the Commission to direct that a return of the election be made, if satisfied that the result of the election will not be affected by voting in the area in which voting remains outstanding. In terms of a Presidential election, this discretion is extended by Regulation 87 of the *Elections (General) Regulations*, 2012 in the following terms:

> " (3) Upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the Commission shall??

(a) verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre;

(b) tally and complete Form 34C;

(c) announce the results for each of the presidential candidates for each County;

(d) sign and date the forms and make available a copy to any candidate or the national chief agent present;

(e) publicly declare the results of the election of the president in a accordance with Articles 138(4) and 138(10) of the *Constitution*;

(f) issue a certificate to the person elected president in Form 34D set out in the Schedule; and

(g) deliver a written notification of the results to the Chief Justice and the incumbent president within seven days of the declaration;

Provided that the Chairperson of the Commission may declare a candidate elected as the President before all the Constituencies have delivered their results if in the opinion of the Commission the results that have not been received will not make a difference with regards to the winner on the basis of Article 138(4)(a)(b) of the *Constitution*..." [emphasis supplied].

321. In the present case, voters from 25 constituencies did not vote, due to politically-instigated violence. There were also individuals who opted to boycott the election. The IEBC then designated a different day for the elections to be conducted in the 25 Constituencies that had not voted. However, even on this specially-designated election day, elections could not be held in the said areas, due to violence; and the 1st respondent called off the repeat elections. Consequently, upon the tallying and verification of results being complete, the Commission declared the winning candidate as the President-elect, despite the electorate in the 25 Constituencies not having voted.

322. It is clear that the Commission made its declaration pursuant to Article 138 of the *Constitution*, Section 55B of the *Elections Act*, 2011 and Regulation 87 of the *Elections (General) Regulations*, 2012. On that basis, even though voters in 25 constituencies had not

voted, the declaration of results by the Commission was in perfect accord with the terms of the *Constitution*.

6. Illegalities and Irregularities: to what extent were these a factor in the electoral process?

323. One of the grounds upon which Petition No. 4 of 2017 is anchored is that the fresh Election was "marred by illegalities and irregularities." The petitioners cite several items under that head: failure to conduct nominations; ungazetted and undesignated returning and presiding officers and/or illegally appointed returning and presiding officers; ballot papers with candidates whose names should not have appeared; arbitrary relocation of polling stations on election day without notice;failure to conduct a legitimate, credible and transparent process; and lack of transparency. To support these allegations the petitioners rely upon the supporting affidavits of Mr. Njonjo Mue and Mr. Billy Atudo, sworn on 5th November, 2017.

324. We have already considered some of the alleged illegalities and irregularities in detail; in particular, the issue of nominations for the fresh Presidential election, and the appearance of certain candidate-names on the ballot paper. Our position on such issues is now quite clear.

325. The 2nd and 3rd petitioners contended that the conduct of election lacked transparency, for failing to disclose the total number of voters who had turned out to vote on 26th October, 2017. To support this, they argued that, on the 26th October, 2017, the 2nd respondent had intimated that the final voter turnout would be known by close of voting, at 17OO hours, but that the 2nd respondent failed to disclose the total extent of voter turn-out on 26th October, 2017; and that thereafter, the proportions kept changing, from 48% to 34%, and thereafter to 38%. In our view, the issue of changing percentages in terms of voter turn out did not in any way call into question the final tally announced by the 1st Respondent at the time he declared the results of the presidential election. It is this final tally that ought to have attracted the attention of the Petitioners

i. Returning Officers and Presiding Officers

326. The 2nd and 3rd petitioners contended that a number of Returning Officers and Presiding Officers in the election, did not turn up on the date of the election; and that the election was presided over by officials who had been illegally appointed, and that any returns prepared by such officials contravened the *Constitution*. To support this argument, the petitioners invoked the High Court decision in *Khelef Khalifa & Hassan Abdi v. Independent Electoral and Boundaries Commission*, Judicial Review Application No. 628 of 2017 [201] eKLR wherein the High Court had held that the appointment of Returning Officers and their deputies was illegal.

327. In response to this argument, all the respondents together with the interested parties, by contrast, submitted that the appointment of the Constituency Returning Officers and their deputies was legal and proper. The attention of this Court was drawn to the fact that the issue is subject of a pending appeal before the Court of Appeal. It was the respondents' further contention that, contrary to the petitioners' allegation, the Judgment by Odunga J in R*epublic v. IEBC exparte Khelef Khalifa & Another* JR No. 628 of 2017, [2017] eKLR, did not invalidate the appointment of the Constituency Returning Officers or their deputies. At any rate, they submitted that the said Judgment of the High Court had been stayed on the 25th October, 2017 by the Court of Appeal in *Independent Electoral and Boundaries Commission v. Khelef Khalifa & Another*, Civil Application No. 246 of 2017. The respondents urged this Court to exercise restraint, bearing in mind the hierarchy of the Courts.

328. From the submission of the parties, it is clear that this issue was canvassed in *Republic v. Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & Another*, Judicial Review Misc. Application No. 628 of 2017 (formerly Mombasa JR 58 of 2017 [2017] eKLR), and the Court held [paragraph *114*] that:

> " Having considered the issues raised herein and pursuant to Section 11 of the *Fair Administrative Action Act*, 2015, these are my findings:
>
> (1) The Respondent was under a constitutional and statutory obligation pursuant to Regulation 3(2) of the Elections (General) Regulations, 2012 to provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.
>
> (2) The Respondent did not provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.
>
> (3) In so doing the Respondent violated Regulation 3(2) of the said Regulations as read with Articles 38 and 81 of the *Constitution*.
>
> (4) Since there is no prayer seeking either the cancellation of the fresh elections due for 26th October, 2017 or their postponement, it would not be efficacious to grant the orders herein in the manner sought."

115. Therefore without sanitizing the said process, I decline to issue the reliefs sought herein in the exercise of my discretion not based on lack of merit, but on public interest."

329. Upon the delivery of the said Judgment, the IEBC filed an application at the Court of Appeal, Civil Appeal No 246 of 2017 seeking a stay of execution of the decision of the High Court, pending the lodging, hearing and determination of the intended appeal. Upon the hearing of the application, the Court of Appeal (Githinji E. M, Koome M. K, Sichale F JJA) made the following exparte interim Orders;

> " .....
>
> 7. The Impugned decision of the High Court has the potential of rendering the Presidential Elections slated for 26th October, 2017, irregular even before the elections are held thus precipitating another election outside the stipulated sixty days and in contravention of the provisions of Article 140 (3).
>
> 8. In deference of the sovereignty of the people and the supremacy of the *Constitution*, we order that the declaration by the High Court that the appointment of the Returning and Deputy Returning Officers was in violation of Regulation 3 (2) aforesaid as read with Articles 38 and 81 of the *Constitution* and the implementation thereof is hereby suspended and/or put in abeyance pending the hearing of the application inter parties.
>
> 9. For the avoidance of doubt, this order means that the Constitutional and Statutory functions of the Returning Officers and their Deputies relating to the Presidential Elections slated for 26th October, 2017 are not invalid."

330. In the above context, the petitioners' claim rests squarely upon a single case, KhelefKhalifa, which is now the subject of a pending appeal. By the High Court's decision, the said appointment of Returning Officers and their deputies, had been tainted with illegality: and so, all such returns as emanated from such officials, were in contravention of the *Constitution*, and consequently, the election result in question should be annulled – by the petitioners' cause.

331. Such a contention is contested by both the respondents and the interested parties. They maintain that the appointment of the constituency Returning Officers and their deputies, was in due compliance with the law in every respect. They urge further, that the issue is sub judice, as it is the subject of future determination by the Court of Appeal, which has

already ordered (in Independent Electoral and Boundaries Commission v. Khelef Khalifa & Another, Civil Appl. No. 246 of 2017) that the matter rests in abeyance, and is to occasion no prejudice for the moment, in relation to the exercise of the mandate of the said electoral officials. The respondents, in advancing their standpoint, have observed that Mr. Justice Odunga, in the Khelef Khalifa Case, had not taken any action to invalidate the appointment of the said polling officials.

332. Whereas the respondents' position represents a valid status quo, and the legal status of the Returning Officers thus cannot be denied, this Court has an obligation to set the matter to rest. The Court is considering an electoral matter in which it takes the first instance, and the ultimate instance. Its singular jurisdiction in the electoral matter is to be secured by holding that the current legal status of the said electoral officials, carries validity for now, and for the future: irrespective of such determination as may later be made by any other Court on the matter. Guided by exigency, and by judicial notice which must be taken of the reality of discharge of the assigned mandate of the electoral agency, we now hold that the officers in question lawfully held their positions, and duly discharged the constitutional mandate devolving to them. This is also because on the election date, the stay Orders granted by the Court of Appeal were firmly in place, and to state otherwise would be to negate the value of the validity of Court decisions, unless and until they are overturned. The decision of the High Court, to that extent, cannot be the basis for invalidating the 26th October election.

333. Accordingly, we find no validity in the petitioners' claim that the said Returning Officers and their deputies, lacked authority.

(ii) Was there arbitrary relocation of polling stations contrary to the law?

334. The 2nd and 3rd petitioners submitted that on the 26th October, 2017, without notice, or further direction to the voters, the 2nd respondent arbitrarily relocated the following polling stations, Kibra (1390) Sarangombe (Ward 023) KAG Olympic Educational Center with 3789 registered voters; and Kibra (1390) Sarangombe (Ward 024) Kibera PAG Church School with 2957 voters, and that this resulted in about 6,746 voters being disenfranchised, as only 2 voters managed to vote.

335. The petitioners contended that the 2nd respondent dishonestly claimed that an election had taken place in areas such as St Mary's Polling Station within Mombasa County, when the voters did not have a real opportunity to vote; and that this showed dishonesty, especially by representing that an election took place, when the majority of voters were disenfranchised. They urged that there was no fair election.

336. In response, the 1st and 2nd respondents stated that by moving the polling station, they acted within the powers provided for under Regulation 64(2) of the Elections (General)

Regulations 2012, which allows Presiding Officers to transfer polling to another polling station or public entity. In addition, it was their submission that the notices of transfer were displayed conspicuously at the polling stations, and anybody who visited the polling station would have seen them. It was there submission that the move was necessitated by the fact that the polling station had been barricaded and replaced with bonfires, and this, coupled with escalating violence, made it impossible to vote at these stations. Thus, the Returning Officer for Kibra advised the presiding officers to move to Olympic Primary School, which was secure; and they placed notices at the entrance of the centre, informing voters of the new stations. This was corroborated by the 3rd respondent, who emphasized that the 1st respondent's official acted within the law, and that the transfer was necessitated by violence that had erupted in Kibra Constituency.

337. With regard to Changamwe, the 1st and 2nd respondents relied upon the affidavit of the Returning Officer for Changamwe, Ms. Luciana Jumwa Sanzua, dated 12th November, 2017, who averred that no polling station was set up in any ungazetted area, as there was no occurrence of events such as to warrant such an action, and voting went on normally.

338. We note that the allegations as regards Kibra Constituency, have not been substantiated with any evidence showing that only 2 people voted at the polling station. No one has come up to say that he or she could not trace or find the polling station after it was moved. It is also admitted that the polling stations were moved as a result of violence that erupted, and that the 2nd respondent exercised the powers which are conferred on it under Regulation 64(2) of the *Elections (General) Regulations 2012*.

339. In this regard, the allegations by the petitioners are in generality, and are not supported by any evidence; and they have been rebutted by the various returning officers.

(iii) Voter identification, and transmission of results

340. The 2nd and 3rd petitioners submitted that at least 28% of the people who turned out to vote in the fresh election could not be identified biometrically, contrary to representations made by the 2nd respondent that they would put in place a Biometric Register that is secure and accurate. This, they submitted, raises doubt concerning the actual number of people who turned out to vote in the fresh election. It was submitted that the people who were identified by the KIEMS kit were only 5.5 million voters, and that there were about 78,000 voters who were not identified but still voted.

341. The 2nd and 3rd petitioners contended that, there were discrepancies between voter turnout as recorded in Forms 34A, and as captured/recorded in OT-Morpho's KIEMS Kits records/ logs in a sample of about 100 polling stations in Garissa and Muranga. It was contended

that, in some polling stations the turn-out gap between Form 34A and in the KIEMS Kit is more than half of the total number of registered voters in that station.

342. On behalf of the 1st respondent, it was submitted that for the authenticity of the transmission logs from the KIEMS kits that were provided to Court, the affidavit of Silas Njeru provided the requisite explanation. It was submitted that the KIEMS kits have different resolutions and it all depends on how the Returning officer sets it, as regards the pictures produced. The KIEMS kit is a stand-alone gadget and no image can be transmitted in the system unless it originates from the KIEMS kit.

343. On the failure to transmit both the text results and the image of the Form 34A, it was submitted by Mr. Mahat, counsel for the 2nd respondent, that first there was no evidence that anyone was prejudiced by the omission to transmit the text results. Secondly, upon the High Court Order to include Mr. Aukot and other candidates, the company reconfiguring the KIEMS kits was categorical, that having already reconfigured the kits with two candidates, it would need more time to incorporate all the candidates. However, this was not possible since the Supreme Court Order for a fresh election under Article 140(3) of the *Constitution*, was time bond. He urged that where there is a conflict between a regulation and the *Constitution*, it must be the *Constitution* that takes precedence.

344. The 3rd respondent went through the process of KIEMS Kits identification through Biometrics, and the complementary manual identification through the alpha-numeric setting, and document search using the surname, or other names. This was corroborated by the 1st interested party, who confirmed to Court that the complementary identification system was working.

345. The 3rd respondent urged the Court to find that the 2nd respondent acted in a transparent manner, by opening up its servers without being prompted immediately after the 1st respondent declared the 3rd respondent as the President-elect, on the 30th day of October, 2017, to enable candidates and observers to have access to information in its servers.

346. The 2nd and 3rd petitioners contend that through Kura Yangu Sauti Yangu (KYSY), they received and analysed about 1167 forms 34A from its observers. Out of the total 1,167 forms, 55 were not signed by agents while 1,112 had agents. Out of this number 1,106 forms were signed by the Jubilee Party Agents only; out of the 266 Forms 34B obtained and analysed by KYSY from the 2nd respondent's portal, 250 were signed only by Jubilee Party Agents and only 12 were signed by Jubilee agents as well as other party agents. Only 1 form was signed by a non-Jubilee agent. Only 3 forms were not signed by any agent; out of the 266 forms 34B obtained by KYSY from the 2nd respondent's portal, 260 forms have serial numbers on every page while 6 don't have serial numbers on every page; from the 266 forms 34B obtained and analysed by KYSY from the 2nd respondent's portal, "handover" sections were

fully completed in only 13 forms, handover sections were partially completed in 55 forms and handover sections were blank in 198 forms. There were no Forms 34B that contained fully completed "takeover" sections.

347. Following this, the petitioners submitted that despite the Supreme Court's decision that the Forms 34A, B and C need to be standardized, verifiable, accurate and authentic, there is evidence as outlined above, that some of the forms transmitted by the 2nd Respondent are either forgeries, had mathematical errors or were altered.

348. In response, the 3rd respondent, on his part submitted that the 1st respondent conducted elections that are free, fair, secure, and transparent, devoid of discrimination, with full participation of the public and other stakeholders and in a manner that is simple, verifiable and accountable.

349. The difficulty with the 2nd and 3rd petitioners' submission on this issue is that, not being candidates or agents, may not really be privy to the nitty gritty of the operations of the electoral process. It is undisputed that the 2nd respondent developed a compliance and a legal matrix to guide it in the transmission process. The petitioners, however, make general allegations, but without specifying in which manner transparency was not achieved, and in what aspect.

350. It is worth noting that most polling stations had agents mainly from the 3rd respondent's party. However, save for the bare allegations made by the petitioners, we were unable to detect such serious anomalies as to demand that the election should be invalidated.

(iv) Voters Register

351. The 2nd and 3rd petitioners urge that the 2nd respondent did not put in place a Biometric Voter Register (BVR) that was secure and accurate making it prone to electoral fraud. They submitted that according to the evidence on record, at least 28% of the people who turned out to vote in the fresh election could not be identified biometrically, raising doubt as to the actual number of people who voted.

352. It was urged that failure to use the electronic system of voter identification (Electronic Voter Identification Device-EVID) to identify voters was meant to misrepresent the voter turnout. In addition, that there were unexplained changes in the total number of registered voters between 30th June, 2017 (the date when the Register was gazetted for purposes of the General Election) and 26th October, 2017, (the date of the fresh presidential election).

353. It was submitted that in an audit conducted by KPMG on the Voters' Register, only about 5000 voters were classified as having been registered without biometric records, yet, the 2nd respondent claimed that there were about 1.6 million voters identified without biometrics.

In the 2nd and 3rd petitioners' view, this was indicative of electoral fraud and breached their legitimate expectation that the ICT systems would work with a seamless complementary mechanism in cases where the KIEMS kit experienced systems failure. They referred to the Court of Appeal's decision in the case of National Super Alliance Coalition (NASA) v. Independent Electoral and Boundaries and Boundaries Commission, Civil Appeal No. 258 of 2017 (The NASA case) to elaborate on the meaning of the term 'complementary mechanism' under Section 44A of the *Elections Act*.

354. It is our perception that, the issue of a Voters' Register when raised in any election proceedings, is a primary issue for determination. Registration of voters is also a constitutional imperative, by Article 83 of the *Constitution* which outlines the prerequisites of voter registration, in the following terms:

> "(1) A person qualifies for registration as a voter at elections or referenda if the person –
>
> (a) is an adult citizen;
>
> (b) is not declared to be of unsound mind; and
>
> (c) has not been convicted of an election offence during the preceding five years.
>
> (2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.
>
> (3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election."

355. Registration facilitates the effectuation of the right to vote. Article 38(3)(a) decrees that every adult citizen has a right, without unreasonable restrictions, to be registered as a voter. As such, the right to vote cannot be fully enjoyed if the registration of voters is not properly conducted. The 2nd and 3rd petitioners thus contend that:

(i) the Voters' Register was not simple, accurate and verifiable;

(ii) there were more than one Voter's Register between the General Elections held on 8th August, 2017 and the fresh election conducted on 26th October, 2017;

(iii) the KPMG Audit Report noted numerous anomalies in the Register, that were not addressed before the fresh Presidential election; and

(iv) the Register facilitated multiple voting.

356. These concerns have been rebutted in the responses filed by the 1st, 2nd and 3rd respondents in their various depositions. Certain factual concessions were, however, made. The allegation that the Register kept mutating was withdrawn in the last paragraph of Mr. Billy Atudo's affidavit, as noted by counsel for the 3rd respondent, Mr. Tom Macharia. It was further noted that the varying figures were as a result of the inclusion of prisoners in the County totals. A pertinent issue of factual verification, however, is whether the total numbers of registered voters declared by the 1st respondent in Forms 34C, during the 8th August and 26th October elections, and those published in the Gazette in terms of Section 4 of the *Elections Act* and Regulation 12(4) of the General (Registration of Voters) Regulations, 2012 tallied.

357. Exhibit 'WC-2' annexed to the Affidavit of Ms Winnie Guchu is a Gazette Notice No. 6250 dated 27th June, 2017 certifying that the revision of the Register of voters had been completed for purposes of the General Election held on 8th August, 2017. The total number of registered voters in all the Counties, according to this Gazette Notice totaled 19,601, 502. In addition to this number, a total of 5, 528 persons were registered in the prisons, and a total of 4,393 registered in the diaspora, making a grand total of 19,611,423. Exhibit WC-3, Gazette Notice No. 8751 annexed in the Affidavit of Ms. Guchu suspended the registration of voters and revision of the voters' roll, until 8th November, 2017. The import of this suspension is that the total number of registered voters contained in the Register used for the 8th August General Election was still in operation during the 26th October, 2017 fresh Presidential election. Did the numbers match? Evidence was pointed to the Form 34C, generated during the 8th August General election and the fresh Presidential election. According to the evidence provided by the 1st respondent, the total number of registered voters, according to Form 34C was 19,611,423 registered voters, which tallies with the number recorded in the Gazette Notice No. 6250.

358. The 2nd and 3rd petitioners did not lead further evidence to prove the alleged changes in the number of Registered Voters, or that indeed, this affected the outcome of the fresh Presidential election. In any event, the existence of these differences is attributed to the inclusion of prisoners from the total numbers by Kura Yangu Sauti Yangu. The evidence adduced by the respondents, therefore, sufficiently discharges the petitioners' allegations of an inconsistent Voters Register.

359. On the issue of the KPMG Audit Report, it was alleged that the 1st respondent did not comply with the recommendations of the KPMG Audit Report to, inter alia, deal with the presence of dead voters in the Register. What was the genesis of this audit?

360. Part II of the *Elections Act* comprehensively covers "Registration of Voters and Determination of Questions Concerning Registration." Section 8A (3) of the *Elections Act* places a mandatory obligation on the Commission to engage a reputable firm to conduct

an audit of the Register of Voters, for purposes of, *inter alia*, verifying the accuracy of the Register and updating the Register. That Section reads:

> " Audit of the register of votes
>
> (1) The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of –
>
> (a) verifying the accuracy of the Register;
>
> (b) recommending mechanisms of enhancing the accuracy of the Register; and
>
> (c) updating the register.
>
> (2) ....
>
> (3) For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of –
>
> (a) verifying the accuracy of the Register;
>
> (b) recommending mechanisms of enhancing the accuracy of the Register; and
>
> (c) updating the register.
>
> (4) The firm engaged under subsection (3) shall conduct the audit and report to the Commission within a period of thirty days from the date of engagement.
>
> (5) The Commission shall, within fourteen days of receipt of the report under subsection (4), submit the report to the National Assembly and the Senate.
>
> (6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate" [emphasis supplied].

361. From the materials on record, we noted that in April, 2017, the 2nd respondent formally engaged KPMG to conduct an Audit on the Voters' Register with the following objectives:

(i) to verify the accuracy of the register; to (ii) recommend mechanisms for enhancing accuracy of the register and updating the register. According to a press release issued on 9th June, 2017 by the IEBC, after completion of the exercise, the scope of the audit was to:

(i) review the legal framework relating to voter registration;

(ii) review the voter registration process, voter transfer process and voter updates processes;

(iii) review the Biometric Voter Registration System and database that hosts the Register of Voters;

(iv) review the process of identifying and removing deceased voters from the Register of Voters;

(v) assess the accuracy of the Register of Voters in terms of completeness of the details of voters' data and matching of voters details (Biometrics) to the voter;

(vi) assess inclusiveness of the Register of Voters in relation to eligible voting population based on gender, age and geographic distribution;

(vii) review and recommend improvements on existing mechanism for continuous update of the Register of Voters;

(viii) analyze the security of the registration of voters' data and infrastructure it sits on; and

(ix) make recommendations for enhancing the accuracy and inclusiveness of the Register of Voters.

362. The 2nd respondent, in addition, has submitted a copy of the Audit Report to Parliament, in line with the law. The recommendations in the report covered eight broad areas as follows:

(i) stakeholder engagement and feedback;

(ii) legal and institutional issues;

(iii) inaccuracies in the Register of Voters;

(iv) irregularities in the Register of Voters;

(v) deceased persons in the Register of Voters;

(vi) inclusiveness in the Register of Voters;

(vii) database security and infrastructure controls; and

(viii) action plan for implementing recommendations.

363. The 2nd respondent further issued a commitment to continue with stakeholder engagements, to promote transparency in the Register of Voters. The report also noted that, in order to address emerging data issues, it was imperative for the 2nd respondent to assert its independence, as well as cooperate with other reinforcing external agencies such as those concerned with immigration and registrations of births and deaths. This, the report noted, was outside the internal ambits of the 2nd respondent, and included institutional co-ordination and collaboration. The Report also noted that at least 5,427 records lacked biometric fingerprint images in the Register. A total of 2,900,089 records had a number of inconsistencies such as: mismatched gender and date of birth; mismatched date of birth; inconsistencies in gender, names and particulars. IEBC noted furthermore that where the details in the Register were confirmed to be invalid, they would be expunged from the Register. The 2nd respondent in that regard indicated that it would reconcile audit findings, and address gaps within 5 days of the press statement, which process had commenced during verification; and that other issues would be addressed through the new infrastructure and database security software which had been acquired.

364. The 2nd respondent has also pointed out that the Register used by KPMG for the audit was provisional in nature. Consequently, it thereafter undertook a verification exercise, which cleaned up the Register including, removing names of dead voters. Although allegations of Voters' Register permutations and inaccuracies were raised, particularly with respect to the aspects addressed in the Audit Report, clear, specific, and direct allegations regarding the Voters' Register, and its effect on the conduct of the fresh Presidential election, were not made. Indeed, the respondents rebutted these allegations systematically, and while the audit report was a statutory requirement by Parliament to improve transparency and enhance the accuracy of the Register, the implementation of the recommendations by KPMG required actions on the part of IEBC, as well as cross-institutional collaboration, to facilitate implementation.

365. The more essential concern for the purposes of these proceedings is, whether the allegations made in the petition concerning the Voters' Register affected the outcome of the fresh Presidential election. The Voters' Roll is the centerpiece of an electoral process. At the heart of the right to vote is the obligation of the State to ensure that the registration of voters is undertaken and discharged properly. the *Constitution* addresses voter registration in four separate Articles, namely: (Arts. 38(3)(a); 82(1)(c); 83; and 88(4)(f)). Kenya's history of elections features voter registration as one of the aspects that required intensive reform. When this Court determined the *Raila 2013* case, the conclusion was that the Register was a product of several components. To consolidate these components into one central location, the KIEMS was introduced, which is a one-stop gadget, with three functionalities, these

being: voter registration; voter identification; result transmission. Each of these components is independent, yet they all reinforce the electoral process.

366. Voter identification addresses some of the fundamental issues that arose in earlier elections. According to the 2nd respondent, it is an elaborate system of identification, structured in a way that does not negate any persons' right to vote. The composite of the voter identification designs are: Biometric identification; alphanumeric search with reference to identification documents; alphanumeric search with reference to physical keying in of the biographic data; Presiding Officer Authentication (Supervision mode); and complementary identification. With the checks guaranteed by these elaborate modes of identification, most of which were witnessed by voters, and visible in the eviRTSlogs provided by the 2nd respondent, the 2nd and 3rd petitioners have not met the dictates of proof to show that: dead persons participated in the election; unqualified persons voted; persons with special needs were denied the chance to vote or that the total number of registered voters was in doubt at the time of the election.

367. We further note that Section 2 of the *Elections Act*, 2011 defines a "Register of Voters" to mean a current register of persons entitled to vote at an election, prepared in accordance with Section 3, and includes a register that is compiled electronically. As such, a print-out of the electronic register for purposes of the election was not in violation of the law. Indeed, as submitted by counsel for the 3rd respondent, Mr. Tom Macharia, Regulation 61 (4) of the *Elections (General) Regulations, 2012*, requires the "Returning Officer to provide each polling station with both electronic and hard copy of the Register of Voters or such part thereof as contains the biometric data and alpha numeric details of the voters entitled to vote at a polling station."

368. In addition to the above, we note that the Voters' Roll is subject to periodic inspection as decreed by Section 6 of the *Elections Act*, 2011. The discretion to determine when a Register is closed to inspection rests with the Commission. This is necessitated by the administrative needs that attach to electoral management and preparation. This continuous exercise, therefore, shows that the Commission was not under immediate obligation to act on the recommendations of KPMG.

369. The Voters' Roll is a living document; with the addition of eligible persons entitled to vote, and the exit of others, its character also changes, necessitating regular updating. In this regard, Section 8 of the *Elections Act*, 2011 is very instructive:

> "(1) The Commission shall maintain an updated Register of Voters.
>
> (2) For purposes of maintaining an updated register of voters, the Commission shall?
>
> (a) regularly revise the Register of Voters;

(b) update the Register of Voters by deleting the names of deceased voters and rectifying the particulars therein;

(c) conduct a fresh voter registration, if necessary, at intervals of not less than eight years, and not more than twelve years, immediately after the Commission reviews the names and boundaries of the constituencies in accordance with Article 89(2) of the *Constitution*;

(d) review the number, names and boundaries of wards whenever a review of the names and boundaries of counties necessitates a review; and

(e) revise the Register of Voters whenever county boundaries are altered in accordance with Article 94(3) of the *Constitution*."

370. The Supreme Court of India reaffirmed the living nature of the Voters' Roll in the case of *Lakshmi Charansen and Others v. A.K.M Hassan Uzzamanand Others*, 1985 SCC (4) 689 SCALE 384, in terms that commend themselves to this Court, as follows:

> "It is true as submitted on behalf of the Election Commission, a perfect electoral roll is not possible. But at the same time, it must be remembered that the name of any eligible voter should not be omitted from, nor the name of any disqualified person included in the electoral roll, in violation of any constitutional or statutory provisions. The error, when pointed out, has to be removed" [emphasis supplied].

371. The processes outlined by the law relating to registration, verification, inspection, audit, transfer of registration, and updating the Voters' Register, are all time-bound. In this case, the 3rd petitioner question processes that occurred before the conduct of the General Election on 8th August, 2017. As was rightly pointed out, the question of the Register was addressed by the Court (paragraph 301 of the Majority decision) in Raila 2017, and we have been satisfied that the 1st respondent did not alter the Register as alleged by the 2nd and 3rd petitioners. All evidence adduced and analysed leads to a contrary position. As such, the answer to the question: what was the effect of alleged neglect by the 1st respondent to address issues raised in the KPMG audit? must lie in a finding of "no effect."

372. In view of all the evidence presented, and the submissions, the 2nd and 3rd petitioners' grounds on the Voters' Register, must fail.

373. This Court has already pronounced itself in unequivocal terms, on the effect of irregularities upon an election. The legal position remains as stated in the majority decision of the Court in Raila 2017. Our view is informed by the conclusion which we have made, as to the applicable law in relation to the 26th October, 2017 election. This may be simply restated: not every irregularity or procedural infraction is enough to invalidate an election. The irregularities must be of such a profound nature as to affect the actual result, or the integrity of an election, for a Court of law to nullify the same.

374. We have painstakingly considered the petitioners' case, as stated in the petition and accompanying affidavits. We have, in equal measure, considered the respondents' replies, and the accompanying affidavits. We have read, and listened with undivided attention to the submissions of all counsel, regarding the issue of illegalities and irregularities. We have taken note of the fact that while the petition makes far-reaching allegations of irregularities, the same have been effectively rebutted, or explained away in replying affidavits, and submissions of counsel.

375. Our examination of sample materials submitted to the Court by the 1st and 2nd respondents (Forms 34A 34B and Form 34 C), as against the ones attached to the petitioners' pleadings, lends credence to the explanations given to the Court by the respondents. It was not lost on us that, while the 2nd and 3rd petitioners made serious allegations of widespread malpractices having characterized the election, various counsel for the petitioners spent most of their allocated time addressing us on collateral issues, instead of laying evidence, and discharging the burden of proof, by addressing the respondents' written submissions.

376. This finding leads us to the unavoidable conclusion that the petitioners have not discharged the burden of proof to the standard established by this Court. At no time, in our view, did the burden shift to the 1st and 2nd respondents. By the same token, the Court has not been persuaded that the respondents violated the applicable electoral law, in the management of the October 26, 2017 election.

7. Election Laws (Amendment) Act, 2017

377. The 2nd and 3rd petitioners plead in paragraphs 74 and 75 of their petition, inter alia, that the Elections Laws (Amendments) Bill, 2017 was intended to diminish the role of technology in elections, open election results to manipulation, and signal to voters that it would not be possible to successfully challenge the results of the fresh Presidential election, even if the same were to be unconstitutional, unlawful or irregular. They state that the said Bill has since become law, with the overt approval of the 3rd respondent, and has been gazetted as *Election Laws (Amendments) Act*, Number 34 of 2017. Consequent upon that pleading, the petitioners raise, for determination by this Court (at paragraph 140 of the Petition), the

issue that, in light of the amendment of Section 83 of the *Elections Act* by the *Election Laws (Amendment) Act, 2017* after the conduct of the fresh Election, the question: which law is applicable for purposes of determining the present dispute? and, whether Section 83 of the *Elections Act* as amended is unconstitutional and invalid.

378. The petitioners then seek various reliefs, the one relevant to the above pleading being, that a declaration be made that Section 83 of the *Elections Act* (as amended) is unconstitutional and invalid, to the extent of its inconsistency with the *Constitution*.

379. As regards the issue of the applicable law in respect of the October 26, 2017 election, our view is that, as at the time the cause of action arose, to wit, the October 26, 2017, the law then applying was the *Elections Act*, 2011. The amended laws did not become effective until the November 2, 2017. In that context, the common practice is that legislation should be effected prospectively and not retrospectively; that is, laws should be forward-looking and should not apply backwards in time. Prospective application of legislation is based on ancient Roman and English common law – see *Fray v. Omaha World Herald Co.,* 960 F.2d 1370, 1374 (8th Cir. 1992). "Prospectivity" is also consistent with elemental notions of fairness; as stated in the U.S. Supreme Court concurring opinion in *Kaiser Aluminium & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) of Mr. Justice Scalia:

> " The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."

380. It is a conventional rule of construction that, legislation must be addressed to the future, and a statute should not be given retrospective operation, interfering with antecedent rights. We are inclined to the standpoint that, legislation should bear only prospective effect, in the absence of special legislative signal to the contrary. Where a legislative body thus wishes to change the law regarding a past event/action, its intent is to be clear enough. By this principle, where legislation is ambiguous, or silent as to its effective date, it should be presumed to be prospective.

381. In the present instance, when Parliament passed the amendment to Section 83, it did not state that the law shall apply retroactively. The United States Supreme Court, in *Landgraf v. USI Film Prods*. 511 U.S. 244, 265-73 (1994), limited this presumption to statutes altering substantive rights. That Court presumed prospectivity to avoid construing a new law that otherwise might have attached new [post-enactment] legal consequences "to events completed" before the law's enactment. Although the Landgraf case dealt with private actions, the reasoning is in our view, germane to the instant matter.

382. This Court has, furthermore, already pronounced itself on the retrospectivity of laws, in the case of *Samuel Kamau Macharia v. Kenya Commercial Bank Ltd* [2012] eKLR (at paragraph 61), to the effect that a retroactive law is not unconstitutional unless it:

(i) is in the nature of a bill of attainder;

(ii) impairs the obligation under contracts;

(iii) divests vested rights; or

(iv) is constitutionally forbidden.

383. The issue in this petition, however, is that the amended law was not made retroactive by Parliament, and should, therefore, be read prospectively. It is noteworthy that, in addressing the same issue in *Moses Masika Wetangula v. Musikari Nazi Kombo* [2014] eKLR, the Court of Appeal adopted the *dicta* in Morgan v. Simpson [1974] 3 All ER 722, and took the position that an election must be guided by the law as it was on the date of the election. The Court thus stated the rationale:

> " This was a reiteration of the globally established principle that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law of that election."
>
> (See also Lon L Fuller "*Eight Ways to Fail to Make Law*" in Feinberg and Coleman (eds) *Philosophy of Law* (Thompson Learning, 2000) 91-94.)

384. From the foregoing, we find that the applicable election law, in respect of the conduct of the October 26, 2017 election was the *Elections Act*, 2011, the *Elections Laws (Amendments) Act, 2017* (*Act No. 34 of 2017)* not having come into effect as at the time of that election, and the same not having had retrospective application.

385. The second issue is this: the 2nd and 3rd petitioners seek a declaration that Section 83 of the amended law is unconstitutional and invalid. Having taken into account all the submissions on the matter, and being aware, as we are, that the amended law is the subject of various pending causes before the High Court, such as in Nairobi High Court Petition No. 548 of 2017 – *The Katiba Institute & Africa Centre For Open Governance v. Hon. Attorney General & The Government Printer*, we restate our stand in similar circumstances, as in Re the Matter of the Interim Independent Electoral Commission where this Court stated para paragraph 47.:

> " The application is still more inappropriate in the light of the several petitions pending before the High Court: Constitutional Petition No. 65 of "2011 –

> Milton M. Imanyara & Others v. Attorney General & Others; Constitutional Petition No. 123 of 2011 – John Harun Mwau –vs- Attorney General. The two cases seek the interpretation of the *Constitution*, with the object of determining the date of the next elections. Those petitions raise substantive issues that require a full hearing of the parties; and those matters are properly lodged, and the parties involved have filed their pleadings and made claims to be resolved by the High Court. To allow the application now before us, would constitute an interference with due process, and with the rights of parties to be heard before a Court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. This is a situation in which this Court must protect the jurisdiction entrusted to the High Court."

386. However, the above position can be distinguished, as we have stated elsewhere in this Judgment, from a matter arising in the course of a Presidential election in regard to which the Supreme Court has unqualified jurisdiction, and where the issue essentially relates to a petition before the Court. The Supreme Court, in its advisory opinion in, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR Advisory Opinion No. 2 of 2012, thus stated its jurisdiction to adjudicate over any dispute touching on the presidential petition, whilst acknowledging the mandate of the High Court on determining the constitutionality of a statute (paragraph 76):

> " For the Court to have jurisdiction, the Reference must fall within the four corners elucidated ...It was, however, argued on behalf of CREAW that since appeals of this issue of two-third gender principle are now before the Court of Appeal a decision on this Reference could render them nugatory. It is true that this Court's decision binds the Court of Appeal, but it is for the Court of Appeal to make such a decision. I have no evidence that the pending appeals are on all issues raised in this Reference. In any event this Court has held that it will decide matters that come to us on a case-by-case basis. We have also held we should not subvert the jurisdiction of the courts below. The Court of Appeal will take its golden chance to enrich the jurisprudence in this area."

387. The overlapping jurisdiction between the High Court and the Supreme Court only arises when interpreting or applying the provision in so far as it relates to the Presidential petition. Where however, the challenge to a statutory provision is directed as a ground in the context of a Presidential petition, the Supreme Court should not find any difficulty in addressing the same in the context of a Presidential petition. This does not exclude the power to refer the matter to the High Court, for its proper disposal, depending on the circumstances.

388. We find no reason, therefore, to disturb our already settled principle of not taking away the jurisdiction of other Superior Courts, and determining issues pending thereat. We thus would restate our position in *Raila 2017*, [paragraph 313]:

> " Having that in mind and fortified by our observation that the interpretation of Section 14 of the *Election Offences Act* is a live matter at the High Court, we are unable to address our minds to any allegation that touches on this section. That is the end of the matter."

389. Similarly, we leave the issue of the unconstitutionality or invalidity, or otherwise, of Section 83 of the amended law to the determination of the High Court, where the matter is currently under consideration. In stating so, we see no prospect of the High Court making a finding that would affect our determination of the present Presidential election petition.

8. Legitimacy and Credibility of the Presidential Election

(i) Was the election held on 26th October, 2017 and its results, legitimate and credible, both in fact and in law?

390. The only substantive question that is left unanswered is whether the election conducted on 26th October, 2017 lacks legitimacy and credibility? The 2nd and 3rd petitioners, in that regard, argue that the election was not conducted in a conducive environment; that many voters were disenfranchised; and that the low voter turn-out was a manifestation of a seemingly low quality election, that was defective on all fronts. In analyzing this issue, we will begin by examining the meaning and applicability of the term 'legitimacy' and 'credibility', in the general context of a Presidential election, and finally apply the concepts to the facts of the case.

(ii) Legitimacy

391. The relevant definition of "legitimacy", in this context, is set out in the *Concise Oxford English Dictionary*, 12th ed. (Angus Stevenson & Maurice Waite) (Oxford: Oxford University Press, 2011), p.814: "...able to be defended with logic or justification." From this meaning, it is clear that "legitimacy" is a broad yardstick, essentially concerned with propriety, or lack of it.

392. In that context, two scholars, Professors Patrick McAuslan and John F. McEldowney in their work, *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey's Law of the Constitution* (London: Sweet & Maxwell, 1985), p.2n have perceived that "a claim to political power is legitimate only when the claimant can invoke some source of authority beyond... himself." And, equally relevant is the perception of Professor Maurice Duverger

in his book, *Political Parties: Their Organization and Activity in the Modern State* (London: Methuen & Co. Ltd., 1964), p.26: "an institution is legitimate when it corresponds to the dominant doctrines of a period, to the most widely held beliefs on the nature and form of power."

393. From such a background of scholarly theory, it is clear that Kenyan elections have to be evaluated, in their general outlook, in the context of recognized legal practice; of the operative law and governance institutions; and of the profile of stable socio-political order and of economic dynamics that have sustained, and continue to sustain the community.

iii "Credibility"

394. The term "credibility" is still more subjective, *Black's Law Dictionary*, 8th ed. (Bryan A. Garner) (St. Paul, MN: West Group, 2004), p. 396 defining it as "the quality that makes something worthy of belief." Credibility in whose terms? We take the view that the term must be measured in the eyes of the general population for whom dependability and sustainability are all-important, on a day-to-day basis. Indeed, the rationale of the electoral process is that it should facilitate dependability of governance for the voting public. Though the test is largely subjective, the Court's task is to rest its findings on its classical yardsticks of legality, rationality and objectivity, being guided by its true, professional understanding of the public interest.

395. Thus in addressing credibility in the context of the impugned election among other things, the Court must adhere to verifiable criteria, such as:

> was there valid preparation for the election?
>
> did the election take place? was the conduct of the election guided by prescribed law?
>
> what scope of discretion existed within the law?
>
> was this duly exercised? was a candidate duly declared elected?
>
> in general picture, was the constitutional task accomplished?

396. As already stated, the 2nd and 3rd petitioners contest the credibility of the 26th October 2017 election on the basis of claims of "restrictions of right to vote" in some constituencies and of claims that the State occasioned such restrictions; of claims of violence occurring in such constituencies; of fear of bodily injury in such constituencies; of acts of intimidation in such constituencies. It is also alleged that some citizens, in such constituencies directly, prevented voting, by other citizens and that blockages to polling activities did occur. How do such factors feature in the credibility-profile of the elections, in the nation at large?

397. We note in that regard that the 2nd and 3rd petitioners contend that the election conducted by the 1st and 2nd respondents on 26th October, 2017 fell outside the principles stipulated under Article 81(e) of the *Constitution* which is concerned with free and fair election. They thus contend that the election was not free from violence, intimidation, improper influence or corruption.

398. The 2nd petitioner specifically swears in his affidavit in support of the petition that the 3rd respondent had addressed a public rally on 1st September, 2017 issuing threats to the Judiciary: and he avers that the said threat had kept off voters from the polls, during the repeat election of 26th October, 2017. He also averred that the launch of the "Jubilee Women Bregade" had intimidated voters who, consequently, failed to turn up for the repeat election.

399. The 2nd petitioner also invoked a statement emanating from the 1st respondent on 18th October, 2017, that he had encountered political interference, threats and pressure emanating from fellow Commissioners thus creating doubts as to the legitimacy of the election he was to preside over.

400. The 2nd petitioner further claims that the election process had been affected by rioters and security officers in two polling centres in Kibra, and in the counties of Siaya, Homa Bay, Kisumu and Migori. He also relied on a statement in a report by the Election Observation Group (ELOG), of 1st November, 2017, that the election had taken place in a tense political environment occasioned by lack of trust in IEBC. The deponent attributed to such lack of trust, ELOG's inability to send its observers to certain parts of the country viz. Busia, Bungoma, Vihiga, Kakamega, Kisumu, Migori, Homa Bay, Siaya, Nyamira and Kisii.

401. The 2nd and 3rd petitioners relied too on the affidavit of one accredited observer, Mr. John Paul Obonyo, who deponed that a number of people had the practice of burning tyres on the road in affected areas and had prevented the IEBC from accessing a polling station at an informal settlement known as Bangladesh.

402. In the class of such statements for the proposition that the election was conducted in a condition of violence, the petitioners have come with other allegations that are not in sworn statements as we have already demonstrated earlier parts of this judgment. For example, it is claimed that men in military and police uniforms were seen in Nairobi; that there was militia-group activity and that there was the taking of oaths, prayers, and practices which had in the past been associated with the Mungiki sect. It was further claimed that the Police, and persons dressed in police uniform, forcefully broke into houses in areas deemed to be NASA stronghold, beating up and maiming men, and raping women: it was alleged that such use of force was intended to provoke, and had the effect of provoking the voters in such areas to abstain from going to polling stations.

403. Such general allegations include the attribution of scare-mongering to the Cabinet Secretary for Internal Security, Dr. Matiang'i – against any inclination to vote for any other candidate a matter we have already addressed.

404. There are similar allegations to the effect that there had been a withdrawal of police security personnel attached to the NASA presidential candidate and his running mate, and other co-principals; and that the police openly superintended and aided the disruption of a NASA rally in Meru.

405. The 2nd and 3rd petitioners thus contend that the voting environment, on the whole, was not conducive to the proper conduct of fresh election in most parts of the country. Yet, as the petitioners contend, the 1st and 2nd respondents still proceeded and purported to conduct fresh Presidential election. They allege that such incidents, taken singly or cumulatively, had compromised the outcome of the fresh election – rendering it a nullity. So, they contend, what transpired on the 26th of October, 2017 was by no means an election – and so should be annulled as the whole process lacked legitimacy.

406. From the proper meaning of legitimacy, it is not tenable to attribute lack of this to Presidential elections duly conducted by the terms of the *Constitution* and the relevant statutes and regulations, and by the constitutionally-designated authority, strictly in compliance with the valid Orders of the Supreme Court – election essential to the sustenance of the national governance process as constantly recognized by the national population. Only the failure of the conduct of such election would constitute lack of legitimacy – as it would occasion such uncertainty and appearance of crisis as would afflict the whole population in its social, economic and political engagement.

407. Was the election credible? From the controlling factor of legitimacy, the election would be perceived as credible, in the absence of clear evidence that the bulk of it simply failed; that due procedure was not followed in the conduct of election; that someone other than IEBC conducted the election; that the procedures of vote counting were not followed; that false results were announced, in place of the true outcome; that the voters were turned away from polling stations by IEBC, or by State agencies of power; that the motions of verification and announcement of vote-outcome were not complied with. We have stated elsewhere in this judgment that none of these factors were at play or at play in any significant manner.

408. If it emerges that, in accordance with Article 81(e) of the *Constitution* of Kenya, the repeat election was conducted by secret ballot; that it was free from violence (more particularly, such violence being initiated and prosecuted by the electoral body, or by State agencies); that the voters were not influenced by intimidation or corruption; that the management process was in the hand of IEBC; that voting was transparently done; that such voting proceeded transparently, efficiently, accountably, with precision and clear expression of

voter-preference – then such election has to be judged to have been credible for the purposes of the *Constitution*, the law, and the national expectation.

409. It is our considered view, therefore, that the burden falls on the 2nd and 3rd petitioners, not just to allege, but to show by objective evidence the legal foundations of their claim; and thereafter to lay before this Court weighty evidence to sustain each and all of their claims. As already demonstrated, some of their claims are of such a generic order as to lend only feeble grounds for the Court to depart from prima facie perceptions of legitimacy and credibility. Examples in this category are:

(i) that the 1st and 2nd respondents acted outside the law, and demonstrated lack of independence and neutrality;

(ii) that the 1st respondent publicly admitted that he could not guarantee free, fair and credible elections;

(iii) that on 24th October, 2017 the IEBC, without any legal basis, appointed Consolata N.B. Maina as a Deputy National Returning Officer, a position unknown to law;

(iv) that in a public address, the 1st respondent, hours to the elections, publicly acknowledged that everyone was still questioning whether there was going to be an election, thus showing unpredictability and uncertainty as to the prospect of the said election;

(v) that the environment was not conducive to the conduct of a free, fair and credible election;

(vi) that the election failed to meet the general principles stipulated under Article 81(e) of the *Constitution* of Kenya, of free and fair elections;

(vii) that the IEBC was not independent, and its decisions have been unpredictable and capricious, and not based on law: for instance, that the 1st respondent promised to investigate the offences arising out of the decision of the Supreme Court, but failed to do so; that he promised to carry out internal changes at the secretariat, but failed to do so; that he notified the public that there had been no scuffles at the Commission, but later wrote an accusing memorandum to its CEO/Secretary;

(viii) that on 17th October, 2017, in her resignation statement, one Dr. Roselyn Akombe stated that the fresh election could not meet the basic expectation of a credible election, as the Commission was saddled with endless cases which it was losing, on account of legal advice skewed to suit partisan political interests;

(ix) that the IEBC was not transparent: for instance, it could not clearly tell the public whether the voter turnout in respect of voters registered with biometrics exceeded that for those without;

(x) that the IEBC failed to take every diligent and reasonable effort to ensure free, fair and credible election.

410. In a nutshell, it is our finding that the 26th October 2017 elections met the threshold of credibility and legitimacy under the *Constitution*, certain anomalies highlighted in other parts of this Judgment notwithstanding.

(iv) The question of Voter turn-out

411. The claim by the 2nd and 3rd petitioners is that the voter turn-out represented only 38.8% of the registered voters, and that the 1st respondent also failed to properly use the biometric voter identification system, so as to misrepresent the voter turn-out. It was contended that the 2nd respondent failed to fulfil his promise of ensuring that the public was informed of the voter turn-out by 1700 hours (close of polling) on 26th October, 2017. It was contended that the 1st respondent had kept revising the percentage of voter turn-out from 48% to 34% and finally to 38%. It is also claimed that the environment and circumstances in which the election was conducted, led to the low voter turn-out, and more specifically, such turn-out was attributed to the violent demonstrations that engulfed the country on the day of polling.

412. The petitioners contended that the voter turn-out in the fresh Presidential election of October 26, 2017, was the lowest in the history of multiparty democracy in Kenya. As compared to the voter turn-out of 77.5% during the 8th August, 2017 General Election, the petitioners urged, the current 38.8% represented a 39.2% drop, which is appalling, and gravely discredits the recent election.

413. The 2nd and 3rd petitioners, to buttress their claims, rely on a 'voter analysis report' by Kura Yangu Sauti Yangu (KYSY), which indicates that the counties with the highest level of turn-out were those perceived to be predominantly supportive of the Jubilee Presidential candidate. The turnout in those counties was as follows: Murang'a 85.2%, Kirinyaga 84.4%, Nyeri 84.2%, Nyandarua 83.8% and Kiambu 78.8%, whereas the counties with the lowest voter turnout were those whose voters were predominantly supportive of the NASA Presidential candidate. The turn-out was as follows: Kisumu 0.7%, Vihiga 4.0%, Makueni 4.6%, Kakamega 6% and Busia 6.8%.

414. It is the petitioners' further contention, in the foregoing context, that there were differences in turn-out recorded in Forms 34A and in the records attributed to the KIEMS Kit outlined in the OT Morpho Report. This, they submitted, was demonstrated in the analysis of the

Forms 34A and the KIEMS Logs, raising questions about the credibility of the identification of those claimed to have voted vis-a-vis the credibility of the Register.

415. On its part, the 2nd respondent affirmed his neutrality in electoral processes, and asserted that the Commission bears no responsibility for either a high or low voter turn-out.

416. The 3rd respondent, on the other hand, attributed the low voter turn-out to intimidation and violence engineered and co-ordinated by members of the NASA coalition. He argued further that, despite every effort being made by the 1st and 2nd respondents to conduct the election, the continued violent demonstrations impeded a full-scale exercise of the right to vote.

417. The 3rd respondent, in addition, urged that there is no compulsory voting mechanism in Kenya, and voting was no more than the exercise of one's freedom of choice. It was his stand point, that voter turn-out in a repeat election is generally low, as compared to an initial election. Through his counsel, the 3rd respondent pointed to evidence of low voter turn-out in past by-elections in Kenya. For instance in the 2013 General Election, Makueni recorded a voter turn-out of 84% while in the by-election conducted on 22nd July, 2013 to fill a vacancy in the office of the Governor the voter turnout was 24%. Similarly voter turn-out for the by-election held on Kajiado County, Malindi Constituency and Kibwezi Cest Constituency was 12%, 16% and 21% respectively.

418. It is quite clear to us that the petitioners' concern with voter turn-out is that it should be an expression of the legitimacy of the recent election. They constructed this point around the right of every citizen to vote, and the effect of violence and non-voting, in certain constituencies, and its effect on the outcome of the election.

419. We begin to consider this issue from the position that, whereas the right to vote is guaranteed, the *Constitution* does not impose a mandatory obligation on a citizen to vote in an election. The ultimate yardstick for determining the winner in a Presidential contest is provided for under Article 138 (4) of the *Constitution*, in the following terms:

> " A candidate shall be declared elected as President if the Candidate receives –
>
> (a) more than half of all the votes cast in the election; and
>
> (b) at least twenty-five per cent of the votes cast in each of more than half of the counties."

420. This Article spells out the minimum threshold required of a candidate, before being declared elected. The quantifying element is the outcome in the votes cast in an election and, consequently, if the safeguards of the right to vote are guaranteed, and the optimum environment adhered to within the confines of Articles 81 and 86 of the *Constitution*, and of

all the imperatives of a free, fair and credible election, the matter resolves to the question of 'votes cast', and the 'county threshold.' A candidate only needs to attract a modicum of voter support, to earn a positive declaration. Therefore, if the foregoing attributes for declaration are not affected by the voter turn-out, the validity of the declaration stands uncompromised.

421. The 3rd respondent, therefore, correctly argued that low voter turn-out, without more, is insufficient as a basis for invalidation. More so because, where the threshold for declaration has been met, to set aside an election because of low voter turn-out would be to deprive citizens who voted, of the benefit of their franchise. The Constitutional Court of South Africa, in the case of *Kham and Others v. Electoral Commission and Another* (CCT64/15) PARA 2015. ZACC 37, thus pronounced itself on this question:

> "It is notorious that voter turnoutin by-elections is usually low and voters who know that they will in any event be called on to vote again relatively soon, will be disinclined to make a great effort to vote in the by-election as well. This points against an order setting aside the by-elections. But again it cannot be decisive. The voters in these wards were deprived of the free and fair election to which they were entitled. The candidates were deprived of the right to participate in a free and fair election. Saying to them that in any event they will have an opportunity in May to elect fresh representatives and stand for election will not redress that. That is a right they already have. To merge it with the need to hold fresh by-elections is effectively to deprive the voters of their initial right to a free and fair election."

422. In the instant case, it is clear that there were various factors leading to the low voter turn-out. Furthermore, the 3rd respondent urged that in addition to the non-mandatory aspect of Kenya's voting systems, voter turn-out, as a matter of fact, in repeat elections, is usually remarkably low. Indeed, the US Supreme Court, in the case of Burson v. Freeman PARA 1992. USSC 61, recognised that re-running an election would generally have a negative impact on voter turnout.

423. There is a proper basis, therefore, for us to find that voter turn-out has no direct connection to the validity of the declaration of a President-elect, even though, subject to Article 138(4) of the *Constitution*, it remains, important for as many people as possible to participate in a Presidential election.

424. The 2nd and 3rd petitioners urged persistently, that violence and intimidation were the factors that led to the low voter turn-out, and therefore compromised the credibility of the declared result. It is clear to us, however, that such low voter turn-out was due to an amalgam of factors – including in particular, the active call for boycott, and the violent demonstrations, as well as voter-fatigue.

425. On boycotts, we take judicial notice that, throughout the world, a call to boycott elections has the impact of lowering voter turn-out. For instance, in Mauritania, prior to the 2014 election, the opposition called for an election boycott, following the breakdown of negotiations between the National Forum for Democracy and Unity, and the Mauritanian executive, which had aimed at building consensus in the preparation for Presidential elections. Consequently, elections were boycotted by almost the whole opposition, who considered the election to be a sheer masquerade. Nonetheless, according to an opinion document titled "Mauritania: Presidential Elections 2014 – Legitimacy, Promises and Boycott," published by the Spanish Institute for Strategic Studies, 2014, the voter turn-out in the Mauritanian Presidential election was 56.5%, which was low, taking into account that the turn-out in the municipal and parliamentary elections of 2013 was 75.53% in the first round, and a turn-out of 72% in the second round. It is to be noted that notwithstanding the low voter turn-out resulting from the call for boycott by the opposition, the international community signalled their acknowledgment of the election of Mr. Abdel Aziz as President. The opinion document thus records, in respect of the boycott and the effect:

> "The observers of the African Union and the Arab League highlighted the normality of the polling day, even if the opposition that supported the boycott has denounced a massive electoral fraud once more. The European Union, in its communiqué of June 25th, stressed again the importance of an inclusive electoral process where the different political factions assure a credible and democratic result, while congratulating the elected President Abdel Aziz."

426. Regarding voter-fatigue, it is commonplace that voter turn-out is low, when voters are required to participate in elections which run one after another, with only a short break in-between, or if the number of elections in one year are numerous. Dr. Sebastian Garmann, the Chairperson of Public Economics at the University of Dortmund in Germany conducted an empirical study of the patterns of voter turn-out in elections, and proceeded to formulate a paper on his findings, titled "Voter fatigue and turnout". He thus observes:

> "My main finding is that the closer in time an election is to the most recent one, the lower its turnout will be. This effect is highly significant and extremely robust. It is visible in the raw data, does not change quantitatively or qualitatively when common control variables are included, and persists (even at larger magnitudes) when only the time period with exogenous Bürgermeister and Landrat elections is considered. Quantitatively, my results suggest that one additional day between two elections increases turnout at the later election by approximately 0.0016 percentage points—that is to say, if there were a temporal distance of one year

> between two elections, this would increase turnout at the later election by 0.584 percentage points, ceteris paribus."

He further observes in respect of voter fatigues:

> "... it fades approximately six months after an election. Because voter fatigue might explain why countries with high political decentralization and frequent contests—such as the United States and Switzerland—have typically low voter turnout, the present study contributes to the very scarce literature on how election timing causally influences turnout (e.g., Anzia, 2012; Garmann, 2015). This paucity of research on election timing is surprising, as elections constitute probably one of the most studied institutions in economics and political science (Berry and Gersen, 2011). Moreover, the current study can be categorized as part of an emerging body of literature termed "behavioral political economy" (see Schnellenbach and Schubert [2015] for a recent survey), as it shows that contextual variables (i.e., days since the most recent election, and the number of elections in the recent past [used in robustness checks]) can influence turnout decisions."

427. It is a scenario of common occurrence. In France, the voter turn-out in the elections of 23rd April, 2017 was estimated to be 78.69%, while in the second round the voter turn-out was estimated to be about 38%. It is evident, therefore, that in repeat elections, and in by-elections, the voter turn-out is ordinarily lower than the turn-out in general elections. For example, on 28th October, 2014, Zambian President Michael Sata died after a period of illness. The Electoral Commission of Zambia conducted a by-election within 90 days, as prescribed by the Zambian Constitution. According to the Open Society Initiative for Southern Africa and ECF – SADC, in their Report titled, "Election Management Bodies in South Africa" (2016), voter turn-out in the Presidential by-election held in 2015 was very low. At the time of the by-election the number of registered voters was 5,166,084 but of these, only 1,671,662 cast their ballots in the by-election, resulting in a low voter turn-out of 32.4%. Nonetheless, both local and foreign observers of the by-election commended the electoral body, for high levels of professionalism and impartiality, in organizing an election that broadly reflected the will of the Zambian electorate.

428. That such a pattern of voter turn-out in repeat-elections is the constant norm, is clearer still from the scholarly study by Anthony George Fowler, in his dissertation for the degree of

Doctor of Philosophy in Political Science, at Harvard University, 2013, titled "*Five Studies on the Causes and Consequences of Voter Turnout*." He thus records:

> "Low and unequal voter turnout is a serious problem, and it is very difficult to fix! Studies 1 and 2 show that low and unequal participation has significant partisan and policy consequences. Election results and public policies in advanced democracies with voluntary turnout are significantly different from the counterfactual world where everyone turns out to vote. Exogenous factors that influence the composition of the electorate like compulsory voting laws, election-day weather, or the coincidence of lower level elections with a presidential race can significantly change electoral and policy outcomes. Even modest electoral reforms that minimally expand or contract the electorate could have significant consequences because the preferences of marginal voters – those on the cusp of voting or abstaining – are often dramatically different from those of regular voters – those who are sure to turn out. Low and unequal turnout is a serious problem for democracy because election results fail to reflect the preferences of the citizenry."

429. We also note that in the U.S. State of Louisiana, voter turn-out has often been low, a situation attributed to the many elections held in the State – sometimes up to seventy elections per year. The State-wide election statistical report available on Louisiana Secretary of State's website recorded voter turnout for an election held on 14th October, 2017, as remarkably low, within the range of 12% and 25%. This did not taint the credibility of the election. However, it has formed the basis for the Secretary of State, Mr. Tom Schedle, to seek a change in the law, to reduce the number of elections held in that State in any given year. Mr. Tom Schedle has often complained that Louisiana holds too many unnecessary elections, making it difficult to draw the interest of voters, who are weary of repeatedly going to the polls. Going by these statistics, it can be deduced that low voter turn-out is not an unassailable indicator of the want of credibility of an election.

430. It has then to be appreciated, quite objectively, that voter turn-out in a repeat election is generally low. Although there were a myriad of factors in the present case, that led to the low voter turn-out, an election cannot be tainted solely on the ground of voter turn-out. The factors that led to low voter turn-out, although politically tainted, and inviting political solutions, are not sufficient in this instance, as a basis for impugning the electoral process.

431. From the emerging portrait of the issues in this case, it is clear that their primary focus on the broad-textured concepts of "legitimacy" and "credibility" has led the petitioners on a course of prolixity. This stands in contrast to the object of conscientious invocation of the judicial process – which brings before us only a limited set of meritorious issues. This latter category

has been duly answered, bringing the Court to the clear conclusion that the petitioners' case lacks merit.

9. Costs

432. In both Raila 2013 and 2017, this Court took the view that, noting the substantial public interest accompanying Presidential election petitions, it would not be in the interest of justice to penalise a losing party, with the burden of costs. This reasoning may also apply to this case, especially as the petitioners have approached this Court as registered voters (whether or not they voted in the recent election), with complaints that the processes leading to, and the conduct of the 26th October, 2017 election did not meet constitutional or statutory thresholds, and that a further election ought to be held. Although we have not agreed with them, the interests of justice would disincline us to make an adverse Order on costs.

433. By no means does this rule out the possibility that, in a proper case, this Court may dispense the penalty of costs upon a party, where such party brings forth a frivolous or vexatious case, or a case that distinctly aims at settling political scores. We see in particular, the domains of *locus standi*, or public interest litigation, as those which in a proper case, would attract penalty in costs. The order that commends itself to us in this case is that the parties shall bear their own respective costs.

E. The Concurring Opinion of Njoki Ndungu, SCJ

434. This Concurring Opinion is limited to two issues which is (1) the applicability and (2) constitutionality of Section 9 of the *Election Laws (Amendment) Act* amending Section 83 of the *Elections Act*. I have applied a different path of reasoning and finding from that of the majority on the issue of applicability of Section 83 (as amended). I have also addressed and made findings on the submissions and arguments on the constitutionality of the same clause; the Majority having declined to do so at Paragraph 389.

435. At paragraph 43 of the Petition (in Petition No. 4 of 2017, it was pleaded that: "Section 83 of the *Elections Act* contemplates that where an election is not conducted in accordance with the *Constitution* and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. Even so, although the Petitioners aver that both the results and the conduct of the election were affected and rendered invalid, the Petitioners position is that the non-compliance with the *Constitution*, the written laws and the Rule of Law is sufficient to invalidate the Presidential Election."

436. At paragraph 74, the Petitioners averred that: "In September, 2017 Members of Parliament of the Jubilee Party led by the 3rd Respondent, caused to be published the Election Laws (Amendment) Bill 2017 vide which they sought not only to undertake "Parliamentary

Review" of the Supreme Court decision in Raila Odinga 2017 but also proposed to repeal or amend all provisions of the Electoral laws and Regulations the Supreme Court interpreted and relied upon to render its determination. The impact of this legislative proposal was to diminish the role of technology in the elections, open election results to manipulation and to signal to the voters that it would not be possible to successfully challenge the results of the fresh presidential elections even if the same were to be unconstitutional, unlawful or irregular as previously found in Raila Odinga 2017. This was intended to and has the effect of making voters keep off the process."

437. At paragraph 140(ix), one of the questions posed for determination was: "whether Section 83 of the *Elections Act* as amended is unconstitutional and invalid?" The Petition also sought, "a declaration thatSection 83 of the *Elections Act* (as amended) is unconstitutional and invalid to the extent of its inconsistency with the *Constitution* of Kenya."

Submissions

438. The 2nd and 3rd Petitioners urged that the Election Laws (Amendment) Act which amended Section 83 of the *Elections Act* came into effect after the election had taken place. According to the Petitioners, the amendment was intended to circumvent the authority of this Court and was therefore unconstitutional for infringing on the independence of the Judiciary, violates the constitutional right to public participation, violates the right to universal suffrage, and undermines the core constitutional and statutory duties of the Commission to conduct free and fair elections.

439. In addition, the Petitioners urged that the *Election Laws (Amendment) Act* came into effect after the 26th October, 2017 election took place and therefore could not be applied retroactively. The law came into effect on 2nd November, 2017. The Petitioners asked the Court to read the amended Section 83 disjunctively because to read it otherwise would violate Articles 81 and 86 of the *Constitution*. The Petitioners referred to the Court's interpretation of this section in *Raila Odinga & Another vs. Independent Electoral Boundaries Commission & Others*, Sup. Ct. Petition No. 1 of 2017; [2017] eKLR. (Raila Odinga 2017) Judgement and urged that a conjunctive application would be contrary to Articles 81 and 86 of the *Constitution*.

440. In terms of applicability of the law, it was the Petitioners' assertion that the declaration of the 3rd Respondent as the President-elect took place on 30th October, 2017. The Amendment Laws came into effect on 2nd November, 2017. The Petition was filed on 6th November, 2017. As such, the law was not in place when the cause of action, leading to the Petition occurred i.e. on 30th October, 2017. They urged that legislation should be effected prospectively and not retrospectively; that is, laws should be forward looking and should not apply backwards. They also urged that legislation should be presumed prospective in effect in absence of

legislative guidance to the contrary. In this case, Parliament did not state that the amendment to Section 83 ought to apply retrospectively. The Petitioners' argument was that the Court ought to presume the legislation prospective to avoid construing a new law that otherwise might have attached new (post-enactment) legal consequences to events completed before the law's enactment.

441. It was also the Petitioners' assertion that the Amendment Law was purposefully enacted to tie the hands of the Court and make it difficult for it to interrogate the validity of the fresh election in exercise of the Court's judicial authority and independence. The Petitioners urged the Court to find that the amended Section 83 was unconstitutional for reason of its conjunctive language. They were also of the view that any burden to prove the constitutionality of the amended Section fell upon the Respondents.

The Responses

442. The 1st and 2nd Respondents joined the Petitioners in urging that the impugned amended Section 83 was inapplicable to the matter at hand since it had come into effect after the fresh election was conducted. It was urged that this issue was not one that could be determined at this juncture as it was still a live issue before the High Court, which bore the jurisdiction to determine it under Article 165(3)(d)(i) of the *Constitution*. Counsel referred to the case of *Erad Suppliers & General Suppliers Contactors Limited vs. National Cereals and Produce Board* [2012] eKLR [the Erad case] to urge that the issue of constitutionality of Section 83 was a live and integral matter before the High Court, which was the proper forum for a determination on the said question ought to be done.

443. The 3rd Respondent was of the view that indeed, Parliament had amended Section 83 of the *Elections Act* requiring the two step process in making a determination of validity. He urged that the Petitioners had not made any attempt to show that the result of the election had been substantially affected as a result of any non-compliance. This was further reinforced in the Affidavit of Winnie Guchu (Paragraphs 105 to 108) who was of the view that: The Amendment Laws were passed by Parliament in accordance with the laid down legislative procedures; the challenge to the constitutionality of these laws is the subject of a Petition in the High Court; extensive public participation was conducted by both house of Parliament before the laws took effect; and that the provisions of Articles 110 and 116 of the *Constitution* were followed. She urged that this Court was the inappropriate forum for the Petitioners to attempt to supplant the role of Parliament in enacting laws.

444. The 1st Interested Party's view was also that the determination of the issue on constitutionality of Section 83 of the *Election Laws (Amendment) Act* was a preserve of the High Court and this Court lacked jurisdiction to determine the same. The Attorney General submitted that the challenge to the constitutionality or otherwise of Section 83 of

the Election Laws (Amendment) Act was the preserve of the High Court in the first instance in the pending case of *Katiba Institute & 3 Others vs. The Hon. Attorney General & Another*, High Court Petition No. 548 of 2017. He referred to the directions of the Chief Justice in the case of *Ekuru Aukot vs. IEBC & Others* (referred to the High Court as H.C Petition No. 471 of 2017) to buttress this argument. In that case, the Chief Justice's directions were, in part:

> ii. As this Court has no jurisdiction to interpret the *Constitution* save as stated in Article 163(3) and (6) of the *Constitution*, it cannot entertain this matter. The same should have been filed before the Court under Article 165 (3)(d) of the *Constitution*.

445. His opinion was that deferring that determination to the High Court would maintain order and efficacy in the administration of Justice. He relied on the Court's determination *In Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR:

> "In principle, the Supreme Court commits itself to order and efficacy in the administration of justice and to that end it may require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict: and each case will be carefully considered on its merits."

446. The Attorney General however made a concession that Section 83 (as amended) was applicable to the instant Petition on the basis of the principle of presumption of constitutionality. Citing the case of *Ndyanabo vs. Attorney General* [2001] EA 495, he urged that the duty lay with the Petitioners to rebut that presumption. Although his primary submission was that this Court ought not to determine the question of constitutionality of this Section, consideration of purpose and objects of the Act ought to be considered should this Court assume that jurisdiction. He relied on the case of *Murang'a Bar Operators and Another vs. Minister of State for Provincial Administration and Internal Security and Others*, Petition No. 3 of 2011. He added that the purpose and object of the amendment was to bring clarity, certainty, and consistence with the jurisprudence in other common law countries on electoral dispute resolution. Overall, he urged that tying an irregularity to the number of votes cast was meant to safeguard the integrity of the election, sanctity of the vote and the centrality of the will of the voter. Further, that this conjunctive approach is a legitimate object in election legislations in open and democratic societies.

447. The Attorney General also urged that by dint of Article 115(1) as read with 116 of the *Constitution*, the *Election Laws (Amendment) Act* came into force 14 days from the date the Bill was transmitted to the President for assent. As a result, the same was in operation at the time of institution of the instant Petition. As a result, reference ought to be made to its text

and context. He relied on the Supreme Court of India's decision in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd* [1987] 1 SC 424.

He urged that the intent of the Legislature was clear in the statute and the Court's further judicial inquiry, therefore unnecessary.

Analysis

448. Although the Parties referred to numerous decisions of this Court on the matters deserving the exercise of this Court's jurisdiction, none linked their arguments to the role of this Court on questions touching on the interpretation and application of the *Constitution* from the perspective of this Court's exercise of Exclusive Original Jurisdiction. More specifically, whether an issue touching on the constitutionality of any law, integral to the determination of a cause before us, although pending before another Court falls to this Court's determination.

449. Section 83 of the *Elections Act*, 2011 was an integral part of this Court's consideration of the validity of the 8th August, 2017 Presidential election. The decision of the Majority turned on the disjunctive interpretation and application of this Section to the conduct of the election. At paragraph 171, the Court, in a majority, noted that Section 83 was indeed, the fulcrum of the Petition. Paragraph 187 of the Majority Opinion set the stage for the interpretation of this Section and at Paragraph 211, the Court laid out the application of Section 83 by Courts determining the validity, or otherwise of an election. The Majority held:

> 211. In our respectful view, the two limbs of Section 83 of the *Elections Act* should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election" [emphasis supplied].

450. While the cases cited by counsel revolved around this Court's appellate mandate, the Supreme Court's jurisdiction as an election Court and the interplay of the *Constitution* and the law to the issues at hand can be surmised from the reasoning in the case of *Lamanken Aramat vs. Harun Meitamei Lempaka & 2 Others*, Supreme Petition No.5 of 2014, [2014] eKLR, (the Aramat case) at paragraphs 88, 101 and 102:

[88] The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the *Constitution* of Kenya, 2010 (Article 163), a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts, has been established. The exclusive, dedicated role of the Supreme Court under the *Constitution* takes several forms: for example, it has ?original jurisdiction to hear and determine disputes relating to the elections to the office of President? [Article 163(3)(a)];

[101] We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the *Constitution* with finality: and this remit entails that this Court determines appropriately thosesituations in which it ought to resolve questionscoming up before it, in particular, where these have a direct bearing on the interpretation and application ofthe Constitution. Besides, as the Supreme Court carries the overall responsibility [the *Constitution* ofKenya, 2010, Article 163(7)] for providing guidanceon matters of law for the State's judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other Courts.

[102] The Supreme Court's jurisdiction in relation to electoral disputes is, in our opinion, broader than that of the other superior Courts. We note in this regard that while theCourt of Appeal's jurisdiction is based on Section 85Aof the *Elections Act*, with its prescribed timelines, thatof the Supreme Court is broader and is founded on thegeneric empowerment of Article 163 of theConstitution, which confers an unlimited competence for the interpretation and application of the *Constitution*; and this,read alongside the *Supreme Court Act*, 2011 (*Act No. 7of 2011)* illuminates the greater charge that is reposedin the Supreme Court, for determining questions ofconstitutional character [emphasis supplied].

451. This interpretation, and the language of the *Elections Act* and the *Election Laws (Amendment) Act*, places Section 83 at the centre of any determination by an election Court. After the hearing and analysis of the case from the submissions and evaluation of the evidence, the application of Section 83 serves as the Judge's determinate vector. Therefore, although the Parties seemed to be in agreement that the constitutionality of that Section was removed from this Court's Exclusive Original Jurisdiction and was the preserve of the High Court on the basis of a pending suit, my opinion is that this Court's determination of that issue is necessary to complete the mandate bestowed under Article 163(3)(a).

452. As rightly urged, this Court has time and again held that issues pending before another Court will not be subject to determination before the Supreme Court but rather this Court shall allow that other Court having the jurisdiction to determine the matter in the first instance. In *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*, Sup. Ct. Petition No. 2 of 2012; [2012] eKLR, this Court enunciated this concept in the following terms [paragraph 29 & 30]:

> "We draw analogies with the plurality of autonomous structures created by the *Constitution* of Kenya, 2010, which represents a progressive new trend of governance. The Supreme Court, as the ultimate judicial agency, ought, in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.
>
> In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

453. In *Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 other*, Sup. Ct. Civil Appl. No. 35 of 2014; [2014] eKLR, the Court observed: at [paragraph 65]

> "...Subject to the obligation on the part of all Courts to ensure efficiency and dispatch in proceedings before them, as required under the *Constitution*, it is an important principle guiding the judicial function, that the Courts are independent, and are committed to the judicious and conscientious discharge of their mandate. Upon this premise, this Court will in general, keep faith in the other Courts, in the absence of any plain situation to the contrary, that merits judicial notice...."

454. *In Re the Matter of the Interim Independent Electoral Commission*, Sup. Ct. Const. Appl. No.2 of 2011; [2011] eKLR, (Re IIEC) this Court when called upon to make a determination in respect of the exercise of its jurisdiction to interpret the *Constitution*, which

in that case overlapped with that of the High Court, citing the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited*, [1989] KLR 1, held that:

> " [29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1...
>
> [30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*."

455. *In Re IIEC*, this Court also took cognizance that the High Court, the Court of Appeal and the Supreme Court are all empowered to interpret the *Constitution* and that in ordinary circumstances, litigation on issues of constitutional interpretation will in the first instance fall for determination by the High Court. In that regard it held [paragraph 43]

> " Quite clearly, the High Court has been entrusted with the mandate to interpret the *Constitution*. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the *Constitution*, certainly in respect of matters resolved at first instance by the High Court. ... Indeed, interpretation of the *Constitution* stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs... Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the *Constitution* by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages."

456. However, it is important to distinguish those judicial pronouncements from the matter now before us, because in all of those instances this Court had in mind ordinary causes coming before it by dint of Article 163(4)(a) or (b) of the *Constitution*; i.e. appeals from the Court of Appeal; and, issues of constitutional interpretation or application which must have formed an integral part of the issues raised in the superior Courts and been the subject

matter of determination. It follows therefore, that this Court will exercise deference to another superior Court below it in hierarchy, in instances in which the Court of original jurisdiction in respect of the matter before it, is that superior Court. A question however arises as to whether the Supreme Court in hearing a matter in which it has Exclusive Original Jurisdiction will determine an issue of interpretation and application of the *Constitution* or whether it will defer to the Superior Courts below it.

457. My considered opinion is that in a matter in which this Court is exercising Exclusive Original Jurisdiction, – as an election Court – it is imperative for this Court to answer, in the first instance, such questions relating to interpretation and application of the *Constitution* that are so integrally linked to the determination of the validity or otherwise of the declared result.

458. Since the determination of a Petition challenging the declaration of a Presidential election falls to the Exclusive Original Jurisdiction of this Court, the legal implication of leaving main issues unresolved is the creation of a lacuna in the application of the law. Losing the chance to clarify it until such time as the jurisdiction of the Supreme Court will be invoked in another like matter or such time as the Legislature illuminates the penumbras occasioned therein. The grave occasion of this Court's acceptance of the submissions of counsel to skip the central determination revolving around the constitutionality of Section 83 (as amended) leaves a matter properly before the Court unresolved. the *Constitution* does not countenance a situation whereby this Court makes a partial determination on any matter, especially in an election cause. Former DCJ & VP Justice Kalpana Rawal captured this constitutional obligation succinctly in her concurring opinion in *Anami Silverse Lisamula v. The Independent Electoral and Boundaries Commission and Two Others*, Sup. Ct. Petition No. 9 of 2014; [2014] eKLR, (the Lisamula Case) where she pondered on the issue whether the jurisdiction of the Supreme Court under Article 163(4)(a) of the *Constitution* is intertwined with that of the High Court and the Court of Appeal under Articles 87(1) and (2) and 105 of the *Constitution*, and Section 85A of the *Elections Act*, 2011: at [paragraph 133]

> "....The special nature of the Supreme Court under Article 163(4)(a) of the *Constitution* ordains that its mandate to settle legal issues of constitutional controversy, remains alive. The modalities of this charge, which is exercised in final form by this Court, are guided by Article 259(1) of the *Constitution*, which directs that the *Constitution* shall be interpreted in a manner that promotes its purposes, values and principles [Art] 159(1)(a).; advances the rule of law, and the human rights and fundamental freedoms in the bill of rights [Art] 159(1)(b).; and permits the development of the law [Art] 159(1)(c).. Therefore, to curtail the authority of the Supreme Court to address itself to legal issues of constitutional relevance, would be to negate the very essence of its establishment as a final Court. We note,

however, and as has already been held, that this Court's special mandate is to be discharged judiciously."

The distinguished Judge continued at paragraph 135:

> "...Therefore, the peculiar nature of the *Constitution* of Kenya, 2010 informs the peculiarity of the Judiciary in the new dispensation, and more so, that of the Supreme Court. the *Constitution* progressively broadens the arena of litigation in this country, and the Supreme Court must remain steadfast in its duty to address itself to issues that may properly come before it. The jurisprudence to be developed by the Supreme Court of Kenya may bear differences from that of other jurisdictions in the world, because of the special terms of this country's charter, which expresses the people's will, and embodies their mutual agreement. While most jurisdictions would command a Court to relieve itself of duty by making a prompt finding on jurisdiction, Kenya's Constitution directs the Supreme Court to take no rest, until all unsettled issues of its interpretation and application are resolved."

459. In that case (Lisamula), my brother Justice J.B Ojwang', SCJ interrogated the modern day application of the jurisdictional principle in the case of *Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1 (Lillian S) with respect to the jurisdiction of the Supreme Court. His conclusion then mirrors my conclusion now, that in Kenya's current Constitutional scheme, the jurisdiction of the Supreme Court is not as rigid as would have been in 1989 when the Court of Appeal rendered its opinion in the Lillian S case. Indeed, as Ojwang, SCJ determined in the Lisamula case: [at paragraphs 149 and 150]

> "The *Constitution*, thus, reposes special trust in this Supreme Court, to apply its internal procedures, and its modalities of reasoning, to evaluate essentially political questions of public governance, and to render a legitimate opinion that guides the operations of the State, and its plurality of agencies.
>
> It is my perception that this Supreme Court has a larger profile than that which had been attributed to Courts of the past, by the Court of Appeal's decision in "Lillian S"."

460. There are rare instances, when the jurisdiction of the Supreme Court will engage the interpretation of an issue pending before a Superior Court. While Rawal, DCJ & VP (as she then was) and Ojwang, SCJ addressed their minds to this Court's appellate jurisdiction, the present issue makes it clear that where an issue is so integrally linked to the cause before the Court in exercise of its duty under Article 163(3)(a) of the *Constitution*, this Court will address itself to that issue notwithstanding its status before a lower Court. It is clear to my

mind, that the foregoing remarks relating to the mandate of the Supreme Court are not only applicable in exercise of its Appellate Jurisdiction but also in respect of its Exclusive Original Jurisdiction.

461. Moreover, this Court has on various occasions pronounced that it shall utilize every opportunity that presents itself in the course of determination of matters before it to interpret the *Constitution*. The concurring opinion of Mutunga CJ-P (as he then was), in *Jasbir Singh Rai & three Others v. Tarlochan Singh Rai and Four Others*, Sup. Ct. Petition No. 4 of 2012; [2012] eKLR, is instructive on this. At paragraph 81, he makes the following remarks:

> "... I suggest that going forward it will be good practice for this Court to take every opportunity a matter affords it to pronounce on the interpretation of a constitutional issue that is argued either substantively or tangentially by the parties before it."

462. In view of the requirement in Section 3 of the *Supreme Court Act*, 2011 for this Court to: assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya; provide authoritative and impartial interpretation of the *Constitution*; and, develop rich jurisprudence, among others, this Court cannot shy away from determining conclusively all the issues relating to constitutional interpretation and application that arise within a presidential election so long as such issue are central to the determination of the question of validity of the declaration of the President-elect.

463. The resolution of a Presidential Election Petition falls to this Court for determination in exercise of its exclusive original jurisdiction pursuant to Article 140 of the *Constitution*. Failure, by this Court, to determine an issue that is integral to the Petition would have the effect of leaving part of the dispute between the parties unresolved. In terms of Section 83, it would have the effect of leaving undetermined, the fulcrum of the election cause itself. Consequently, the resultant decision would be one falling short of the explicit commands of Article 140 and those of Article 159(2) that justice shall not be delayed and the purposes and principles of the *Constitution* shall be protected and promoted. Such an incomplete decision would also be contrary to the distinct objects of the Court set out in Section 3 of the *Supreme Court Act* and the entire fabric of the *Constitution*.

464. In context, the Petitioners invited this Court to determine the following issues, *inter alia*:

> "In light of the amendment of Section 83 of the *Elections Act* the by Election Laws (Amendment) Act 2017 after the conduct of the fresh Election, which law is

applicable for purposes of determining the present dispute? and whether Section 83 of the *Elections Act* as amended is unconstitutional and invalid?"

In consequence, the Petitioners sought a "declaration that Section 83 of the *Elections Act* (as amended) is unconstitutional and invalid to the extent of its inconsistency with the *Constitution* of Kenya." In response the 1st and 2nd respondents urged that Section 83 of the *Elections Act*, 2011 was amended after the election, the subject of the Petition herein had been conducted. Consequently, they urged, Section 83 (as amended) is not law that is applicable to the determination of the election petition herein.

465. Counsel for the 1st Respondent, Mr. Waweru Gatonye re-emphasised that standpoint by submitting that the amended Section 83 would not inform or affect the determination of the Petition; not an issue related to or whose determination is necessary for the determination of matters in the Petition; and, was not an issue which could be subsumed in the matters in the Petition or deemed to require a determination so as to determine the matter at hand on its merits. Counsel urged that the law applicable to the Petition was Section 83 of the *Elections Act*, 2011 as it was, before the amendment. However, he was categorical that the fresh presidential election of 26th October, 2017 was not tainted by any illegalities or irregularities and if any, they did not get to the threshold required under Section 83.

466. The 3rd Respondent also contended that the *Election Laws (Amendment) Act, 2017* came into force upon publication in the Kenya Gazette on 2nd November, 2017. It was counsel's submission that the provision sets out the considerations that a Court should apply when determining an electoral dispute and the dispute before the Court has arisen after the operationalisation of this Section. Therefore, forming the basis upon which the Court ought to determine the dispute before it. In his submission, the 'old' Section 83 stood repealed.

467. I am of the considered opinion that in order for this Court to determine, with finality, the question of validity of the declaration of the president-elect after the election held on 26th October, 2017, it must inevitably, determine all the issues that crystallise for determination and the applicable electoral law in that respect. This Court is charged to signal the law that it has relied on in arriving at its determination in any matter, more importantly, in determining the validity of a declaration in a Presidential election and for good reason. Firstly, it attracts enormous public interest. Secondly, other Courts look up to this Court to offer the guiding compass on interpretation and application of the *Constitution* and its interplay with other applicable laws and Thirdly, for certainty and predictability of Kenya's electoral jurisprudence.

468. I emphasized on the right-centric nature of election petitions and the pivotal nature of the precedent – setting decisions of this Court, in *Raila Odinga*, 2017, where I observed: [at paragraph 14]:

> "It is proper to emphasize that the Supreme Court in discharging its mandate as an election Court, remains the precedent-setting forum in the country and its decisions must be carefully analysed to ensure that a jurisprudential crisis or confusion does not ensue. Were that to happen, the Court would have failed the *Constitution* and the people..."

469. I agree with the submissions made by Mr. Ogetto for the 3rd Respondent, to the extent that the doctrine of presumption of constitutionality would be applicable in respect of Section 83 of the Election Laws (Amendment) Act as long as that provision has not been adjudged unconstitutional by any Court. However, as explicated earlier, the constitutionality of Section 83 falls for this Court's determination in the present Petition. The observations of this Court in *Moses Masika Wetangula vs. Musikari Nazi Kombo & 2 Others*, Supreme Court Petition No. 12 of 2014; [2014] eKLR, in respect of the mandate of an election Court are instructive. This Court observed [paragraph 112]:

> "The primary duty of the election Court is to give effect to the will of the electorate; and consequently, the Court is to investigate the nature and extent of any election offence alleged in an election petition. Accordingly, the happenings that touch on the due conduct of the election process, come as proper items of agenda in the tasks of an election Court" [emphasis supplied].

Therefore, the pressing need for this Court to conclusively determine the present Petition together with all the issues intricately intertwined with it, cannot be overstated. It is therefore evident that the questions as to whether Section 83 (as amended) is the law applicablein determining the present Petition and whether the same is inconsistent with the provisions of the *Constitution*, are critical issues to be addressed. Having said that, I now proceed to evaluate both.

i. Whether Section 83 of the Election Laws (Amendment) Act is the applicable law in determining the present Petition.

470. The Election Laws (Amendment) Act 2017 was passed by Parliament on 12th October, 2017 and submitted to the President for assent on 13th October 2017. Article 115(1) of the *Constitution* provides that the President must assent to a Bill or return it to Parliament within 14 days of receiving it. Article 115(6) provides that if the President does not assent to a Bill or return it to Parliament within that period, the Bill is deemed to have been assented to

at the end of that period. Under Article 116(1), the law must be published in the Gazette within 7 days of its assent whether express or implied. Article 116(2) provides that an Act of Parliament comes into force 14 days after publication in the Gazette unless the law provides for an alternative date.

471. The President did not assent to the subject Bill by 27th October, 2017 (the 14th day) and by operation of law it was deemed assented to on that date. It was then published in the Gazette on 2nd November, 2017. Since the Act provides that the law would come into force on publication in the Gazette, it came into force on 2nd November, 2017.

472. Reliance was placed by the Petitioner, on the case of *Fray vs. Omaha World Herald Co.* F.2d 1370, 1374 (8th Cir. 1992) where it was held that statutes should be forward looking and should not apply backwards, and that statutes should not be given retrospective operation interfering with antecedent rights. The Petitioners' relied on the Supreme Court of the United States (SCOTUS) decision in the case of *Landgraf vs. USI film Film Prods.* 511, U.S, 244, 265-73 (1994). SCOTUS in this case limited the presumption to statutes altering substantive rights, where it presumed prospectively to avoid construing a new law that otherwise might have attached new post-enactment consequences to events completed before the law was enacted. They also relied on the concurring opinion of Justice Scalia in the case of *Kaiser Aluminium & Chem. Corp vs Bonjo* 494 U.S 827, 855 (1990), where he observed:

> " The principle that legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."

It was thus urged that a statute should not be given retrospective interpretation unless there is legislation guiding to the contrary, which provision was stated to be lacking in the new Amendment Laws. It was thus urged that the petition should be heard and determined as per the *Constitution* and the Election law that existed before the Amendments. It was the submission of counsel for the Petitioners, 1st and 2nd Respondents, the Hon. Attorney General and counsel for the 1st Interested Party that the Amendment Law was inapplicable to the present Petition. However, counsels did not consider the import of Section 83 in isolation from the other Sections in the *Election Laws (Amendment) Act* or distinguish its application from those Sections.

473. Section 83 of the *Elections Act* appears in Part VII of the Act-Election Disputes Resolution, under the heading, 'Election Petitions.' More specifically, it addresses the conduct of the Court after an election Petition has been filed before it. In this instance, the determining cause triggering the application of the law is the cause presented for the Court's determination. Section 83 contains the test to be applied by a Court while determining an

electoral cause before it. Therefore, it does not follow an electoral event i.e. the election, it follows the declaration by a Judicial Officer, of an election cause. Section 83 (as amended) is therefore, the applicable law not just in this Petition, but in other election Petitions and appeals before other Courts.

ii. Whether Section 83 of the *Elections Act* as amended is unconstitutional and invalid.

474. Section 83 (as amended) provides:

> 83.
>
> (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that –
>
> (a) the election was conducted in accordance with the principles laid down in the *Constitution* and in that written law; and
>
> (b) the non-compliance did not substantially affect the result of the election.
>
> (2) Pursuant to section 12 of the *Interpretation and General Provisions Act*, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

475. The Petitioners urged that the amendment was intended to circumvent the authority of this Court and was therefore unconstitutional for infringing on the independence of the Judiciary. They also urged that it violated the constitutional right to public participation, the right to universal suffrage, and undermined the core constitutional and statutory duties of the Commission to conduct free and fair elections. Mr. Waikwa, counsel for the 2nd and 3rd petitioners contended that despite the Respondents' arguments that there were cases pending in the High Court on the issue, it would be unjust for the Court to apply an unconstitutional provision of the law which was central to the determination of the matter without pronouncing itself.

476. The Petitioners imputed the constitutionality of the amended Section 83 of the *Elections Act* against Articles 81 and 86 of the *Constitution*. Their argument was that its disjunctive application would violate the principles under these two provisions. In addition, they generalised their claim of unconstitutionality to four constitutional imperatives (i) independence of the judiciary (ii) the right to public participation (iii) the right to universal suffrage and (iv) the constitutional and statutory duties of the Commission. The challenge by the Petitioner therefore goes to 'the legislative intent in enacting the legislation' and 'textual violation of certain rights and obligations mandated under the *Constitution* and

principles of the electoral system.' These aspects provide sufficient grounds, because the issue of unconstitutionality was pleaded and canvassed, to sustain a claim for determination before this Court.

477. Any challenge of constitutionality or otherwise of any law, act or omission ought to be brought on the basis of inconsistency with the *Constitution* as directed under Article 2(4). This Article provides as follows:

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

478. The role of a Judge is to compare the impugned law or action with the provisions of the *Constitution* to determine consistency or otherwise. There must be more than an implied or incomplete argument touching on constitutionality to exhaustively determine a claim of inconsistency with the *Constitution*. Inconsistency on the basis of statute and on the basis of conduct are distinguishable and ought to be comprehensively pleaded. As distinguished by the Constitutional Court of South Africa in *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11

> " There is an inter-relationship between the invalidity of conduct and the invalidity of law. Conduct that is inconsistent with the *Constitution* and invalid can result in an invalid law. That would happen where for example the *Constitution* requires certain conduct in order to pass a law validly. If the conduct of Parliament falls short of what is required by the *Constitution*, the conduct and the resultant law would be invalid. Here too the court has no choice but to declare the conduct invalid for lack of consistency with the *Constitution*.
>
> An important issue connected with the relationship between the invalidity of conduct and the invalidity of law is whether conduct that is inconsistent with the *Constitution* may be so grave and may be connected to the fulfilment of an obligation of such importance that a court has the power to declare invalid the consequent law even though the conduct by which the law was adopted cannot be said to be invalid...."

479. The Petitioners challenged the Amendment Laws on the basis of invalidity of the law and the legislative conduct of Parliament. The argument was that the purpose and effect of the law was at variance with Articles 81 and 86 of the *Constitution* and that the conduct by Parliament in enacting the Amendment Laws stifled or overlooked the voices of critical actors in Kenya compromising national consensus.

480. The issue was pleaded at paragraphs 74 and 75 of the Petition where the Petitioners pleaded that the Election Laws (Amendment) Bill 2017 sought, through Parliament, to review this Court's decision in the Raila Odinga 2017 case, repeal or amend all provisions of the electoral laws and regulations interpreted and relied upon by this Court to render its determination. It was also the Petitioners' case that the amendments were meant to diminish the role of technology in the conduct of elections, open election results to manipulation and signal to voters the impossibility of successfully challenging the results of the fresh presidential elections even if the same were to be at variance with the *Constitution*, unlawful or irregular as determined in *Raila Odinga 2017*.

481. At paragraph 59 of the Affidavit of Njonjo Mue, it was averred that the Elections Offences (Amendment) Bill, 2017 and the Election Laws (Amendment) Bill 2017, published in the Kenya Gazette Supplement No. 147 and 148 as Bills No. 38 and 39 were a form of counter and response to the opposition's demands for reforms prior to the fresh presidential elections.

482. On the legislative process, it was averred at paragraph 61 that on 28/9/2017 Parliament resolved to reduce the publication time for the two Bills from 14 days to 1 day and the Bills were read for the first time and committed to the joint Committee of Parliament to facilitate public participation which was held between 3rd to 5th October, 2017. At paragraph 62 it was averred that Parliament enacted the laws on 12/10/2017 and transmitted the same to the President for assent. It was further urged that in his acceptance speech delivered at the National Tallying Centre on 30/10/2017, the 3rd Respondent admitted to not having signed the Bills into law due to the need for national consensus. In addition, that the various entities such as civil society, faith based groups, dissenting political actors and election observer missions were disregarding in the haste through which the legislative process was conducted.

483. On behalf of the 3rd Respondent, the leader of the Majority in the National Assembly Mr. Aden Duale swore an Affidavit in response to these allegations to the effect that:

(i) The provisions in the Amendment Laws do not take away any rights or freedoms;

(ii) The Amendments clarify the electoral procedure in line with the *Constitution* and the Electoral law;

(iii) The Amendment Laws were enacted by a legally constituted Parliament in spite of withdrawal of opposition members during the debate;

(iv) the *Constitution* does not demand the passing of the law through bipartisan arrangements;

(v) The Election Laws (Amendment) Bill was not one of the Bills requiring a two thirds majority for purposes of enactment but rather a simple majority;

(vi) It is not illegal that Parliament was predominantly constituted of Jubilee Party Members. This is a manifestation of the people's will and the endorsement of the popular party agenda.

484. It is not enough to plead inconsistency of a law with the *Constitution* as a tangential issue in a case. Claims of inconsistency must be well pleaded and argued by the Parties and where the Court determines that such a crucial question was given peripheral treatment, it may exercise its discretionary powers to ask the parties delve deeper into it. The consideration of any law or conduct against the *Constitution* is central to any legal proceedings.

485. In the present case, the general position by the parties, faulty in my opinion, was that the issue of 'constitutionality of Section 83 (as amended)' was removed from this Court's Jurisdiction on occasion of a pending suit before the High Court. A perusal of the matter pending before the High Court revealed the claim made with respect to Section 83 (as amended). At paragraph 51 of the Petition before the High Court:

> Section 9 of the Election Laws Amendment Act (ELAA) amending Section 83(1) is unconstitutional because it creates a statutory threshold of invalidation of an election that is more onerous than what is contemplated in Articles 81 and 86 of the *Constitution*. It is a backdoor amendment to Articles 81 and 86 and an unjustifiable variation to the jurisprudence of the Supreme Court on Section 83 in Raila Odinga vs. IEBC Election Petition No. 1 of 2017. It also seeks to validate minority over the majority holding over the issue.

486. As elucidated in the foregoing paragraphs, the resolution of the question of Section 83, as urged in this case, is very central to the matter before us. Section 83 of the *Elections Act* (as amended) is a product of the mandate bestowed on Parliament vide Article 82 of the *Constitution*. Parliament has the legislative authority to enact laws, including, legislation on elections. Having determined that the section, as amended is the applicable law in determining this Petition and having noted that it is the determinate vector while making a judicial determination in any election Petition, interpretation of this Section is therefore a vital component of this Court's final determination. The Opinion of Murray CJ in *A vs. The Governor of Arbour Hill Prison* [2006] IESC 45, is persuasive in this case:

> " A primary judicial function is to interpret the law that is to say the *Constitution*, legislation and the common law. As I observed in Crilly –v- Farrington "...First, there is the law; then there is interpretation. Then interpretation is the law. This

simplified reference to the judicial process emphasises that when Courts apply a statute the interpretation which they give it has ultimate authority".

....

"It is also important to bear in mind, as in the present application, that the Courts cannot and do not choose the legal issues, of interpretation or otherwise, which they have to decide. They can only decide such issues when they are raised in the context of judicial proceedings brought before them" [emphasis added].

487. Even where constitutional questions have not been presented concisely and clearly, the Court is not to overlook a determination of that issue. The test set by the Constitutional Court of South Africa in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; is, in this regard, agreeable: At paragraphs 38, 39 and 42.

> " In our adversarial system, courts are required to be impartial and ordinarily only decide issues that the parties have properly raised and are properly before the court in terms of its factual underpinnings. This principle is subject to an exception. A court is not always confined to issues of law explicitly raised by the parties. If a litigant overlooks a question of law which arises on the facts, a court is not bound to ignore the question of law overlooked. Another equally relevant principle in this regard is that of the separation of powers. Courts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the legislature. Ordinarily, therefore, they should raise and consider the constitutionality of laws that are properly engaged before them and where this is necessary for the proper resolution of the dispute before them.
>
> The High Court correctly identified the circumstances in which a court may, of its own accord, raise and decide a constitutional issue. There are two situations in which a court may, of its own accord, raise and decide a constitutional issue. The first is where it is necessary for the purpose of disposing of the case before it, and the second is where it is otherwise necessary in the interests of justice to do so. It will be necessary for a court to raise a constitutional issue where the case cannot be disposed of without the constitutional issue being decided. And it will ordinarily be in the interests of justice for a court to raise, of its own accord, a constitutional issue where there are compelling reasons that this should be done....
>
> It must be stressed that the constitutional issue sought to be raised must arise on the facts of the case before the court. In addition, the parties must be afforded an adequate opportunity to deal with the issue. A court may not ordinarily raise and decide a constitutional issue, in abstract, which does not arise on the facts of

the case in which the issue is sought to be raised. A court may therefore, of its own accord, raise and decide a constitutional issue where (a) the constitutional question arises on the facts; and (b) a decision on the constitutional question is necessary for a proper determination of the case before it; or it is in the interests of justice to do so" [emphasis added].

In a proper case, this Court ought not to defer the determination of a Constitutional issue central to the cause before it to another forum.

i. This Section is presumed to be consistent with the *Constitution* until the converse is established.

488. A principle developed in deference to the separation of powers and more specifically, in light of the role of Parliament under Article 94 of the *Constitution* is 'presumption of constitutionality.' Any legislative action by Parliament is presumed Constitutional and the burden is on the person challenging the legislative act to show in what manner it breaches the *Constitution*. This principle has been resounded in numerous decisions by the High Court. In *Mugambi Imanyara & Another vs. Attorney General & 5 others* [2017] eKLR, Mativo J held that:

> " There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional).
>
> In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment." [citing, with approval, Hamdarddawa Khana vs Union of India and Others 1960 AIR 554]
>
> It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative." [Emphasis] [Citing, with approval, Ndyanabo vs. Attorney General, (Civil Appeal No. 64 of 2001) [2002] TZCA 2, the Court of Appeal of Tanzania]"

489. It is not apparent, either from the case by the Petitioners by way of rebuttal of the presumption of constitutionality or following the application of the law, that the same violates the *Constitution* and more specifically, fundamental rights and freedoms. As such the constitutional qualification against this presumption, in the strict terms of Article 24 (2)

(4) of the *Constitution*, does not arise. I must however add that the finality of the Supreme Court as a judicial agency, and its role as the custodian of the *Constitution* militates, save for rare instances dictated by the circumstances of each case, against the blanket presumption of constitutionality without delving into a holistic interpretation of the constitutional vis-a-vis, the impugned law or conduct. The Judiciary in general and the Supreme Court in particular retains control over interpretation of the *Constitution*. In likeness to Justice Sach's (concurring) observation in *S vs Mhlungu and Others* (CCT25/94) [1995] ZACC 4: At paragraph 127

> " We are a new court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African (read Kenyan) way of dealing with our Constitution, one that starts with the *Constitution* itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights."

490. The Petitioners claim that the Amendment compromises the independence of the Judiciary and was an attempt to review this Court's determination in *Raila Odinga*, 2017. The legislative authority of the Republic is vested in Parliament (Art. 94). Parliament is the only body with powers to make provision having the force of law unless otherwise provided by the *Constitution* or legislation. Therefore, at the outset, by enacting the Election Laws (Amendment) Act, Parliament was well within its Constitutional Mandate.

491. It was also urged that the legislative process was hasty, devoid of public participation and ignorant of the views of other important stakeholders. Article 118 (1)(b) of the *Constitution* requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees. It is admitted that on the 2nd to 5th October, 2017 the Joint Select Committee of the National Assembly and Senate committees on Election Laws (Amendments) Bill 2017 put in place avenues for public participation from the different stakeholders through the submission of proposals. This fulfilled the requirements of public participation as obliged under Article 118 (1)(b).

492. Was the amendment to Section 83 of the *Elections Act* meant to undermine the independence of the Judiciary? The purpose of the *Elections Act* (Amendment) Laws was elaborated by Hon. Cheptumo while moving that the Election Laws (Amendment) Bill, be read a second time in the National Assembly. The purpose according to the following excerpts from the *Hansard of the 12th Parliament* on 10th October, 2017 was to harmonise the laws by clearing any ambiguities flowing from interpretation.

Excerpts of the Hansard:

> Hon. Cheptumo: Thank you, Hon. Speaker. I beg to move that the Election Laws (Amendment) Bill (National Assembly Bill No. 39 of 2017) be read a Second Time.
>
> On 1st September 2017, the Supreme Court, with a majority decision of four Judges, nullified the election of President Uhuru Kenyatta. The court further directed that the Independent Electoral and Boundaries Commission (IEBC) conduct elections within 60 days from that date.
>
> Hon. Speaker, the issues raised by the Supreme Court still remain disturbing, especially as we head to the fresh presidential election. As a patriot, a Kenyan, a leader and an elected Member of the great people of Baringo North, I could not sit and contemplate the possibility of deficiencies highlighted by the court as well as other challenges that arose from the election process.
>
> Hon. Speaker, as you may recall, there were also several cases filed in the High Court by a number of Kenyans prior to the elections on 8th August 2017. Allow me to quote three cases that were filed before the elections of 8th August 2017. The first case is Peter Solomon Gichira versus the Independent Electoral and Boundaries Commission (IEBC) and another. That is Petition No. 234 of 2017 where the Court held that Section 29 of the *Elections Act* contravened the letter and spirit of the *Constitution* in Article 38 on political rights; as read together with Article 137 (1)(d). The second case is that of Kenneth Otieno versus Attorney-General. That is Petition No.127 of 2017, where again the court held that Section 44 (8) offends the *Constitution*. Finally, referring to those two cases is the IEBC versus Maina Kiai and five others. Equally, another issue was addressed here and it was held that the presidential election results declared by the constituency returning officer are final in respect of the constituency and can only be questioned by an election court.
>
> Hon. Speaker, you can see from what I have said so far that in those three cases, issues of concern touching on the election process in the country arose. I said there are well over eight cases of that nature raising various constitutional and legal issues that I could not sit and wait as a responsible patriot, citizen and as a leader of this country. The Bill I have sponsored also seeks to align the *Elections Act* with three decisions I have referred to and, in effect, align the Act with the relevant provisions of the *Constitution*. That is the foundation and basis, among others, that I felt it was important for me to come forth before this august House and take the challenge and raise these concerns.

Close reading of election-related laws also reveals that where there are gaps in the law, indeed, there can be many and variant interpretations depending on the number of lawyers interpreting them. This is a highly litigant country where every Kenyan lawyer will have different interpretations of various situations and laws. Therefore, the Bill proposes specific amendments to fill existing gaps in our scheme of laws and may lead to a legal and constitutional crisis if not addressed prior to the conduct of the fresh elections.

Before highlighting the contents of the Bill and the thinking behind it, I am under obligation to note that upon the Bill being read the first time, this House approved a Motion setting an ad-hoc committee which was under my chairmanship. That Committee was mandated to look into these laws and undertake public participation, which I would like to report to this House that indeed for close to a week we had time to listen to the members of the public.

Hon. Speaker, allow me at this point in time to very sincerely thank the Kenyan people and institutions – both private and government – which had time to come before us...

I want to inform the nation that we received views from across all sectors of our society and I am proud that Kenyans took advantage of that public participation process to come forward and give their input. When they go through the Report that we have tabled today, my colleagues will realise that the comments were overwhelming because we captured every Kenyan in the HANSARD from the memoranda and so on...

Hon. Speaker, allow me to move to the specific clauses of the Bill. Clause 9 of the Bill seeks to amend Section 83 of the *Elections Act*, 2011. This section was the focus of the presidential election. The Supreme Court was of the view that the petitioner had the burden of proving that the election was not conducted in accordance with the principles laid out in the *Constitution* and the electoral laws or that the non-compliance with the principles laid out in the *Constitution* and election laws affected the results of the elections. I do not need to read that. What we are saying here is that Section 83 has two aspects: one, in an election petition, it is the business of the petitioner to establish one aspect of that section. If you can prove that the elections were not done in accordance with the *Constitution*, then an election has to be nullified. The same argument applies to the second part of the particular section. What we would like to propose is that it will be the business of the petitioner to ensure that you prove to the Supreme Court that the election was not conducted in compliance with the *Constitution*.

> The second aspect under Section 83 is about showing that non-compliance with the *Constitution* and the laws, indeed, substantially affected the results. The problem with ambiguous laws is that they are subject to interpretation by different people. We want the law to be clear. We are going for the repeat presidential election on 26th August 2017 and we have a chance to amend the laws to realign them so that if this issue arises in the future, we will not be accused of watching and waiting until too late.
>
> In our region, the same provision as proposed in this Amendment Bill is in use in Nigeria, Ghana, Zambia, Tanzania and Uganda. I cannot explain how we did not provide for our laws to be realigned in that manner. What is relevant now is for this House to make a decision and amend our laws [Emphasis added].

493. The *Constitution* organises the functioning of the State in three distinct arms of Government; the Legislature, Executive and the Judiciary. Each of these entities has powers meant to protect the *Constitution* and sovereignty of the Kenyan people. It does not however follow that when one arm exercises its authority, that authority automatically undermines the functioning of the other. In this case, Parliament made reference to this Court's interpretation of Section 83 in *Raila Odinga* 2017 (in the majority and dissenting opinions) and sought to clarify the law, by way of legislation. I am persuaded by the determination of the Canadian Supreme Court in *Republic vs. Big M Drug Mart Ltd* [1985] 1 SCR 295 that:

> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity." [Emphasis added]

494. The above-provided Hansard excerpts guide my consideration of the purpose and effect of the legislation. I am persuaded that Parliament was in no way invasive into the judicial realm in amending the impugned section. The purpose of the Legislature was to clarify the law and bring it into conformity with international best practice. I must hasten to add that a law does not become unconstitutional simply because it goes against the precedents of this Court or other Courts. This legislative mandate affords an opportunity for the Courts to reconsider precedent and nurtures the development of constitutional law.

495. Does the disjunctive approach of the amended section 83 violate the principles in Articles 81 and 86 of the *Constitution*? Article 81 outlines the principles of the electoral system. Article 86 on the other hand provides the imperatives of voting: voting method, counting, tallying, announcement, and post-election safeguards. These principles are therefore cross-cutting. A stricter dichotomy, of which I am in favour, would separate these two principled provisions as bearing on process and outcome. These two critical elements of an election are crucial in the determination of its validity. The process gives rise to the outcome. Therefore, deviation from the process must be considered against its effect to the declared outcome.

496. As determined by this Court in the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & Others*, Sup Ct. Application No. 5 of 2014 *Elections Act*, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the *Constitution* and that in interpreting them, a Court of law cannot disengage from the *Constitution*.

Section 83 (as amended) provides a formula for evaluating the conduct of an election against the process and the outcome and is the product of Article 82 of the *Constitution*. It also does not take away the powers of an election Court to determine compliance of an election with the purpose and principles of the *Constitution*. As such, I find no persuasion in the claim that it is inconsistent with the *Constitution*.

Conclusion

497. The following conclusions therefore emerge from the foregoing analysis:

1. Section 83 as amended by Section 9 of the *Election Laws (Amendment) Act, 2017* is the law applicable in the judicial determination of this Presidential Election Petition.

2. Section 83 provides the determining formula to any election Court adjudicating an election cause. As such, it also ought to be the applicable law in other election causes before lower Courts.

3. The question of consistency of Section 83 with the *Constitution* is distinctive to that of other provisions in the same Amendment Laws. Section 83 does not follow the electoral event as does the substratum of the other provisions. Section 83 follows the declaration by a Judicial Officer, of an election cause. It is an electoral cause's determining vector.

4. I find no persuasion that the impugned provision, its purpose and effect or the conduct of the Legislature in enacting the Amendment Law contravene the *Constitution*. This issue therefore ought not to be retried by the High Court.

498. In light of the foregoing, I concur with the decision of the Court on all other limbs except those analysed in this Concurring Opinion, to the extent that the reasoning differs. I also concur with the resulting final orders.

F. Conclusion and Final Orders

499. In this Judgment, in arriving at which this Court is both a trial Court and an ultimate appellate Court, we found it judicious to lodge our decision within the stable setting of the material evidence. We have carefully considered the evidence set in original depositions, and a balancing of the pertinent averments has set our minds in a clear course of conviction. Against this background, we have entertained the substantial arguments of learned counsel, constructed around the prescriptions of the *Constitution*, the statutes, and the pertinent regulations. We have also taken note of the pertinent case law and the relevant scholarly writings. In that context, we have taken an unobscured view of vital issues of public policy and public interest: and it all brings us to a number of conclusions, as we have recorded. On that basis, we now make the final orders, as follows:

(a) Petition No.2 of 2017, Hon. John Harun Mwau v. Independent Electoral and Boundaries Commission & 2 others), as consolidated, is hereby dismissed.

(b) Petition No.4 of 2017, Njonjo Mue and Anor v. the Chairperson of the Independent Electoral and Boundaries Commission & 3 others, as consolidated, is hereby dismissed.

(c) As a consequence, the presidential election of October 26, 2017 is hereby upheld, as is the election of the 3rd respondent.

(d) The parties shall bear their respective individual costs.

Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) (Election Petitions) (11 December 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 45 (KLR)

Constitutional Law *– fundamental rights and freedoms- enforcement of fundamental rights and freedoms- right to information – whether the right to information was absolute - what was the extent of the disclosure of the information held by a public entity - whether a person had to prove entitlement to the right of information - what was the balance between the rights to privacy and protection of property guaranteed under articles 31 and 40 of the Constitution vis a vis rights to access of information as guaranteed under article 35 of the Constitution - Constitution of Kenya, 2010 articles 24(1), 31, 35 & 40 ; Access to Information Act, sections 3 & 6; Independent Electoral and Boundaries Commission Act, section 27.*

Law of Evidence *– admissibility of evidence- admissibility of illegally obtained evidence – admissibility of illegally obtained evidence under common law vis a vis constitutional law - whether memos obtained unlawfully could be admitted in court as evidence - whether illegally obtained evidence was admissible - what was the probative value of illegally obtained evidence?*

Brief facts

The instant application sought to expunge from the record various identified internal communications between members of the 2nd respondent (Independent Electoral and Boundaries Commission). The 3rd respondent's (H. E. Uhuru Muigai Kenyatta) position was that the said memos were obtained unlawfully, contrary to section 27 of the Independent Electoral and Boundaries Commission Act, and that article 50(4) of the Constitution also required that such evidence be excluded.

The petitioners (Njonjo Mue and Khelef Khalifa) contended that the said memos were obtained legally and that in any event, article 50(4) of the Constitution gave an exception under which any such evidence could be relied upon by the court. Furthermore, they argued that the memos, apart from being in the public domain, formed an integral part upon which their petition was grounded and their presence on the record would assist the court in making a fair determination

Issues

i. Admissibility of the evidence under common vis a vis constitutional law.
ii. What was the extent of the disclosure of the information held by a public entity and under what circumstances could a person be denied right to information?
iii. Whether a person had to prove entitlement to the right of information and what was the threshold of proof of entitlement to that right?

iv. What were the procedures provided in law on how a person could access information held by the State or State organs.

v. Whether evidence ought to be obtained in accordance with the provisions of both the Constitution and the law.

vi. What was the applicable test in both civil and criminal cases in considering whether evidence was admissible.

vii. What was the place of illegally obtained evidence in terms of admissibility and its probative value?

viii. What was the balance between the rights to privacy and protection of property guaranteed under articles 31 and 40 of the Constitution *vis a vis* rights to access of information as guaranteed under article 35 of the Constitution.

Relevant provisions of the Law

Independent Electoral and Boundaries Commission Act

Section 27

Management of information

1. *The Commission shall publish and publicize all important information within its mandate affecting the nation.*
2. *A request for information in the public interest by a citizen—*

1. *shall be addressed to the secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and*
2. *may be subject to confidentiality requirements of the Commission.*

(3) Subject to article 35 of the Constitution, the Commission may decline to give information to an applicant where—

(a) the request is unreasonable in the circumstances;

(b)the information requested is at a deliberative stage by the Commission;

(c) failure of payment of the prescribed fee; or

(d) the applicant fails to satisfy any confidentiality requirements by the Commission.

(4) The right of access to information under article 35 of the Constitution shall be limited to the nature and extent specified under this section.

(5) Every member and employee of the Commission shall sign a confidentiality agreement."

The Constitution of Kenya, 2010

Article 24(1)

A right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

1. *the nature of the right or fundamental freedom;*

2. *the importance of the purpose of the limitation;*
3. *the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; and*
4. *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

Article 35

(1) Every citizen has the right of access to:

1. *Information held by the State; and*
2. *Information held by another person and required for the exercise or protection of any right or fundamental freedom.*

(3) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

Article 50(4)

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

Access to Information Act (Act No. 31 of 2016)

Section 3

"(a) give effect to the right of access to information by citizens as provided under article 35 of the Constitution;

(b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;

(c) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;

(d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;

(e) provide for the protection of persons who disclose information of public interest in good faith; and

(d) provide a framework to facilitate public education on the right to access information under this Act.

Section 6

(1) Pursuant to article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to:

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d)involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

Held

1. In order to give effect to the rights under article 35 of the Constitution, Parliament enacted the Access to Information Act which provided for the modalities of obtaining any information held by the State or another person. Section 3 was relevant to the instant application as it stipulated the objectives of the Act. Section 6(1) on the other hand provided the extent of the disclosure of the information held by an entity.
2. Article 35(1)(a) and (b) of the Constitution, read with section 3 of the Access to Information Act granted all citizens the right to access information held by the State, or public agencies including bodies such as the 2nd respondent. The right to information implied the entitlement by the citizen to information, but it also imposed a duty on the State with regard to provision of information.
3. The right of access to information was however not absolute and there were circumstances in which a person was denied particular information. Specifically, procedures were provided in a law on how a person ought to access information held by another person and particularly a State organ or entity. Section 8 of the Access to Information Act provided that a person could apply in writing, or where one was unable to write, could apply orally to an information officer who was to put the request in written form.
4. Any such request for information was to be processed within 21 days. Furthermore, section 27(2) of the Independent Electoral and Boundaries Commission Act specified the person to whom such a request was to be addressed to and further provided circumstances when the Commission could withhold any information sought. One such circumstance was where the information sought related to a matter under deliberation and therefore no conclusive findings had been made by the Commission.
5. The rights of access to information relevant to the matter before the court were limited by operation of law, in the instant case, being the procedures for access of any information under section 27(2) of the Independent Electoral and Boundaries Commission Act, as read

together with sections 6(1) of the Access to Information Act. The Constitution, further set limitations on rights including the right to access to information.

6. In common law, the applicable test in both civil and in criminal cases in considering whether evidence was admissible was whether it was relevant to the matters in issue. If it was relevant, it was admissible and the court was not concerned with how it was obtained. It mattered not how one obtained the evidence. Even where it was stolen, the evidence was still admissible. The common law did not reject relevant evidence on the ground that it had been obtained illegally. So far as civil cases were concerned, the court had no discretion; the evidence was relevant and admissible. The court could reject it on the ground that it may have been unlawfully obtained in the beginning. The above position applied generally including to election petitions which were matters *sui generis*.

7. The 3rd respondent relied on article 50(4) of the Constitution and urged that evidence obtained in a manner that violated any right or fundamental freedom in the Bill of Rights was to be excluded as the admission of that evidence had the possibility of rendering the trial unfair, or detrimental to the administration of justice. Evidence ought to have been obtained in accordance with the provisions of both the Constitution and of the law. Obtaining evidence and indeed, as was in the instant case, seizing the same without first obtaining appropriate warrants violated constitutional norms. The right to property as well as the right to privacy stood violated.

8. Article 50(4) of the Constitution provided that evidence obtained in a manner that violated any right in the Bill of Rights had to be excluded if the admission of that evidence had the impact of rendering the trial unfair or otherwise detrimental to the administration of justice. However, not all evidence illegally obtained led to some form of prejudice and therefore occasioning automatic termination of a criminal trial. Such an approach negated and diluted, invariably, the words of the Constitution emphasized above. It had to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, it had to be shown that the admission of such evidence could render the trial unfair or be detrimental to the administration of justice. That was the correct interpretation of the issue at hand generally.

9. The Constitution provided for the right of access to information which had been operationalized through two pieces of legislation, the Independent Electoral and Boundaries Commission Act and the Access to Information Act. The information held by the State or State organs, unless for very exceptional circumstances, had to be freely shared with the public. However, such information was to flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

10. A duty had been imposed upon the citizens to follow the prescribed procedure whenever they required access to any such information. That duty could not be abrogated or derogated from, as any such derogation could lead to a breach and/or violation of the fundamental

principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It was a two way channel where the right had to be balanced with the obligation to follow due process.

11. The petitioners, using the above test, did not show how they were able to obtain the internal memos showing communication between employees of the 2nd respondent. Further, it had been alleged that those memos had only been shown in part, and taken out of context to advance the petitioners' case against the 1st and 2nd respondents, and to an extent, the 3rd respondent. No serious answer had been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only rendered it inadmissible but also impacted on the probative value of such information.

12. There had been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd respondent was guaranteed under the Constitution and section 27 of the IEBC Act. That was because the limitation imposed by both article 50(4) and section 27 of the IEBC Act aforesaid squarely applied to the matter before court.

13. There had to be a balance between the petitioners' rights to access of information as guaranteed under article 35 of the Constitution, against those of the 1st and 2nd respondents' rights to privacy and protection of property also guaranteed under articles 31 and 40 of the Constitution. If access was in the instance, obtained through the laid down procedure under section 27 of the Independent Electoral and Boundaries Commission Act, and section 6(1) of the Access to Information Act, then the rights of both the petitioners and the respondents would have been protected, by dint of the applicable laws that set out the limitations for access of any such information.

14. The petitioners had been unable to establish that the internal memos obtained from the 2nd respondent were to be used in the protection of fundamental rights or freedoms, or that without such information; they would be unjustly prejudiced. Information could only be required for the exercise or protection of a right if it was of assistance in the exercise or protection of the right. Therefore, in order to make out a case for access to information, an applicant had to state what the right that he wished to exercise or protect was, what information was required and how that information would to assist him in exercising or protecting that right. The threshold requirement of 'assistance' had thus been established as: where the requester could not show that the information would have been of assistance for the stated purpose, access to that information was to be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' was not to be enough.

15. It had to be established that the public interest that the petitioners sought to advance was not an infringement on the respondents' rights, and that the acts of the petitioners could have been justifiably upheld in an open and democratic society. However, by violating the provisions of the same Constitution that they lauded in their objection, the petitioners not only violated the provisions of sections 27 of the Independent Electoral and Boundaries

Commission Act, but also breached the provisions of articles 24(1) and 35(1) of the Constitution and in the circumstances, their use of the internal memos did not advance the interests of justice.

Application allowed.

Orders

i. *The following documents were expunged from the record:*

1. *The Internal Memo dated September 5, 2017 from the 1st respondent to the Chief Executive Officer, Mr. Ezra Chiloba marked NM-3 annexed to the affidavit of Njonjo Mue.*
2. *The Internal memo dated October 9, 2017 from a former commissioner of the 2nd respondent, Ms. Roseylne Akombe to the 1st respondent marked NM-10 annexed to the Affidavit of Njonjo Mue sworn on November 5, 2017.*
3. *The Internal Memo dated October 14, 2017 from the Chief Executive Officer of the 1st respondent addressed to the Directors, Managers, CEMS and CECs of the 2nd respondent marked as NM-12 annexed to the affidavit of Njonjo Mue sworn November 5, 2017.*
4. *Internal Memo dated October 16, 2017 from a former commissioner of the 2nd respondent, Ms Roseylne Akombe to the 1st respondent marked as NM-13 annexed to the affidavit of Njonjo Mue sworn on November 5, 2017.*
5. *The Internal Memo dated October 16, 2017 from a former commissioner of the 2nd respondent, Ms. Roselyn Akombe to the 1st respondent marked as PA-7 annexed to the affidavit of Perpetua Adar sworn on November 5, 2017.*

i. *No orders as to costs.*

Citations

Cases

Kenya

1. *Njoya, Timothy v Attorney General & another* Petition 479 of 2013; [2014] eKLR - (Explained)
2. *Okoth, David Ogollav Chief Magistrate Court, Kibera & 2 others* Petition 5 of 2015; [2016] KEHC 4483 (KLR) - (Explained)
3. *Ombija, Nicholas Randa Owano v Judges and Magistrates Vetting Board* Civil Appeal 281 of 2015; [2015] KECA 129 (KLR) - (Distinguished)

South Africa

Unitas Hospital v Van Wvk & another (231/05) (2006) ZASCA 34; 2006 (4) SA 436 (SCA) ; [2006] 4 All SA 231 - (Explained)

United Kingdom

1. *Helliwell v Piggot-Sims* [1980] FSR 356 - (Explained)
2. *Regina v Leatham* (1861) 8 Cox CC 498 - (Explained)

United States

Olmstead v United States, 277 US 438(1928) - (Explained)

Statutes

Kenya

1. Access to Information Act, 2016 (Act No 31 of 2016) sections 3; 6 (1); 8 - (Interpreted)
2. Constitution of Kenya articles 24, 31, 35, 40, 50(4) - (Interpreted)
3. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 27 - (Interpreted)

Advocates

None mentioned

December 11, 2017, the Court delivered the following Ruling:

A. Introduction

1. This is an application by way of notice of motion dated November 11, 2017 and filed on November 13, 2017 by the 3rd respondent seeking orders to expunge from the petition the following documents and/or annexures:

   (a) Internal Memo dated September 5, 2017 from the 1st respondent to the Chief Executive Officer, Ezra Chiloba marked NM-3 annexed to the affidavit of Njonjo Mue.

   (b) Internal memo dated October 9, 2017 from the former Commissioner, Ms Akombe to the 1st respondent marked NM-10 annexed to the affidavit of Njonjo Mue.

   (c) Internal Memo dated October 14, 2017 from Chief Executive Officer of the 1st respondent addressed to the Directors, Managers, CEMS and CECs marked as NM-12 annexed to the affidavit of Njonjo Mue.

   (d) Internal Memo dated October 16, 2017 from former Commissioner, Ms Akombe to the 1st respondent marked as NM-13 annexed to the affidavit of Njonjo Mue.

   (e) Internal Memo dated October 16, 2017 from former Commissioner, Ms. Akombe to the 1st respondent marked as PA-7 annexed to the affidavit of Perpetua Adar.

2. The application is anchored on the main ground that the petitioners substantially rely on a number of internal memos exchanged between members of the 2nd respondent and that the said correspondences were obtained unlawfully and illegally contrary to section 27 of the *Independent Electoral and Boundaries Commission Act* and as such, they should not be

relied upon by the court in making its determination. The 3rd respondent also contends that on September 7, 2017, the 2nd respondent issued a clarification confirming that the contents of the memo were not discussed or sanctioned by it and that it only came to know about them from the media and so they raise matters yet to be resolved by IEBC.

3. The 3rd respondent further contends that by a letter dated September 21, 2017 addressed to the 1st respondent, the Jubilee Party requested the Commission to take urgent measures on the issue of the management of information by the Commission and that shortly thereafter, the 1st respondent dismissed his Personal Assistant for unlawfully leaking information emanating from his office thus confirming that the memos are still the subject of internal discussions within the IEBC. Furthermore, the 3rd respondent questions the authenticity of the said documents and contends that they are of no evidential value.

4. The application was further supported by the affidavit of Mr Raphael Tuju, who in reiterating the grounds adduced in the application, deposed to that the petitioners seek to rely on memos that were illegally obtained and which have not been authenticated.

The 1st & 2nd Respondents' Response

5. On their part, the 1st and 2nd respondents urge that the correspondence on record has been selectively introduced hence inconclusive as to the issues raised. Further, it is their contention that section 27 of the *IEBC Act* has been breached and the petitioners have not explained how they came to be in possession of the impugned memos. That there is no record that they made a request for the same to be supplied to them and that the request had been unlawfully denied. In the event, they agree that the application is merited and the memos should be struck off the record.

The Petitioners' Response

6. The application is opposed by the petitioners. They urge that no prejudice would be suffered by the 3rd respondent should the said memos remain on record. It is also their position that the memos form an integral part upon which their petition is grounded and their presence on the record would assist the court in making a fair determination of the contested issues.

7. The petitioners further contend that the said memos were obtained legally and that in any event, article 50(4) of the *Constitution* gives an exception under which any such evidence may be relied upon by the court. Furthermore, they argue that the said documents are in the public domain and are in wide circulation. In addition, they contend that the constitutional principles of openness and transparency, override any procedural obligation placed upon a party who wishes to obtain documents held by a public entity. Consequently, the petitioners

urge the court to dismiss the 3rd respondent's application and retain the impugned internal memos on the record.

B. Analysis

8. We have been urged to expunge from the record various identified internal communications between members of the 2nd respondent. The 3rd respondent's position is that the said memos were obtained unlawfully, contrary to section 27 of the *Independent Electoral and Boundaries Commission Act*, and that article 50(4) of the *Constitution* also requires that such evidence be excluded.

9. In that regard, section 27 of the *Independent Electoral and Boundaries Commission Act* provides as follows:

> " Management of information
>
> (1) The Commission shall publish and publicize all important information within its mandate affecting the nation.
>
> (2) A request for information in the public interest by a citizen—
>
> (a) shall be addressed to the secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and
>
> (b) may be subject to confidentiality requirements of the Commission.
>
> (3) Subject to article 35 of the *Constitution*, the Commission may decline to give information to an applicant where—
>
> (a) the request is unreasonable in the circumstances;
>
> (b) the information requested is at a deliberative stage by the Commission;
>
> (c) failure of payment of the prescribed fee; or
>
> (d) the applicant fails to satisfy any confidentiality requirements by the Commission.

(4) The right of access to information under article 35 of the *Constitution* shall be limited to the nature and extent specified under this section.

(5) Every member and employee of the Commission shall sign a confidentiality agreement." (Emphasis added)

10. On the other hand, the rights of access to information is provided for under article 35 of the *Constitution* in the following terms:

"(1) Every citizen has the right of access to:

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(3) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(4) The State shall publish and publicise any important information affecting the nation."

11. In order to give effect to the rights under article 35, Parliament enacted the *Access to Information Act* (Act No 31 of 2016) providing for the modalities of obtaining any information held by the State or another person. section 3 is relevant to the present application as it stipulates the objectives of the *Act* as follows:

"(a) give effect to the right of access to information by citizens as provided under article 35 of the *Constitution*;

(b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;

(c) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the *Constitution* and any other law;

(d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to

accountability, transparency and public participation and access to information;

(e) provide for the protection of persons who disclose information of public interest in good faith; and

(f) provide a framework to facilitate public education on the right to access information under this Act."

12. Section 6(1) on the other hand provides the extent of the disclosure of the information held by an entity as follows:

" Limitation of right of access to information

(1) Pursuant to article 24 of the *Constitution*, the right of access to information under article 35 of the *Constitution* shall be limited in respect of information whose disclosure is likely to:

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) <u>significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;</u>

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession." (Emphasis added)

13. Article 35(1)(a) and (b) of the *Constitution*, read with section 3 of the *Access to Information Act* would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd respondent. In addressing that issue, the court in Petition No 479 of 2013 *Rev Timothy Njoya v Attorney General & Another*; [2014] eKLR, it was held;

> " A plain reading of section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd respondent. In *Nairobi Law Monthly v Kengen* (*supra*) the court dealt with the applicability of the right to information as follows;
>
> > "The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of article 35(3) of the *Constitution of Kenya* which imposes an obligation on the state to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the state"."

14. This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity.

16. Section 8 of the *Access to Information Act* in the above context thus provides that a person may apply in writing, or where one is unable to write, may apply orally to an information officer who shall then put the request in written form and any such request for information must be processed within 21 days. Furthermore, section 27(2) of the *Independent Electoral and Boundaries Commission Act* specifies the person to whom such a request should be addressed to and further provides circumstances when the Commission may withhold any information sought. One such circumstance is where the information sought relates to a matter under deliberation and therefore no conclusive findings have been made by the Commission.

16. The rights of access to information relevant to the matter before us is therefore from the foregoing, limited by operation of law, in this instance, being the procedures for access of any information under section 27(2) of the *Independent Electoral and Boundaries Commission Act*, as read together with sections 6(1) of the *Access to Information Act*. article 24(1) of the *Constitution*, further sets limitations on rights including necessarily the right to access to information. It provides thus:

> " A right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
>
> (a) the nature of the right or fundamental freedom;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; and
>
> (d) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose." (Emphasis added)

17. Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person 'unlawfully' or 'improperly' obtains any information held by an entity? Can a court of law admit such evidence?

18. In answer to that question, we note that in Civil Appeal No 281 of 2015 *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Boar*; [2015] eKLR it was held;

> " What does the law state regarding illegally obtained evidence? In the case of *Karuma, Son of Kaniu v The Queen* [1955] AC 197 which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that
>
> > " the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained".

In that case, the Privy Council decision was supported by the decision in *Reg v Leatham* (1861) 8 Cox CCC 498 which was referred to in the judgment. In Re Leatham (*supra*), it was said

> " it matters not how you get it if you steal it even, it would be admissible in evidence".

In *Olmstead v United States* (1928) 277 US 438 the Supreme court of the United States of America opined that

> " the common law did not reject relevant evidence on the ground that it had been obtained illegally."

In *Helliwell v Piggot-Sims* [1980] FSR 356 it was held that "so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning."

19. The above position applies generally including to election petitions which are matters sui generis. But we further note that the 3rd respondent relies on article 50(4) of the *Constitution* and urges that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights should be excluded. The said provision reads-

> " Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice." (Emphasis added).

20. The courts have extensively interrogated the provision of article 50(4) and made conclusive determinations on the same. In Petition No 5 of 2015 *David Ogolla Okoth v Chief Magistrate court, Kibera & 2 others*; [2016] eKLR for example, the court pronounced as follows:

> " It is true evidence ought to be obtained in accordance with the provisions of both the *Constitution* and of the law. Obtaining evidence and indeed, as in this particular case, seizing the same without first obtaining appropriate warrants violates constitutional norms. The right to property as well as the right to privacy will be violated. ... In such instances, article 50(4) provides...

> [e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice"

21. The learned Judge further opined:

> "I do not however agree with the position adopted by the petitioner which is seemingly an unqualified one that all evidence not properly obtained lead to some form of prejudice and therefore the automatic termination of a criminal trial. Such an approach negates and dilutes, invariably, the words of the *Constitution* emphasized above. There has to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, there must then be shown that the admission of such evidence would render the trial unfair or be detrimental to the administration of justice."

22. Again that is the correct interpretation of the issue at of hand generally but in the instant matter, the *Constitution* provides for the right of access to information which has been operationalized through two pieces of legislation, the *Independent Electoral and Boundaries Commission Act* and the *Access to Information Act*. We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

23. Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the *Constitution* and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.

24. The petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the petitioners' case against the 1st and 2nd respondents, and to an extent, the 3rd respondent. No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board* (*supra*). In the present instance, there has

been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd respondent is guaranteed under the *Constitution* and section 27 of the *IEBC Act*. This is because the limitation imposed by both article 50(4) and section 27 aforesaid squarely apply to the matter before us.

25. The court also has to find a balance between the petitioners' rights to access of information as guaranteed under article 35 of the *Constitution*, against those of the 1st and 2nd respondents' rights to privacy and protection of property also guaranteed under articles 31 and 40 of the *Constitution*. If access was in the instance, obtained through the laid down procedure under section 27 of the *Independent Electoral and Boundaries Commission Act*, and section 6(1) of the *Access to Information Act*, then the rights of both the petitioners and the respondents would be protected, by dint of the applicable laws that set out the limitations for access of any such information. The petitioners have further been unable to establish that the internal memos obtained from the 2nd respondent would be used in the protection of fundamental rights or freedoms, or that without such information, they would be unjustly prejudiced. Thus in *Rev Timothy Njoya v Attorney General & another* (*supra*) at para 44, the court held as follows;

> " In *Cape Metropolitan Council v Metro Inspection Services Western Cape & others* (2001) ZASCA 56 the court stated as follows;
>
> > " Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...
> >
> > An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.(Emphasis added)"
>
> The same position was adopted in *Unitas Hospital v Van Wvk & another* (231/05) (2006) ZASCA 34 where the court expressed itself as follows;
>
> > " [17] The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough"."

26. From the foregoing it has to be established that the public interest that the petitioners seek to advance would not infringe on the respondents' rights, and that the acts of the petitioners would justifiably be upheld in an open and democratic society. However, by violating the provisions of the same *Constitution* that they laud in their objection, the petitioners not only violated the provisions of sections 27 of the *Independent Electoral and Boundaries Commission Act*, but also breached the provisions of articles 24(1) and 35(1) of the *Constitution* and in the circumstances, their use of the internal memos would not advance the interests of justice.

C. Finding

27. In view of our findings above and having deliberated on the contested issues, our final orders in the notice of motion dated November 11, 2017 shall be as follows:

(i) The following documents are expunged from the record:

(a) The Internal Memo dated September 5, 2017 from the 1st respondent to the Chief Executive Officer, Mr Ezra Chiloba marked NM-3 annexed to the affidavit of Njonjo Mue.

(b) The Internal memo dated October 9, 2017 from a former Commissioner of the 2nd respondent, Ms Roseylne Akombe to the 1st respondent marked NM-10 annexed to the affidavit of Njonjo Mue sworn on November 5, 2017.

(c) The Internal Memo dated October 14, 2017 from the Chief Executive Officer of the 1st respondent addressed to the Directors, Managers, CEMS and CECs of the 2nd respondent marked as NM-12 annexed to the affidavit of Njonjo Mue sworn November 5, 2017.

(d) Internal Memo dated October 16, 2017 from a former Commissioner of the 2nd respondent, Ms Roseylne Akombe to the 1st respondent marked as NM-13 annexed to the affidavit of Njonjo Mue sworn on November 5, 2017.

(e) The Internal Memo dated October 16, 2017 from a former Commissioner of the 2nd respondent, Ms Roselyn Akombe to the 1st respondent marked as PA-7 annexed to the affidavit of Perpetua Adar sworn on November 5, 2017.

(ii) There shall be no orders as to costs.

Institute for Democratic Governance v Odinga & 4 others; Independent Electoral and Boundaries Commission & another (Interested Parties) (Election Petition 3 of 2017) [2017] KESC 8 (KLR) (Election Petitions) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 8 (KLR)

Civil Practice and Procedure *- institution of suits - suits capable of being consolidated or heard and determined together - presidential election petitions and other Supreme Court petitions - whether presidential election petitions which were to be concluded within 14 days could be heard and determined together with other petitions for which similar timelines were not applicable - Constitution of Kenya 2010, article 140 and 163(3).*

Constitutional Law *- presidential election petitions - differences between presidential election petitions and other petitions filed at the Supreme Court - the requirement that presidential election petitions filed at the Supreme Court were to be concluded within 14 days - whether a petition that did not entail a challenge to the election of the President-elect but sought to have it heard at the same time as other petitions which challenged the validity of the presidential elections could be heard and determined together with other petitions which entailed a challenge to the election of the President-elect - Constitution of Kenya 2010, article 140 and 163(3).*

Brief facts

The petition did not entail a challenge to the election of the President-elect but there were attempts to have it handled at the same time as other petitions which challenged the validity of the presidential elections held on October 26, 2017. The Supreme Court was engaged in hearing two other petitions under article 140 which challenged the election of Hon. Uhuru Muigai Kenyatta and Hon. William Samoei Ruto as President and Deputy President-elect respectively. Those petitions were brought under the provisions of article 140 of the Constitution and they constituted time-bound litigation for which a determination was required within 14 days.

Jubilee Party applied to be joined as an interested party in the petition. Meanwhile, counsel for the respondents raised a preliminary objection challenging the jurisdiction of the Supreme Court to hear the petition.

Issues

i. Whether a petition that did not entail a challenge to the election of the President-elect but court orders were sought to have it heard at the same time as other petitions, which challenged the validity of the presidential elections, could be heard and determined together with other petitions which entailed a challenge to the election of the President-elect.

Held

1. The instant petition did not challenge the election of the President-elect. It was brought under article 163(3) of the Constitution. It was therefore not a time-bound litigation under

the provisions of article 140 of the Constitution which would need to be determined within 14 days. It was therefore not a petition which could be heard together with Petitions Nos 2 and 4 which entailed a challenge to the election of the President-elect. It ought to be taken out of the cause list of matters to be heard within the 14 days which would conclude on December 13, 2017.

2. There was no time to rule on the application by Jubilee Party or the respondent's preliminary objection. The ruling on the applications made was deferred to a date to be given on notice.

Ruling deferred to a date to be given on notice.

Citations

Cases

None mentioned

Statutes

Kenya

Constitution of Kenya articles 140, 163(3) — (Interpreted)

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

1. Jubilee party has applied to be joined as an interested party in this petition. In the course of hearing that application counsel for the respondents have raised a preliminary objection challenging the jurisdiction of this court to entertain the petition.

2. Today and for the next two (2) to three (3) days, this court will be engaged in hearing two petitions under article 140 challenging the election of Hon Uhuru Muigai Kenyatta and Hon William Samoei Ruto as President and Deputy President elect respectively.

3. Petitions under article 140 are time bound litigation which must be determined within 14 days as required by clause (3) of that article.

4. This petition does not challenge the election of the President elect. It is brought under article 163(3) of the *Constitution*. It is therefore not a time bound petition under article 140 of the *Constitution* that we must hear within 14 days. It cannot therefore be heard along with Petition Nos 2 and 4. It is accordingly taken out of the cause list of matters to be heard between today and the December 13, 2017.

5. We do not even have time to rule on the said application to join Jubilee or on the preliminary objection raised by the respondents. In the circumstances we defer our ruling to a date to be given on notice.

It is so ordered.

Institute for Democratic Governance v Odinga & 4 others;
Independent Electoral and Boundaries Commission & another
(Interested Parties); Oganga (Applicant) (Election Petition 3 of 2017)
[2017] KESC 44 (KLR) (Election Petitions) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ, PM Mwilu, DCJ & VP, JB
Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 44 (KLR)

Election Law *– presidential election petition – public interest - obligation of conscientiousness – obligation of the court to take up matters that don't run contrary to public interest – whether a court could take up causes that ran contrary to public interest*

Brief facts

The applicant (Stephen Owoko Oganga) sought to be enjoined in the presidential election petition as an interested party on grounds that he was a registered voter and that he understood the presidential election procedure considering that he was to vie as an independent presidential candidate and that he was the chairman of the "independent candidates lobby group" that was involved in training agents overseeing the general elections.

Issues

Whether the Supreme Court while determining the presidential election petition could take up causes that ran contrary to public interest.

Held

1. The Supreme Court's time and other resources were gravely strained at the moment of determining the instant presidential election petition; yet they had to be deployed in essential causes of service to the Kenyan people.
2. There was an obligation of judicial conscientiousness, which dictated that the court had to decline to take on those causes that ran contrary to the public interest, and that made none but nominal endowment to the true cause of dispute settlement. The instant application fell squarely in the category of tendencies that negated the court's service commitment.

Application dismissed.

Citations

Cases

None referred to

Statutes

Kenya

Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 22 - (Interpreted)

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

1. The applicant has moved this court by application, by way of his notice of motion dated November 13, 2017. A citizen and registered voter from Biashara Ward, in Nakuru East Constituency in the Great Rift Valley, the applicant has resorted to the umbrella of a petition that was lodged by a Non-Governmental Organization, the Institute for Democratic Governance, which was making a case against not only the Independent Electoral and Boundaries Commission, as the duly mandated organizer of the presidential election of October 26, 2017, but also against the principals of the political coalition, NASA, which had elected not to take part in the said presidential election.

2. What is the meritorious basis for the applicant calling upon this court to intervene, in relation to the Presidential election of October 26, 2017, and with those associated with NASA as respondents?

3. The applicant asked to be enjoined as a respondent, in the petition by the said Institute for Democratic Governance. He asked to be granted leave to file and serve his papers of support of the Non-Governmental Organization's petition aforesaid.

4. What are the applicant's grounds? Firstly, the applicant avers that the *Supreme Court (Presidential Election) Petition Rules* (in particular, rule 22) are a basis for such an application. Secondly, he avers that he is a registered voter: and therefore, the matter which names certain particular individuals as respondents, "directly affects [him] as [an] individual and as a matter of public interest". Thirdly, the applicant avows that he "understands the Presidential election procedure, on monitoring and evaluation [and the] whole system [and] how it was supposed to work", especially as he himself "was to vie as [an] independent Presidential candidate." Fourthly, the applicant states that he is "the chairman of the independent candidates' lobby group that was... involved in training....agents....overseeing the general elections."

5. Such, essentially, are the grounds whereupon rest the applicant's case, that this court should formally commit itself to entertaining his case as a respondent, alongside that of the various individuals whom the Institute for Democratic Governance had chosen to list down as respondents – without any formal signal of consent from them.

6. As already recorded, the Supreme Court's time and other resources are at this moment, gravely strained – yet must be deployed in essential causes of service to the Kenyan people.

There is, necessarily, an obligation of judicial conscientiousness, which at this time, dictates that the court must decline to take on those causes that run contrary to the public interest, and that make none but nominal endowment to the true cause of dispute settlement.

7. The instant application falls squarely in the said category of tendencies negating the court's service commitment.

8. Accordingly, the instant application is hereby dismissed, and its costs shall devolve to the applicant.

Orders accordingly.

Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Election Petition 4 of 2017) [2017] KESC 28 (KLR) (Election Petitions) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 28 (KLR)

Jurisdiction *- jurisdiction of the Supreme Court - jurisdiction in presidential election petitions - whether the Supreme Court could expunge internal correspondences between members of the Independent Electoral and Boundaries Commission from the record of the court in a presidential election petition.*

Brief facts

The applicant filed the instant notice of motion application dated November 11, 2017 seeking to strike out internal correspondences between members of the 2nd respondent from the record of the court.

Issues

Whether the Supreme Court could expunge from its record internal correspondences between members of the Independent Electoral and Boundaries Commission from a presidential election petition.

Held

The court expunged several documents from the record.

Application allowed.

Orders

i. *The following documents were expunged from the record:*

1. *The internal memo dated September 5, 2017 from the 1st respondent to the Chief Executive Officer of the Independent Electoral and Boundaries Commission (IEBC) marked NM-3 annexed to the affidavit of the 1st petitioner sworn on November 5, 2017.*
2. *The internal memo dated October 9, 2017 from a former commissioner of the 2nd respondent, Roseylne Akombe to the 1st respondent marked NM-10 annexed to the affidavit of the 1st petitioner sworn on November 5, 2017.*
3. *The internal memo dated October 14, 2017 from the Chief Executive Officer of the 1st respondent addressed to the directors, managers, CEMS and CECs of the 2nd respondent marked as NM-12 annexed to the affidavit of the 1st petitioner sworn November 5, 2017.*
4. *Internal memo dated October 6, 2017 from a former commissioner of the 2nd respondent, Roseylne Akombe to the 1st respondent marked as NM-13 annexed to the affidavit of the 1st petitioner sworn on November 5, 2017.*

5. *The internal memo dated October 16, 2017 from a former commissioner of the 2nd respondent, Roselyn Akombe to the 1st respondent marked as PA-7 annexed to the affidavit of Perpetua Adar sworn on November 5, 2017.*
6. *No order as to costs.*

Editorial notes

The reasons for the instant decision were to be given on notice.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya article 50 — Interpreted
2. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rules 9, 17 — Interpreted
3. Supreme Court Act, 2011 (cap 9B) sections 12(1), 24, 31 — Interpreted

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

1. In view of the issues raised by the parties in their affidavits and submissions and noting the very limited time this court has to consider and deliver a detailed and reasoned decision, having deliberated on the contested issues placed before us, our final orders regarding the notice of motion dated November 11, 2017 shall be as follows:

    (i) The following documents are expunged from the record:

        (a) The internal memo dated September 5, 2017 from the 1st respondent to the Chief Executive Officer, Mr Ezra Chiloba marked NM-3 annexed to the Affidavit of Njonjo Mue sworn on November 5, 2017.

        (b) The Internal memo dated October 9, 2017 from a former Commissioner of the 2nd respondent, Ms Roseylne Akombe to the 1st respondent marked NM-10 annexed to the affidavit of Njonjo Mue sworn on November 5, 2017.

        (c) The Internal Memo dated October 14, 2017 from the Chief Executive Officer of the 1st respondent addressed to the Directors, Managers, CEMS

and CECs of the 2nd respondent marked as NM-12 annexed to the affidavit of Njonjo Mue sworn November 5, 2017.

(d) Internal Memo dated October 6, 2017 from a former Commissioner of the 2nd respondent, Ms Roseylne Akombe to the 1st respondent marked as NM-13 annexed to the affidavit of Njonjo Mue sworn on November 5, 2017.

(e) The Internal Memo dated October 16, 2017 from a former Commissioner of the 2nd respondent, Ms Roselyn Akombe to the 1st respondent marked as PA-7 annexed to the affidavit of Perpetua Adar sworn on November 5, 2017.

(ii) There shall be no orders as to costs.

2. The reasons for this decision shall be given on notice.

Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Election Petition 4 of 2017) [2017] KESC 30 (KLR) (Election Petitions) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ, PM Mwilu, DCJ & VP, JB
Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 30 (KLR)

Election Law *– presidential election petition – timelines for filing presidential election petition - where affidavits and annexures to the presidential election petition were filed out of time - whether the court could strike out affidavits and annexures filed out of time in a presidential election petition.*

Civil Practice and Procedure *– affidavits – striking out paragraphs of an affidavit – where paragraphs of an affidavit made reference to a non-existent affidavit - whether the court could expunge paragraphs of an affidavit that made reference to an affidavit that was not before the court.*

Civil Practice and Procedure *– presidential election petition – copies of a presidential election petition – where some of the copies of the presidential election petition lacked various documents - whether the court could admit documents that were filed in the court registry and that were present in some copies of the petition but were not present in other copies of the petition.*

Brief facts

The 3rd respondent (Uhuru Muigai Kenyatta) filed an application that sought to strike out various documents that were filed out of time by the petitioners. The documents were filed on November 7, 2017, a day later than the deadline for filing a presidential election petition. The application was also based on the ground that the bound copies of the petition lacked crucial documents. Out of the required 8 copies and the additional copies required to be served upon the respondents, only two sets had all the accompanying documents. The application additionally sought to expunge certain paragraphs from affidavits filed by the petitioner on grounds that some of the paragraphs made reference to a non-existent affidavit.

Issues

i. Whether the Supreme Court could expunge paragraphs of an affidavit that made reference to an affidavit that was not before the court.

ii. Whether the Supreme Court could strike out affidavits and annexures filed out of time in a presidential election petition.

iii. Whether the Supreme Court could admit documents that were filed in the court registry and that were present in some copies of the petition but were not present in other copies of the petition.

Held

1. Rule 7 of the Supreme Court (Presidential Election Petition) Rules, 2017 required a petition filed therein to conform to the provisions of the first schedule which provided that a petitioner was to

lodge, together with the petition, at least eight (8) copies of the petition and all documents which accompanied it.

2. The petitioner remained under a duty to strictly comply with the law and in the instant case, file all the required documents within time. However, due to the voluminous nature of the materials brought before the court during presidential election petitions, there was a possibility of a mix-up leading to incomplete set of documents, being filed in some instances.

3. As at the end of November 6, 2017, which was the last day for filing the presidential petition, there were two complete set of petitions filed together with all the accompanying documents. Whereas the petition served upon the 3rd respondent contained some volumes of documents which were received by the registry on November 7, 2017, the documents were served on the 3rd respondent within time and above all, the two sets of the court's copies had all the documents in place.

4. The 3rd respondent would suffer no prejudice if the court admitted the contentious documents as properly filed. However, it was expected that parties would strictly adhere to the procedural rules of the court and while the pressures of time imposed on parties to a presidential election petition were well known, parties ought to be diligent and ensure that all documents were filed within time and with the requisite copies for the court and other parties. The court's reluctant acceptance of the explanation of the delay in filing all documents on time in the instant case was guided by that fact but that acceptance should never be used to make late filings a common feature in the Kenyan judicial system not least in the instant court.

Application partly allowed.

Orders

i. Prayers that sought the striking off of various documents from the affidavits sworn by Njonjo Mue and Billy Atundo on November 5, 2017 were disallowed.

ii. Prayer that sought the striking off of the reference to an affidavit by James Gondi at paragraph 76 of the affidavit sworn by Njonjo Mue on November 5, 2017 was allowed.

iii. The prayer that sought the striking off of paragraphs 74 and 75 and 30, 31 and 61 of the affidavits sworn by Njonjo Mue and Billy Atudo respectively was disallowed.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya article 140 -(Interpreted)
2. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 7 -(Interpreted)

Advocates

Mr Muhoro for the 1st respondent

November 14, 2017, the Court delivered the following Ruling:

1. This is an application by way of a notice of motion dated November 11, 2017, seeking to strike out and expunge from the record the following documents??

   (a) Volume 1 being an affidavit by Njonjo Mue sworn on November 5, 2017;

   (b) Volume 2 being an annexture marked "NM 21" to the affidavit of Njonjo Mue filed on November 7, 2017;

   (c) Volume 9 being an annexure marked "BA 13" to the affidavit of Billy Atudo;

   (d) Volume 10A being an annexure marked "NM 21" to the affidavit on Njonjo Mue;

   (e) Volume 10B being an annexure marked "BA 14" to the affidavit of Njonjo Mue; and

   (f) Volume 12B being an annexure marked "BA 40" to the affidavit of Billy Atudo.

2. The application also seeks to strike out certain paragraphs of the affidavits filed in support of the petitioners' case as follows??

   (a) Part of paragraph 76 and the whole of 74 and 75 of the affidavit sworn by Njonjo Mue on November 5, 2017; and

   (b) Paragraph 30, 31 and 61 of the affidavit sworn by Billy Atudo on November 5, 2017.

3. In support of the application, the 3rd respondent urges that the identified documents were filed out of time and that though the deadline for filing the petition was November 6, 2017, the above documents were filed on November 7, 2017, one day out of time.

4. With regard to paragraphs 74 and 75 of the affidavit sworn by Njonjo Mue and paragraphs 30, 31 and 61 of the affidavit sworn in support of the petition by Billy Atudo, the 3rd respondent urges that, once the impugned annexures are struck out, the affected paragraphs will henceforth lack a legal foundation upon which they can stand and must similarly be struck out.

5. With regard to paragraph 76 of the affidavit sworn by Njonjo Mue, the 3rd respondent submits that though the said paragraph refers to an affidavit by one, James Gondi, no such affidavit has been annexed to any of the petitioners' documents and therefore any reference to it is superfluous.

6. In his submissions, the 3rd respondent therefore urges that the Supreme Court Rules provide that a petition must be supported by an affidavit together with all the accompanying annexures and once they are not filed within time or at all then the whole petition collapses.

7. In opposing the application, the petitioners submit that article 140 of *Constitution* provides for the filing of only a petition as a basic requirement through which one approaches the court in a presidential election petition. They thus urge that, as at the end of November 6, 2017, they had filed a complete petition together with all the accompanying documents as is required under the law. The petitioners' counsel on record, Ms Soweto, further submitted that, though they had in their possession all the required documents as at midnight on November 6, 2017, they were advised at the registry to come back the following morning, to complete the filing exercise. Counsel however later acknowledged that out of the required 8 copies and the additional copies required for the respondents, only two sets had all the accompanying documents and those were the documents that were acknowledged to have been filed on October 6, 2017.

8. With reference to the affidavit of one James Gondi, referred to at paragraph 76 of Njonjo Mue's affidavit, counsel admitted that its non-filing was an inadvertent error and the same is indeed not on record. Consequently, she submitted that she had no objection to the striking off of any reference to such an affidavit.

9. On his part, Mr Muhoro, counsel for the 1st respondent opposes the application and submits that there has been a long queue at the Registry over the last one week due to the many volumes of documents being filed and hence it is possible to file some documents out of time. That therefore the late filing of the documents in issue is excusable.

10. Having considered the application, the affidavit in support thereof, and the submissions of counsel for the parties, we have arrived at the following conclusions:

    (a) Rule 7 of the *Supreme Court (Presidential Election Petition) Rules, 2017* requires a petition filed therein to conform to the provisions of the First Schedule which provides that a petitioner shall lodge, together with the petition, at least eight (8) copies of the petition and all documents which accompany it.

    (b) Though the petitioner remains under a duty to strictly comply with the law and in this case, file all the required documents within time, we recognize that due to the voluminous nature of the materials brought before the Court, during presidential election petition, there is a possibility of a mix-up leading to incomplete set of documents, being filed in some instances.

(c) In this case however, as at the end of November 6, 2017, which was the last day for filing the presidential petition, there were two complete set of petitions filed together with all the accompanying documents.

(d) Whereas we acknowledge that the petition served upon the 3rd respondent contained some volumes of documents which were received by the registry on November 7, 2017, the said documents were served on the 3rd respondent within time and above all, the court appreciates that two sets of the court's copies had all the documents in place.

11. Flowing from the above, we find that the 3rd respondent will suffer no prejudice if we admit the contentious documents as properly filed. Having so said however, it would be expected that parties would strictly adhere to the procedural rules of this court and while the pressures of time imposed on parties to a presidential election petition are now well known, parties ought to be diligent and ensure that all documents are filed within time in this case and with the requisite copies for the court and other parties. Our reluctant acceptance of the explanation of the delay in filing all documents on time in this case is guided by that fact but that acceptance should never be used to make late filings a common feature in our judicial system not least in this court. Having so stated, we make the following orders:

(a) Prayers (a)-(f) with regard to the striking off of various documents from the affidavits sworn by Njonjo Mue and Billy Atudo on November 5, 2017 are hereby disallowed.

(b) Prayer seeking the striking off of the reference to an affidavit by James Gondi at paragraph 76 of the affidavit sworn by Njonjo Mue on November 5, 2017 is hereby allowed.

(c) As a consequent to order (a) above, the prayer seeking the striking off of paragraphs 74 and 75 and 30, 31 and 61 of the affidavits sworn by Njonjo Mue and Billy Atudo respectively, are hereby disallowed.

(d) There shall be no orders as to cost.

Mue & another v Chairperson of the Independent Electoral and Boundaries Commission & 3 others (Election Petition 4 of 2017) [2017] KESC 29 (KLR) (Election Petitions) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 29 (KLR)

Civil Practice and Procedure *- parties to a suit - joinder of parties to a suit - whether it was appropriate to join a party with a common cause with other parties to a suit, including the petitioners, as a respondent - whether it was appropriate for a respondent which had such a common cause to be struck out.*

Issues

Whether a party which had a common cause with other parties to a presidential election petition, would be struck out as a party to the petition.

Held

There was an intricate network of common cause which linked the 4th respondent, the National Super Alliance, to other parties in the petition. It was detrimental to the 3rd respondent who in view of the mode of joinder of the 4th respondent, would have no opportunity to safeguard his rightful interests in the electoral process. In the circumstances, it was appropriate to strike out the 4th respondent as a respondent in the petition.

4th respondent struck out.

Citations

Cases

None referred to

Statutes

None referred to

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

1. An intricate network of common cause links the 4th respondent to the other parties to this petition, in a formation that is clearly detrimental to the 3rd respondent who, in view of the mode of joinder of the 4th respondent, will have no opportunity to safeguard his rightful

interests in the electoral process – a subject which is, quite significantly, one of the most important public interest.

2. In the circumstances, the 4th respondent must be struck out as a respondent in this petition.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2017.

.....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

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

REGISTRAR

SUPREME COURT OF KENYA

Pkosing v National Super Alliance & 12 others (Petition 19 of 2017)
[2017] KESC 9 (KLR) (Election Petitions) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB
Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 9 (KLR)

Electoral Law *– presidential election petition – timelines of a presidential election petition - applications that may be filed under or consolidated with the presidential election petition – application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results - whether an application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results warranted consolidation with the presidential election petition – Constitution of Kenya (2010) article 140; Supreme Court Act (Act No. 7 of 2011), section 24; Supreme Court (Presidential Election Petition)Rules (2017), rule 26*

Brief facts

The petitioner contended that the actions of the 6th and 7th respondents (Raila Amolo Odinga and Stephen Kalonzo Musyoka) to boycott and sabotage the conduct of elections on October 26, 2017 amounted to treason and an attempt to unconstitutionally establish a government in Kenya. Upon perusal of the petition, the Hon Chief Justice directed for the petition to be heard by the court after hearing the time bound presidential election petition. Undeterred, the applicant returned to the Supreme Court with an application under section 24 of the Supreme Court Act and rule 26 of the Supreme Court Rules that sought for the petition to be consolidated and heard together with the presidential election petition.

Issues

i. Whether an application challenging the conduct of presidential election candidates in accepting or rejecting the presidential election results warranted consolidation with the presidential election petition.
ii. Whether the petition had raised questions with regard to the validity of the presidential election.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 140

140. Questions as to validity of presidential election

(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

(2) 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.

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.

Held

1. The application did not fall within the purview of article 140 of the Constitution which required petitions challenging the election of the president elect to be filed within seven days of the declaration of the results of the presidential election and heard and determined within 14 days of filing.
2. If the Supreme Court lost focus and succumbed to pressure and allowed all cases by parties aggrieved by the conduct of a presidential election to be heard within the period of 14 days allowed by article 140 of the Constitution, it would be swamped by an avalanche of petitions it would not be able to determine within the prescribed time frame and occasion a constitutional crisis. The instant petition was not time bound. It would be heard after the Supreme Court determined the petitions challenging the election of the president.

Application deferred to be determined at a later date after the determination of the presidential election petition.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya article 140 - (Interpreted)
2. Supreme Court Act, 2011 (cap 9B) section 24 - (Interpreted)
3. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 26 - (Interpreted)

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

1. In his petition dated November 1, 2017 Hon David PKosing, the Member of Parliament for Pokot South (the applicant), seeks 16 declarations. The gravamen of his prayers is that the acts of Raila Amolo Odinga, Stephen Kalonzo Musyoka, Wycliffe Musalia Mudavadi and Moses Masika Wetangula together with their political parties, the National Super Alliance; Orange Democratic Movement; Wiper Democratic Movement – Kenya; Ford Kenya Party; and Amani National Congress as well as their supporters, to boycott, sabotage, frustrate and or obstruct the conduct of the October 26, 2017 presidential election, amount to treason

and an attempt to establish a government in Kenya other than in accordance with the *Constitution*. Hon Pkosing seeks a further declaration that Hon Uhuru Muigai Kenyatta was lawfully elected in the fresh presidential election held on October 26, 2017.

2. On November 3, 2017, the Deputy Registrar of this court directed that the petition be served upon all the respondents and that the matter be mentioned before him on November 15, 2017 to determine compliance with those directions before a hearing date is fixed.

3. On November 12, 2017, the Deputy Registrar took the file to the Hon Chief Justice and sought guidance in the matter as Mr Kibe Muigai, learned counsel for the applicant, was demanding that this petition should be heard before the November 17, 2017. Upon perusal of the petition, the Hon Chief Justice directed that "As the Supreme Court is engaged in hearing time bound petitions under article 140 of the *Constitution*, I direct that this petition be heard by the whole court on priority basis after December 13, 2017".

4. Undeterred, the applicant has returned to this court with an application under section 24 of the *Supreme Court Act* and rule 26 of the *Supreme Court Rules* seeking that his petition be consolidated and heard together with "this petition". We suppose he is referring to petition Nos 2 and 4 filed by Mr Harun Mwau and Njonjo Mue & another challenging the declaration of Hon Uhuru Muigai Kenyatta and Hon William Samoei Ruto respectively as President and Deputy President elect. We are, this evening, going to give directions and commence the hearing of those petitions tomorrow.

5. Hon Pkosing's application cannot be granted for the simple reason that it does not fall within the purview of article 140 of the *Constitution* which requires petitions challenging "the election of the president elect" to be "filed within seven days of the declaration of the results of the presidential election" and heard and determined "within 14 days" of filing.

6. Hon Pkosing's petition is not seeking to challenge the declaration of Hon Uhuru Kenyatta as the president elect. As we have said, Hon. Pkosing's petition is seeking declarations to the effect that the acts of Hon Raila and Hon Stephen Musyoka and supporters to boycott and their attempts to sabotage the conduct of elections on October 26, 2017 amount to treason and an attempt to unconstitutionally establish a government in Kenya.

7. If this court loses focus, succumbs to pressure and allows all cases by parties aggrieved by the conduct of a presidential election to be heard within the period of 14 days allowed by article 140, it will be swamped by an avalanche of petitions it will not be able to determine within that time frame and occasion a constitutional crisis.

8. In the circumstances, we decline to grant this application. As we have stated, Hon Pkosing's petition is not a time bound litigation. It will therefore be heard with others after this court determines the petitions challenging the election of the president.

Mwau v Independent Electoral and Boundaries Commission & 2 others; Attorney General (Amicus Curiae) (Petition 2 of 2017) [2017] KESC 3 (KLR) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 3 (KLR)

Civil Practice and Procedure *- joinder of parties - amicus curiae - application by the Attorney General to be enjoined in a presidential petition as amicus curiae - whether the Attorney General had qualified to be admitted as amicus curiae.*

Brief facts

The applicant (the Attorney General) lodged an application to be enjoined in the proceedings as *amicus curiae.* According to the applicant, his joinder in the proceedings would enhance the right of access to justice in terms of the qualitative normative content of the political rights as well as open positive lines of development of electoral law jurisprudence with regard to whether nominations of presidential candidates was a procedural requirement in the conduct of fresh a presidential election arising under article 140(3) of the Constitution.

The applicant contended that the conduct of a fresh presidential election arising under article 140(3) of the Constitution was a matter of great public interest to which joinder of the Attorney General as a defender of the public interest was critical. According to the applicant, the presidential electoral disputes normally raised constitutional questions of great public importance revolving around the interpretation and application of constitutional and legal principles and policy to a given disputed issue.

It was contended that having been involved as *amicus curiae* in the *Raila Odinga, 2013* case where the issue of candidates to participate in a fresh presidential election was raised, and having been involved in post-2013 electoral legal reform as affirmed by the court in the case of *Raila Odinga & Another vs. IEBC & 2 Others*, the Attorney General was in a special position to assist the court in making a determination on the issue. It was argued that the applicant had the relevant expertise to assist the court to make a determination on the pointed issues by placing relevant material and research before the court.

Issues

i. Whether the Attorney General had qualified to be admitted as a*micus curiae*

ii. Whether the Attorney General's a*micus* brief would have addressed points of law that had not been addressed by the parties to the suit.

Held

1. The Attorney General had not qualified to be admitted as *amicus curiae* in the proceedings because his application had not met the threshold laid out in the *Mumo Matemu* case. In particular:

a. The Attorney General's *amicus* brief had not addressed point(s) of law not already addressed by the parties to the suit so as to introduce only novel aspects of the legal issue in question that aid the development of the law.
b. The *amicus* brief neither demonstrated that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available nor draw the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. The issues advanced in the *amicus* brief had been extensively covered by the parties to the petition and no new points of law or legal expertise on the proposed issue of 'nomination' had been advanced by the Attorney General.

Application dismissed.

Citations

Cases

Kenya

1. *Aukot, Ekuru v Independent Electoral and Boundaries Commission & 3 others* Petition 471 of 2017; [2017] eKLR - (Mentioned)
2. *Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* Petitions 5, 4 & 3 of 2013; [2013] KESC 8 (KLR) (Consolidated) - (Mentioned)
3. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Election Petition 1 of 2017; [2017] KESC 39 (KLR) - (Mentioned)
4. *Trusted Society for human Rights Alliance v Matemu, Mumo & 5 others* Civil Application 29 of 2014; [2015] KESC 6 (KLR) - (Explained)

Trinidad and Tobago

Peters v Attorney General (2002) 3 LRC 32 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 81,140(3); 156(5)(6) — Interpreted
2. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rules 4(2); 54 — Interpreted

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

1. Upon perusing the application dated November 13, 2017 and filed on even date by the Hon Attorney General to be enjoined in these proceedings as *amicus curiae* on the grounds that:

(i) The applicant has a constitutional and statutory obligation to promote, protect and uphold the rule of law and defend the public interest and in particular:

a. Authorised under article 156(5) of the *Constitution* and section 6(2)(a) to appear with leave of the court as a friend of the court in any civil proceedings to which the Government is not a party.

b. Obligated under article 156(6) of the *Constitution* to promote, protect and uphold the rule of law and defend the public interest.

(ii) The Hon Attorney General has been admitted as *amicus curiae* in all the previous presidential election petitions before this court in appreciation of his statutory and constitutional mandate.

(iii) The Office of Attorney General has been involved in post 2013 electoral legal reform processes under article 81 of the *Constitution* which puts it in a special position to assist the court to make a determination on the issues raised in the petition.

(iv) The instant petition raises complex and significant constitutional and legal questions regarding whether the nomination of presidential candidates is a mandatory procedural requirement in the conduct of fresh presidential election under article 140(3) of the *Constitution*.

(v) The Hon Attorney General in the case of *Raila Odinga & others v IEBC & Others*; Supreme Court Petition No 5 of 2013 (*Raila Odinga*, 2013 case) raised the issue of candidates to participate in a fresh presidential election arising under article 140(3) of the *Constitution*, which issue is live in this petition and the Attorney General has special insights on the issue.

2. Further, in the affidavit in support of the application sworn on November 13, 2017, the Attorney General avers that throughout his tenure, he has exercised the necessary impartiality and independence as demanded by the constitution and the law throughout the electoral process leading to the conduct of the fresh presidential election.

3. Upon reading the *amicus* brief and upon considering the written submissions in support of the application, the applicant contends that:

(i) His joinder in these proceedings will enhance the right of access to justice in terms of the qualitative normative content of the political rights as well as open positive lines of development of electoral law jurisprudence with regard to whether nominations of presidential candidates is a procedural requirement in the conduct of fresh presidential election arising under article 140(3) of the *Constitution*.

(ii) The conduct of fresh presidential election arising under article 140(3) of the *Constitution* is a matter of great public interest to which joinder of the Attorney General as a defender of the public interest is critical as enunciated in the case of the *Trusted Society for human Rights Alliance v Mumo Matemu & 5 Others* (2015) eKLR (*Mumo Matemu*)case.

(iii) Presidential electoral disputes normally raise constitutional questions of great public importance revolving around the interpretation and application of constitutional and legal principles and policy to a given disputed issue. He referred to the case of *Peters v Attorney General* (2002) 3 LRC 32 CA Trinidad and Tobago at 101 to buttress this submission.

(iv) Having been involved as *amicus curiae* in the *Raila Odinga*, 2013 case where the issue of candidates to participate in a fresh presidential election was raised, and having been involved in post-2013 electoral legal reform as affirmed by this court in the case of *Raila Odinga & another v IEBC & 2 others* [2017] eKLR, the Attorney General is in a special position to assist the court in making a determination on this issue.

(v) The Hon Attorney General has the relevant expertise to assist the court to make a determination on the pointed issues by placing relevant material and research before the court.

4. Having considered the application, by a unanimous decision of the court, we find that the Hon Attorney General does not qualify to be admitted as *amicus curiae* in these proceedings because his application does not meet the threshold laid out in the *Mumo Matemu* case. In particular:

i. The Attorney General's amicus brief does not address point(s) of law not already addressed by the parties to the suit so as to introduce only novel aspects of the legal issue in question that aid the development of the law. The Attorney General only points to the decision of the High Court in the case of *Ekuru Aukot v Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR. He then submits that the IEBC was constitutionally bound to follow that decision, being a decision in rem, in conducting the fresh presidential election.

ii. The *amicus* brief neither demonstrates that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available nor draws the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. The issues advanced in the amicus brief have been extensively covered by the parties to the petition and no new points of law

or legal expertise on the proposed issue of 'nomination' has been advanced by the Hon Attorney General.

5. Consequently, we hereby make the following orders under rule 54 of the *Supreme Court Rules* as read with rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules 2017*:

(i) The notice of motion dated November 13, 2017 seeking orders that this court grants leave for the honorouble Attorney-General to appear as *amicus curiae* in these proceedings is hereby denied.

(ii) No order as to costs.

Orders Accordingly

Mwau v Independent Electoral and Boundaries Commission & 2 others; Maina (Interested Party) (Presidential Election Petition 2 of 2017) [2017] KESC 4 (KLR) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 4 (KLR)

Election Law *– presidential election petition – application to be enjoined as an interested party – considerations to be enjoined as an interested party in a presidential election petition – whether the petitioner met the qualifications to be enjoined as an interested party in the presidential election petition - Trusted Society of Human Rights Alliance v Mumo Matemu and 5 Others [2015] eKLR: Francis Karioki Muruatetu and another v Republic & 5 others [2016] eKLR*

Civil Practice and Procedure *– presidential election petition – application to be enjoined as an interested party – considerations to be enjoined as an interested party in a presidential election petition – whether the petitioner met the qualifications to be enjoined as an interested party in the presidential election petition - Trusted Society of Human Rights Alliance v Mumo Matemu and 5 Others [2015] eKLR: Francis Karioki Muruatetu and another v Republic & 5 others [2016] eKLR*

Brief facts

The applicant (Edward Kings Onyancha Maina) sought to be enjoined as an interested party in the presidential election petition. The Applicant was a registered voter who had cast his vote on the October 26, 2017 election and he stated that if the petition was upeld it would violate his freedoms and rights. He based his application on grounds that he was not consulted by the petitioner before making the instant petition and on further grounds that the petition sought to violate his freedoms and rights. He contended that he stood to have his rights violated in the event that the declared results were invalidated.

Issues

Whether the petitioner met the qualifications to be enjoined as an interested party in the presidential election petition.

Held

1. The applicant had not demonstrated that he had an identifiable stake in the petition nor had he demonstrated that he would be prejudiced if he was not enjoined as a party taking into account that the issues he raised had already been addressed by the parties.
2. The applicant did not qualify to be joined as an interested party. The application did not meet the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* [2015]eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others* [2016]eKLR that the applicant did not intend to make submissions before the court that were not already presented by the rest of the parties.

Application dismissed.

Citations

Cases

Kenya

1. *Muruatetu, Francis Karioki & another v Republic & 5 others* Petitions 15 & 16 of 2015; [2016] eKLR (Consolidated) - (Explained)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Explained)

Statutes

Kenya

1. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 4(2) - (Interpreted)
2. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 25 - (Interpreted)

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

(An application for joinder as an interested party under rule 25 of the *Supreme Court Rules, 2012* as read with rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*)

1. Upon perusing the application dated November 11, 2017 and filed on November 13, 2017 by Edward Kings Onyancha Maina for joinder as an interested party in the Presidential Election Petition No 2 of 2017 and;

2. Upon reading: the affidavit of Mr Edward Kings Onyancha Maina, a Kenyan citizen residing and working at Nakuru City and a registered Voter, sworn on the November 11, 2017; and;

3. Upon considering the arguments made under the application in which the applicant contends that he was a registered voter, who cast his vote in the October 26, 2017 repeat Presidential election; that he was not consulted by the petitioner before making the petition (No 2 of 2017); the petition seeks and does violate his freedoms and rights; that grant of leave will enable him to ventilate, sustain, protect, promote, enforce and champion his freedoms and rights enshrined under the Constitution and the relevant law; and, that he strongly fears that unless he is enjoined in the present petition he stands to be violated as a voter in the event that the declared results are invalidated.

4. The applicant has not demonstrated that he has an identifiable stake in the present petition neither has he demonstrated that he will be prejudiced if he is not enjoined as a party taking into account the issues he raises have already been addressed by the parties.

5. Having considered the application, by a unanimous decision of the court, we find that the applicant does not qualify to be joined as an interested party and make the following orders under rule 25 of the *Supreme Court Rules* as read with rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules 2017*.

Orders	Reasons
The application is disallowed.	The application does not meet the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, Supreme Court Petition No 12 of 2013, [2015] eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others*, Supreme Court Petition No 15 & 16 of 2015 (Consolidated); [2016] eKLR in that the applicant does not intend make submissions before the court that are not already presented by the rest of the parties.

Mwau v Independent Electoral and Boundaries Commission & 2 others; Wamaya (Applicant) (Presidential Election Petition 2 of 2017) [2017] KESC 7 (KLR) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 7 (KLR)

Civil Practice & Procedure *– parties – parties to a suit – joinder as an interested party - where applicant applied to be admitted as an interested party in the proceedings before the Supreme Court – circumstances under which a party can be admitted as an interested party in a matter – whether the applicant could be admitted as an interested party in the circumstances –Supreme Court Rules, 2012, rule 25; Supreme Court (Presidential Election Petition) Rules, 2017, rule 4 (2).*

Brief facts

Ben Caleb Wamaya made an application for joinder as an interested party in the Presidential Election Petition No. 2 of 2017. He contended that he was a registered voter, who wished to cast his vote in the October 26, 2017 repeat presidential election but he was denied his right to do so due to the unavailability of election staff and materials and the actions of the Police chasing away people from the polling station.

Issues

i. What were the legal requirements governing applications for parties to be enjoined as interested parties in Supreme Court proceedings?
ii. Whether the applicant satisfied the legal requirements governing applications for parties to be enjoined as interested parties in Supreme Court proceedings.

Relevant provisions of the Law

The Supreme Court Rules, 2012;

Rule 25; Interventions*;*

(1) A person may at any time in any proceedings before the Court apply for leave to be joined as an interested party.

(2) an application under this rule shall include:-

(a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

(4) An application under this rule shall be determined on the basis of written submissions. Provided that the Court may, where the applicant is unrepresented, direct that submissions may not be made orally.

The Supreme Court (Presidential Election Petition) Rules, 2017;

Rule 4 (2);

4(2) Where there is no applicable provision in the Act or in these Rules, the procedures set out in the Supreme Court Rules, 2017 in so far as they are not inconsistent with the Act or these Rules, shall apply to an election petition.

Held

1. The applicant had not demonstrated that he had an identifiable stake in the instant petition, nor had he demonstrated that he would be prejudiced if he was not enjoined as a party taking into consideration the issues he raised had already been addressed by the parties.
2. The applicant did not qualify to be joined as an interested party and his application was disallowed by the court under rule 25 of the Supreme Court Rules as read with rule 4(2) of the Supreme Court (Presidential Election Petition) Rules 2017.
3. The application did not meet the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others,* (Supreme Court Petition No. 12 of 2013), [2015] eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others,* (Supreme Court Petition No. 15 & 16 of 2015 (consolidated)) [2016] eKLR, in that the applicant did not intend to make submissions before the court that were not already presented by the rest of the parties.

Application disallowed.

Citations

Cases

Kenya

1. *Muruatetu, Francis Karioko & another v Republic & 5 others* Petitions 15 & 16 of 2015; [2017] KESC 2 (KLR) (Consolidated) - (Applied)
2. *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Petition No 12 of 2013; [2015] eKLR - (Applied)

Statutes

Kenya

1. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 4(2)- (Interpreted)
2. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 25 - (Interpreted)

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

(An application for joinder as an interested party under rule 25 of the *Supreme Court Rules, 2012* as read with rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*)

1. Upon perusing the application dated November 7, 2017 and filed on even date by Ben Caleb Wamaya for joinder as an interested party in the Presidential Election Petition No 2 of 2017 and;

2. upon reading: the affidavit of Mr Ben Caleb Wamaya (registered to vote at Carwash Polling Station code No 015, in Kisumu Central Constituency, Kisumu County), sworn on the November 7, 2017;

3. Upon considering the arguments made therein, in which the applicant contended that he is a registered voter, who wished to cast his vote in the October 26, 2017 repeat presidential election but he was denied his right to do so due to the unavailability of election staff and materials and the actions of the police chasing away people from the polling station.

4. The applicant has not demonstrated that he has an identifiable stake in the present petition neither has he demonstrated that he will be prejudiced if he is not enjoined as a party taking into consideration the issues he raises have already been addressed by the parties.

5. Having considered the application, by a unanimous decision of the court, we find that the applicant does not qualify to be joined as an interested party and make the following orders under rule 25 of the *Supreme Court Rules* as read with rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*.

6.

Orders	Reasons
The application is disallowed.	The application does not meet the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others,* Supreme Court Petition No. 12 of 2013, [2015] eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others,* Supreme Court Petition No. 15 & 16 of 2015 (consolidated); [2016] eKLR in that the applicant does not intend make submissions before the Court that are not already presented by the rest of the parties.

Mue & another v Chairperson Independent Electoral and Boundaries Commission & 3 others; Aukot (Applicant) (Presidential Election Petition 4 of 2017) [2017] KESC 10 (KLR) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB
Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 10 (KLR)

Civil Practice & Procedure *– parties – parties to a suit – joinder as an interested party - where applicant applied to be admitted as an interested party in proceedings before the Supreme Court – circumstances in which a party could be admitted as an interested party in a matter – where the applicant was a presidential candidate in the fresh presidential election - whether the applicant could be admitted as an interested party in the circumstances –Supreme Court Rules, 2012, rule 25; Supreme Court (Presidential Election Petition) Rules, 2017, rule 4 (2).*

Brief facts

Ekuru Aukot, the Party Leader of the Thirdway Alliance Kenya, made an application for joinder as an interested party in the Presidential Election Petition No 4 of 2017. He contended that he had direct and legitimate interest in the petition; that he was a presidential candidate for both the general election held on August 8, 2017 and the fresh presidential election held on October 26, 2017; that being a presidential candidate in the election which was the subject of the instant petition, he would suffer prejudice if he was not enjoined as a party in the proceedings; that he would advance submissions that were relevant and useful to the petition and which would be different from those of the other parties since he had been an active player in the elections and had gathered crucial information, facts and analysis that had a direct bearing on the instant proceedings and the ultimate outcome; and, that he would be directly affected by the outcome of the instant petition.

The applicant further contended that he had made a similar application within Presidential Election Petition No 1 of 2017 and the court had found that he would have been prejudiced if not enjoined and that he had an identifiable stake in the matter in line with the criteria laid down in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others, Supreme Court Petition No 12 of 2013, [2015] eKLR* and *Francis Karioki Muruatetu & another v Republic & 5 others, Supreme Court Petition No 15 & 16 of 2015 (Consolidated) [2016] eKLR.*

Issues

i. What were the legal requirements governing applications for parties to be enjoined as interested parties in Supreme Court proceedings?
ii. Whether the applicant satisfied the legal requirements governing applications for parties to be enjoined as interested parties in Supreme Court proceedings.

Relevant provisions of the Law

Supreme Court Rules, 2012

Rule 25 - Interventions

(1) A person may at any time in any proceedings before the court apply for leave to be joined as an interested party.

(2) an application under this rule shall include :-

(a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the court and different from those of the other parties.

(4) An application under this rule shall be determined on the basis of written submissions. Provided that the court may, where the applicant is unrepresented, direct that submissions may not be made orally.

Supreme Court (Presidential Election Petition) Rules, 2017

Rule 4

(2) Where there is no applicable provision in the Act or in these Rules, the procedures set out in the Supreme Court Rules, 2017 in so far as they are not inconsistent with the Act or these Rules, shall apply to an election petition.

Held

1. The applicant qualified to be joined as an interested party and allowed the application under rule 25 of the Supreme Court Rules as read with rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017.
2. The application met the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others,* Supreme Court Petition No 12 of 2013 [2015] eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others,* Supreme Court Petition No 15 & 16 of 2015 (Consolidated) [2016] eKLR in that the applicant having been a presidential candidate in the fresh presidential election was directly affected by the outcome of the petition in the event of invalidation of the declared results.

Application allowed.

Citations

Cases

Kenya

1. *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2016] KESC 12 (KLR) - (Applied)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Applied)

Statutes

Kenya

1. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 4(2) — (Interpreted)
2. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 25 — (Interpreted)

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

1. Upon perusing the application dated November 10, 2017 and filed on November 11, 2017 by Ekuru Aukot for joinder as an interested party in the Presidential Election Petition No 4 of 2017 and;

2. Upon reading: the affidavit of Mr Ekuru Aukot, the Party Leader of the Thirdway Alliance Kenya, sworn on the November 10, 2017; and;

3. Upon considering the arguments made for the applicant in which it is contended that the applicant has direct and legitimate interest in the present petition; he was a presidential candidate for both the general election held on the August 8, 2017 and the fresh presidential election held on October 26, 2017; being a presidential candidate in the election which is the subject of the present petition, he will suffer prejudice if he is not enjoined as a party in the proceedings; he shall advance submissions that are relevant and useful to the petition and which will be different from those of the other parties since he has been an active player in the elections and has gathered crucial information, facts and analysis that have a direct bearing on the current proceedings and the ultimate outcome; and, that he will be directly affected by the outcome of this petition.

4. The applicant had made a similar application within Presidential Election Petition No 1 of 20017 in the month of August and the court found he would have been prejudiced if not enjoined and that had an identifiable stake in the matter in line with the criteria laid down in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others,* Supreme Court Petition No 12 of 2013, [2015] eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others*, Supreme Court Petition No 15 & 16 of 2015 (Consolidated); [2016] eKLR

5. Having considered the application, by a unanimous decision of the court, we find that the applicant qualifies to be joined as an interested party and make the following orders under rule 25 of the *Supreme Court Rules* as read with rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*.

6.

Orders	Reasons
The application is allowed.	The application meets the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others,* Supreme Court Petition No 12 of 2013, [2015] eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others*, Supreme Court Petition No 15 & 16 of 2015 (Consolidated); [2016] eKLR in that the applicant having been a presidential candidate in the fresh presidential election will be directly affected by the outcome of the petition in the event of invalidation of the declared results.

Mue & another v Chairperson of the Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017) [2017] KESC 5 (KLR) (Election Petitions) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 5 (KLR)

Electoral Laws *- presidential election petition - scrutiny of votes - principles applicable to the grant of orders of scrutiny of votes - circumstances under which the court would grant orders of scrutiny of votes.*

Brief facts

The 1st and 2nd petitioners made an application for orders of scrutiny dated October 13, 2017. The application contained 20 prayers in total.

Issues

Circumstances under which orders for scrutiny of votes would be granted.

Held

The principles laid down in *Peter Gatirau Munya* regarding applications and orders for scrutiny would guide the Supreme Court in making its determination. Additionally, the Supreme Court would also be guided by its ruling of October 28, 2017 in *Raila Odinga & Kalonzo Musyoka v IEBC & others* wherein it clarified the grounds upon which an order for scrutiny would be granted or partially granted or declined.

Application allowed.

Orders

i. *The 2nd respondent was to grant access to all original Forms 34A, Forms 34B, and Forms 34C to the petitioners herein. (Prayer 14).*

ii. *The 2nd respondent was to avail a certified copy of the Voter Register to the petitioners at the cost of the latter (petitioners).*

iii. *Prayers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18 and 19 were declined on the basis grounds which would be elaborated in a detailed version of the ruling to be issued by the Supreme Court at a later date.*

iv. *Some of the prayers were declined due to the sheer impracticability of their implementation given the short time left for the determination of the petitions at hand.*

v. *Others were declined because they were not pleaded with sufficient particularity in the petition.*

vi. *Others were declined on grounds that they were couched in such general terms as to be no more than fishing expeditions.*

Citations

Cases

Kenya

1. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Applied)
2. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2017] KESC 31 (KLR) - (Applied)

Statutes

None referred to

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

1. We have considered the application for scrutiny dated, October 13, 2017, by the 1st and 2nd petitioners in Election Petition No 4 of 2017. The application contains 20 prayers in all. We have also considered the affidavits in support of and opposition to the said application. We have paid due regard to the oral submissions of counsel for the petitioners and the respondents. In arriving at the orders we are about to make, we have been guided by the principles laid down by this court in *Peter Gatirau Munya*; regarding applications and orders for scrutiny. We are further guided by our ruling of October 28, 2017 in *Raila Odinga & Kalonzo Musyoka v IEBC & others*; wherein following an application for scrutiny by the petitioners, this court further clarified the grounds upon which an order for scrutiny may be granted, or partially granted, or declined altogether.

2. Pursuant to the foregoing, by unanimous decision, we hereby make the following orders:

    (i) The 2nd respondent do grant access to all original forms 34A, forms 34B, and forms 34C to the petitioners herein. (prayer 14).

    (ii) The 2nd respondent do avail a certified copy of the voter register to the petitioners at the cost of the latter (petitioners) (Prayer 17).

    (iii) Prayers 1,2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18 and 19 are hereby declined. The said prayers have been declined on the basis of very clear grounds which will be elaborated in a detailed version of this ruling to be issued by the court at a later date. Some of the prayers have been declined due to the sheer impracticability of their implementation given the short time left for the determination of the petitions at hand. Others have been declined because they were not pleaded with sufficient

particularity in the petition. Yet others, were declined on grounds that they are couched in such general terms as to be no more than fishing expeditions.

Mue & another v Chairperson Independent Electoral and Boundaries Commission & 2 others; Maina (Applicant) (Presidential Election Petition 4 of 2017) [2017] KESC 6 (KLR) (Election Petitions) (14 November 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 6 (KLR)

Election Laws *- presidential election petition - joinder of parties in a presidential election petition - application to be enjoined as an interested party in a presidential election petition - whether the Applicant had an identifiable stake in the petition and would be prejudiced if he was not enjoined as an interested party - whether the applicant had qualified to be enjoined as an interested party.*

Civil Practice and Procedure *- joinder of parties - application to be enjoined as an interested party in a presidential election petition - whether the applicant had an identifiable stake in the petition and would be prejudiced if he was not enjoined as an interested party - whether the applicant had qualified to be enjoined as an interested party.*

Brief facts

Mr. Edward Kings Onyancha Maina made an application for joinder as an interested party in the Presidential Election Petition No. 4 of 2017. The applicant contended that he was a registered voter, who cast his vote in the October 26, 2017 repeat presidential election and that he was not consulted by the petitioner before instituting the petition (No. 2 of 2017). According to the applicant, the petition being urged had violated his freedoms and rights. The applicant stated that grant of leave will enable him to ventilate, sustain, protect, promote, enforce and champion his freedoms and rights enshrined under the Constitution and the relevant law. The applicant contented that he strongly feared that unless he was enjoined in the instant petition he stood to be violated as a voter in the event that the declared results were invalidated.

Issues

i. Whether the applicant had qualified to be enjoined as an interested party.
ii. Whether the applicant had an identifiable stake in the petition and would be prejudiced if he was not enjoined as an interested party

Held

1. The applicant had neither demonstrated that he had an identifiable stake in the petition nor had he demonstrated that he would be prejudiced if he was not enjoined as a party taking into account the issues he raised had already been addressed by the parties.
2. The applicant had not qualified to be joined as an interested party. The applicant had not intended to make submissions before the court that were not already presented by the rest of the parties.

Application dismissed.

Citations

Cases

Kenya

1. *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2016] KESC 12 (KLR) - (Applied)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Applied)

Statutes

Kenya

1. Constitution of Kenya In general - (Cited)
2. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rule 4(2) - (Interpreted)
3. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 25 - (Interpreted)

Advocates

None mentioned

November 14, 2017, the Court delivered the following Ruling:

(An application for joinder as an interested party under rule 25 of the Supreme Court Rules, 2012 as read with rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017)

1. Upon perusing the application dated November 11, 2017 and filed on November 13, 2017 by Edward Kings Onyancha Maina for joinder as an interested party in the Presidential Election Petition No 4 of 2017 and;

2. Upon reading: the affidavit of Mr Edward Kings Onyancha Maina, a Kenyan citizen residing and working at Nakuru City and a registered voter, sworn on the November 11, 2017; and;

3. Upon considering the arguments made therein in which the applicant contends that he was a registered voter, who cast his vote in the October 26, 2017 repeat presidential election; that he was not consulted by the petitioner before making the Petition (No 2 of 2017); the petition seeks and does violate his freedoms and rights; that grant of leave will enable him to ventilate, sustain, protect, promote, enforce and champion his freedoms and rights enshrined under the *Constitution* and the relevant law; and, that he strongly fears that unless he is enjoined in the present petition he stands to be violated as a voter in the event that the declared results are invalidated.

4. The applicant has not demonstrated that he has an identifiable stake in the present petition neither has he demonstrated that he will be prejudiced if he is not enjoined as a party taking into account the issues he raises have already been addressed by the parties.

5. Having considered the application, by a unanimous decision of the court, we find that the applicant does not qualify to be joined as an interested party and make the following orders under rule 25 of the *Supreme Court Rules* as read with rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules 2017*.

Orders	**reasons**
The application is disallowed.	The application does not meet the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Supreme Court Petition No 12 of 2013, [2015] eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others* Supreme Court Petition Nos 15 & 16 of 2015 (Consolidated); [2016] eKLR in that the applicant does not intend make submissions before the court that are not already presented by the rest of the parties.

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) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & N Ndungu, SCJJ)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 42 (KLR)

Electoral law *– presidential elections – validity of presidential elections - petition challenging the validity of the president elect – claim that there was non-compliance with the Constitution and electoral laws in the August 2017 presidential elections - claim that there were various irregularities and illegalities during the conduct of the elections – what were the principles of free and fair elections - Constitution of Kenya, 2010, articles 81, 86 and138; Elections Act, Cap 7, sections 39(1c), 44 and 83; Elections (General) Regulations, 2012, regulation 87(1)(b).*

Electoral Law *- presidential elections - electoral process - transmission of results and declaration of results - verification of results - process to be followed -whether the Court of Appeals' decision in the case of Maina Kiai provided a justification for declaring the results of the election of the President by the national returning officer without reference to Forms 34A - whether the Court of Appeal's decision relieved the Independent Electoral and Boundaries Commission from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying center and to the national tallying center - Elections Act, Cap 7, section 39(1C).*

Electoral Law *– elections - election offences - undue influence - what was the meaning of undue influence in the context of an electoral malpractice - Election Offences Act, Cap 66, section 10, 14(1) and (2).*

Electoral Law *- presidential elections - requirements to be met for a candidate to be declared duly elected as President - computation to determine the threshold of 50% +1- what was meant by the "votes cast" to be taken into account in the computation to determine the threshold of 50% +1 - valid versus rejected votes in presidential elections - what was the meaning of "votes", "cast" and "ballot papers" - what was the place of valid versus rejected votes in a presidential election - Constitution of Kenya, 2010, article 138(4); Elections Act, Cap 7, section 2.*

Electoral Law *– elections – role of technology in the election process - transmission of election results – whether technology was a mandatory component of Kenya's electoral transmission process – Elections Act, Cap 7, section 39, 44 and 44A.*

Statutes *- interpretation of statutes - cannons of statutory interpretation - interpretation of section 83 of the Elections Act - where section 83 had two limbs - compliance with the law on elections and irregularities that may affect the result of the election - what was the proper interpretation of section 83*

and whether the two limbs in the provision were conjunctive or disjunctive in interpretation - Elections Act, Cap 7, section 83.

Constitutional Law *– fundamental rights and freedoms – political rights - right to challenge the results of a presidential election petition - whether election petitions were right centric or form centric.*

Constitutional Law *– fundamental rights and freedoms – fundamental rights and freedoms vis a vis directive principle in the Constitution - what prevailed where there was a conflict between constitutional fundamental freedoms and the directive principles in the Constitution.*

Law of Evidence*– burden and standard of proof - burden and standard of proof in presidential election petitions – nature of burden and standard of proof - what amounted to and who bore the burden of proof in presidential election petitions – what were the circumstances under which the evidential burden of proof shifted – what was the standard of proof in election petitions - what was the distinction between the legal burden and the evidentiary burden of proof in election petitions - Evidence Act, Cap 80, section 107.*

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine matters pending before the High Court - whether the Supreme Court could adjudicate an issue which was still the subject of judicial determination at the High Court.*

Words and Phrases *– vote – definition of vote - expression of one's preference or option in a meeting or election by ballot, show of hands or other type of communication - Black's Law Dictionary.*

Words and Phrases *– vote – definition of vote – opinion expressed, resolution or decision carried, by voting - Dictionary of Modern Legal Usage.*

Brief facts

On August 8, Kenya held the second general election under the Constitution of Kenya, 2010 (Constitution). It was the first time that a general election was held under article 101(1) of the Constitution which decreed the holding of general elections every five years on the second Tuesday of August in the 5th year. The general election was also held for the first time under an elaborate regime of electoral laws including amendments to the Elections Act made to introduce the Kenya Integrated Electoral Management System (KIEMS) which was a new device intended to be used in the biometric voter registration, and, on the election day, for voter identification as well as the transmission of election results from polling stations simultaneously to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC).

On August 11, 2017, the 2nd respondent, exercising its mandate under article 138(10) of the Constitution, as the Returning Officer of the presidential election, declared the 3rd respondent, Uhuru Muigai Kenyatta, the winner of the elections with 8,203,290 votes and the 1st petitioner , Raila Amollo Odinga as the runner's up with 6,726,224 votes. On August 18, 2017, the petitioners, Raila Amolo Odinga and Stephen Kalonzo Musyoka, who were the presidential and deputy presidential candidates respectively of the National Super Alliance (NASA) Coalition of parties, running on an Orange Democratic Movement (ODM) party ticket and Wiper Democratic

Movement ticket respectively, filed the instant petition challenging the declared result of that presidential election (the election).

The petition was anchored on the grounds that the conduct of the 2017 presidential election violated the principles of a free and fair election as well as the electoral process set out in the Constitution, electoral laws and regulations and that the respondents committed errors in the voting, counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result; illegally declared as rejected unprecedented and contradictory quantity of votes; failed in the entire process of relaying and transmitting election results as required by law; and generally committed other contraventions and violations of the electoral process.

The petitioners argued that the IEBC committed massive systemic and systematic irregularities which went to the very core and heart of holding elections. It was the petitioners' case that the election was marred and significantly compromised by intimidation and improper influence or corruption. The most critical and persistent claim was non-compliance with the law, the argument being that the 1st respondent announced results on the basis of Forms 34B before receiving all Forms 34A. It was also alleged that the results announced in Forms 34B were different from those displayed on the 1st respondents' public web portal.

The petitioners similarly claimed that the IEBC deliberately inflated votes cast in favour of the 3rd respondent. As a consequence, they further argued, it was impossible to determine who actually won the presidential election and/or whether the threshold for winning the election under the Constitution was met.

The petitioners' further case was that the results that were streaming in from August 8, 2017 to August 11, 2017 showed a consistent difference of 11% between the results of Uhuru Kenyatta and Raila Odinga. According to the petitioners, such a pattern indicated that the results were not being streamed in randomly from the different polling stations but that they were being held somewhere and adjusted using an error adjustment formula to bring in a pre-determined outcome of results. Additionally, they claimed that the electronic system of transmission was compromised by third parties who manipulated it and generated numbers for transmission to the NTC. The petitioners also took issue with the large number of rejected votes accounting for at least 2.6% of the total votes cast arguing that that had an effect on the final results and the outcome of the presidential election.

The 1st and 2nd respondents filed a joint response, while the 3rd respondent filed a separate response to the petition. They all opposed the petition and urged the court to find that IEBC conducted a free, fair and credible election. It was the respondents' case that the presidential election was conducted in accordance with the Constitution, the IEBC Act, the Elections Act, the Regulations thereunder, and all other relevant provisions of the law. The respondents claimed that, contrary to the allegations of the petitioners, the process of relay and transmission of results from the polling stations to the Constituency Tallying Center (CTC) and to the National Tallying Center (NTC), and from the CTC to the NTC was simple, accurate, verifiable, secure, accountable, transparent, open and prompt as required by article 81 (e) (iv) and (v) of the Constitution.

The respondents submitted that the alleged inaccuracies and inconsistencies in Forms 34A and 34B were minor, inadvertent and in their totality did not materially affect the declared results. They urged the court to find that the petitioners had not substantiated the claim that the said irregularities affected at least 7 million votes.

According to the 1st and 2nd respondents, the rejected votes did not account for 2.6% of the total votes cast as contended by the petitioners. They submitted instead that the total number of rejected ballots was 81,685 as declared in Form 34C, a percentage of 0.54% of the votes cast. They thus urged that the rejected ballots were properly excluded from valid votes in accordance with the law.

The 3rd respondent urged that a party seeking the nullification of a presidential election bore the burden of proving that not only was there non-compliance with the election law but that the non-compliance also affected the results of the election. He thus submitted that the only way the petitioners could impugn the results reflected in Forms 34A and 34B was through demonstrating either that legal votes were rejected or that illegal votes were allowed and that that had an effect on the election.

Following the petitioner's application at the pre-trial stage, the court granted an order for scrutiny and access on terms that the petitioners and the 3rd respondent were to attain read only access to the certified photocopies of the original Forms 34As 34Bs and 34Cs prepared at and obtained from the polling stations by presiding officers and used to generate the final tally of the presidential election; to the Forms 34A, 34B and 34C from all 40,800 polling stations; and to the scanned and transmitted copies of all Forms 34A and 34B. The scrutiny process was conducted under the supervision of the Registrar of the Court and a report filed. The Registrar made the following observations:

1. Certain forms 34As appeared to have been duplicated.
2. Certain forms 34As and 34Bs appeared to be carbon copies.
3. Certain forms 34As and 34Bs appeared to be photocopies.
4. Some of the forms had no evidence of being stamped or signed.

It was recorded that out of the 291 Forms 34B scrutinized; 56 forms bore no watermark, 5 forms had not been signed by the returning officer, 31 forms had no serial numbers, 32 forms had not been signed by the respective party agents, the "hand over" section of 189 forms had not been filled and the "take over" section of 287 forms had not been filled. Further, a random scrutiny of 4,299 Forms 34A across 5 counties was undertaken to check and confirm; whether the forms bore the watermarks and the serial numbers; whether the forms had been signed and stamped by the presiding officers; whether there was involvement of the party agents.

Some of the issues emanating from the scrutiny of Forms 34A were that:

1. some forms were carbon copies;
2. others were the original Forms 34As but did not bear the IEBC stamp;
3. other forms were stamped & scanned while others were photocopies;
4. others had not been signed.

The report further indicated that out of the 4,299 Forms 34As, 481 were carbon copies, but signed, 157 were carbon copies and were not signed; 269 were original copies that were not signed; 26 of the Forms were stamped and scanned. 1 form was scanned and not stamped; 15 had not been signed by agents, 58 were photo copies of which 46 had not been signed; and 11 had no watermark security feature.

The petitioners contended that the report had proved beyond reasonable doubt, that the election process was shambolic. They contended that the Form 34C which was used to announce the presidential results had no security features and hence the authenticity of the results as announced in Form 34C could not be guaranteed.

On September 1, 2017, the Supreme Court issued a determination of the petition without reasons pursuant to rule 23 (1) of the Supreme Court Presidential Election Rules 2017.

Issues

i. What amounted to and who bore the burden of proof in a presidential election petition?
ii. What were the circumstances under which the evidential burden of proof shifted?
iii. What was the distinction between legal burden and the evidentiary burden of proof in election petitions?
iv. What was the standard of proof in election petitions?
v. What was the distinction between "votes", "cast" and "ballot papers?"
vi. What was the place of valid versus rejected votes in a presidential election.
vii. What was the meaning of "votes cast" to be taken into account in the computation to determine the threshold of 50% +1 under article 138(4) of the Constitution.
viii. What was the proper interpretation of section 83 of the Elections Act and whether the two limbs in the provision (compliance with the law on elections, and irregularities that may affect the result of the election) were conjunctive or disjunctive?
ix. What were the principles of free and fair elections?
x. Whether the Court of Appeals' decision in the *Maina Kiai* case provided a justification for declaring the results of the election of the president by the national returning officers without reference to Forms 34A.
xi. Whether the Court of Appeal's decision in the *Maina Kiai* case relieved the Independent Electoral and Boundaries Commission from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre.
xii. What was the meaning of undue influence in the context of an electoral malpractice?
xiii. Whether the Supreme Court could adjudicate issues which were still the subject of judicial determination at the High Court.
xiv. Whether election petitions were right centric or form centric.
xv. Whether technology was a mandatory component of Kenya's electoral transmission process.

xvi. What prevailed where there was a conflict between constitutional fundamental freedoms and the directive principles in the Constitution?

xvii. What was the proper test for verification of an electoral process?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 81- General principles for the electoral system

(e) *free and fair elections, which are—*

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent; and,

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

Article 86 - Voting

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

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

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

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

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

Article 138 - Procedure at presidential election

(3) In a presidential election—

(c) after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

Elections Act, Cap 7

Section 2 - Interpretation

"ballot paper" means a paper used to record the choice made by a voter and shallinclude an electronic version of a ballot paper or its equivalent for purposes of electronic voting."

Section 4 - Register of Voters

"*There shall be a register to be known as the Registerof Voters which shall comprise of–*

(a) a poll register in respect of every polling station;

(b) a ward register in respect of every ward;

(c) a constituency register in respect of every constituency;

(d) a county register in respect of every county; and

(e) a register of voters residing in Kenya.

Section 10 - Eligibility to vote

(1) A person whose name and biometric data are entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station."

Section 6A - Verification of biometric data

(1) "The Commission shall, not later than sixty days before the date of a general election, open the Register for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.

(2) The Commission shall, upon expiry of the period for verification specified under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process.

(3) The Commission shall, upon expiry of the period for verification specified under subsection(1) publish- ...the Register of Voters online and in such manner as may be prescribed by regulations.

Section 39 - Determination and declaration of results.

(1C) For purposes of a presidential election the Commission shall-

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the Constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission.

Section 44 - Use of technology.

(1) there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results."

(3) the Commission shall ensure that the technologyin use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent."

Section 44A - Complementary mechanism for identification of voters.

Notwithstanding the provisions of Section 39 and Section 44, the Commission shall put in place a complementary mechanism for the identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution.

Elections (General) Regulations, 2012

Regulation 87

(1) The constituency returning officer shall, as soon as practicable

(a)...

(b) deliver to the National tallying centre all the Form 34B from the respective polling stations and the summary collation forms."

Election Offences Act, Cap 66

Section 10 - Undue Influence

(1) A person who directly or indirectly in person undue influence or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of""

(a) Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

(b) Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or

(c)Impeding or preventing a person from being nominated as a candidate or from being registered as a voter, Commits the offence of undue influence.

(2) ...

(3) A person who directly or indirectly by duress or intimidation""

(a) Impedes, prevents or threatens to impede or prevent a voter from voting; or

(b) In any manner influences the result of an election, commits an offence.

(4) ...

Section 14 - Use of public resources.

(1) Except as authorized under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.

(2) No government shall publish any advertisements of achievements of respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.

(3) For the purposes of this section, the Commission shall, in writing require any candidate, who is a Member of Parliament, a county governor, a deputy governor or a member of a county assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office.

Leadership and Integrity Act, Cap 185C

Section 23 - Political neutrality

(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties

(a) Act as an agent for, of further the interests of a political party or candidate in an election; or

(b) Manifest support for or opposition to any political party or candidate in an election.

(2) An appointed State Officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.

(3) Without prejudice to the generality of sub-section (2) a public officer shall not

(a) Engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

(b) Publicly indicate support for or opposition against any political party or candidate participating in an election.

Held

Per Majority

1. The common law concept of burden of proof (*onus probandi)* was a question of law which could be described as the duty which lay on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. The law placed the common law principle of *onus probandi* on the person who asserted a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislated that principle.
2. An applicant who sought to annul an election bore the legal burden of proof throughout. Thus a petitioner who sought the nullification of an election on account of non-conformity with the law or on the basis of irregularities was required to adduce cogent and credible evidence to prove those grounds to the satisfaction of the court. That was fixed at the onset of the trial and unless circumstances changed, it remained unchanged. Therefore, it was the petitioners who bore the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of the election, the 3rd respondent's election as President of Kenya should have been nullified.
3. Though the legal and evidential burden of establishing the facts and contentions which would support a party's case was static and remained constant throughout a trial with the plaintiff, however, depending on the effectiveness with which he or she discharged that, the evidential burden kept shifting and its position at any time was determined by answering the question as to who would lose if no further evidence was introduced.
4. Once the court was satisfied that the petitioner had adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifted to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground was one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bore an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifted and it behoved the respondent to adduce evidence to prove compliance with the law.
5. Besides the burden of proof, the law also imposed a degree of proof required to establish a fact. The extent of the proof required in each case was what, in legal parlance, was referred to as the standard of proof. Black's Law Dictionary defined it as the degree or level of proof demanded in a specific case in order for a party to succeed.

6. In electoral disputes, the standard of proof remained higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature were made; it was proof beyond reasonable doubt. Electoral disputes were not ordinary civil proceedings hence reference to them as *sui generis.* It must be ascertainable, based on the evidence on record, that the allegations made were more probable to have occurred than not.
7. No controversy arose as to the meaning of the word 'cast'. In elections, the term referred to the ballot papers inserted into ballot boxes. The problem which arose was the correct meaning that should be ascribed to the term "votes". Neither the Constitution nor the Elections Act defined the term "vote". The Elections Act, however, defined the term "voter" to mean a person whose name was included in a current register of voter*s*.
8. The distinction between a ballot paper and a vote was discernible. A ballot paper was the instrument in which a voter recorded his choice, while a vote was the actual choice made by a voter. A ballot paper did not become a vote by merely being inserted into the ballot box, as it could later turn out to be rejected.
9. A voter was said to have cast his or her vote when the procedure under regulations 69(2) and 70 of the Elections (General) Regulations, 2012 was followed. That meant that, upon receipt of the ballot paper, the voter proceeded to mark correctly, indicating his exact choice of the candidate he wished to vote for, and then inserted that marked ballot paper into the respective ballot box for the election concerned.
10. In the circumstances, a rejected vote, a vote which was void, a vote that accorded no advantage to any candidate, could not be used in the computation of determining the threshold of 50% + 1. A purposive interpretation of article 138(4) of the Constitution, in terms of article 259 of the Constitution, led to only one logical conclusion: that the phrase *votes cast* in article 138(4) meant valid votes. Consequently, the court's view in the 2013 *Raila Odinga case* would be maintained.
11. The court in the 2013 *Raila Odinga* case, did not render an authoritative interpretation of section 83 of the Elections Act as read together with the relevant provisions of the Constitution. At best, the court only made a tangential reference to the section while addressing the applicable twin questions of burden and standard of proof in an election petition.
12. There were two limbs to various provisions from comparative jurisdictions that were similar to section 83 of the Kenyan Elections Act: compliance with the law on elections, and irregularities that may affect the result of the election. The issue in the interpretation of the provisions was whether or not the two limbs were conjunctive or disjunctive. The use of the term 'and' in the cited English provisions rendered the two limbs conjunctive under the English law. Save for minor changes, the conjunctive norm in the two limbs of the provision as captured in the two English provisions appeared to have been borrowed lock, stock and barrel by many Commonwealth countries, notably Nigeria, Ghana, Zambia, Tanzania and

Uganda. However, under both the repealed National Assembly and Presidential Elections Act (section 28) and the Elections Act (section 83) the term used was "or" instead of "and" appearing in the English Acts. The use of the word "or" clearly made the two limbs disjunctive under the Kenyan law. While interpreting section 83 of the Elections Act, that distinction should be borne in mind.

13. Section 83 of the Kenyan Elections Act was different from other countries in two other fundamental aspects.
    a. The Kenyan Act did not have the word 'substantially' which was in many of the provisions of other countries.
    b. In 2011, the Elections Act (No. 24 of 2011) was enacted and repealed the National Assembly and Presidential Elections Act. Section 83 of the Elections Act, to harmonize it with the Constitution of Kenya 2010, added that to be valid, the conduct of the elections in Kenya must comply with the principles laid down in the Constitution. That addition was purposive given that the repealed Constitution of Kenya did not contain any constitutional principles relating to elections. In interpreting the section therefore, the court had to first pay due regard to the meaning and import of the constitutional principles it envisaged.

14. Among the well-established cannons of statutory interpretation, was the requirement that in addition to reading the statutes as a whole, where the words were clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning. The language used must be construed in its natural and ordinary meaning. The sense must be that which the words used ordinarily bear. Kenya being a constitutional system, the interpretation of the statutes must also be harmonized with the values and principles in the Constitution. The wording of section 83 of the Elections Act was clear and unambiguous. The words of the section must therefore be given their natural and ordinary meaning.

15. Guided by the principles of statutory interpretation, and given the use of the word "or" in section 83 of the Elections Act as well as some of the Supreme Court's previous decisions, the court could not conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in the Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election. Such an approach would be tantamount to a misreading of the provision.

16. Annulling of presidential election results was a case by case analysis of the evidence adduced before the court. Although validity was not equivalent to perfection, if there was evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts in exercise of judicial independence and discretion were at liberty to annul the outcome of a sham election, for such was not in fact an election.

17. An election should be conducted substantially in accordance with the principles of the Constitution, as set out in article 81(e). Voting was to be conducted in accordance with the principles set out in article 86 of the Constitution. The Elections Act and the Regulations thereunder, constituted the substantive and procedural law for the conduct of elections. If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election was not to be invalidated only on ground of irregularities. Where however, it was shown that the irregularities were of such magnitude that they affected the election result, then such an election stood to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection were not enough, by and of themselves, to vitiate an election. Where an election was conducted in such a manner as demonstrably violated the principles of the Constitution and the law, such an election stood to be invalidated.
18. While the two limbs (compliance with the law on elections, and irregularities that may affect the result of the election) should be applied disjunctively, it would not take the route that even trivial breaches of the law should void an election. That was not realistic. It was a global truism that no conduct of any election could be perfect. Even though the word 'substantially' was not in section 83 of the Elections Act, it could be inferred in the words 'if it appears' in that section. That expression required that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be 'a sham or travesty of an election' or 'a spurious imitation of what elections should be'.
19. Section 83 of the Elections Act applied to the presidential election petitions as it did to all other election disputes. The two limbs in section 83 could not be given a conjunctive interpretation. The two limbs of section 83 should be applied disjunctively. In the circumstances, a petitioner who was able to satisfactorily prove either of the two limbs of the section could void an election.
20. A petitioner who was able to prove that the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, would on that ground alone, void an election. He would also be able to void an election if he was able to prove that although the election was conducted substantially in accordance with the principles laid down in Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.
21. An election such as the one at hand, had to be one that was both quantitatively and qualitatively in accordance with the Constitution. It was one where the winner of the presidential contest obtained more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties as stipulated in article 138(4) of the Constitution. In addition, the election which gave rise to that result

must be held in accordance with the principles of a free and fair election, which were by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in article 81. Besides the principles in the Constitution that governed elections, section 83 of the Elections Act required that elections be conducted in accordance with the principles laid down in that written law. The most important written law on elections was the Elections Act itself.

22. Elections were not only about numbers. Even in numbers, to arrive at a mathematical solution, there was always a computational path one had to take, as proof that the process indeed gave rise to the stated solution. Elections were not events but processes. Elections were not isolated events, but were part of a holistic process of democratic transition and good governance. Incidentally, IEBC's own Election Manual (Source Book) recognized that an election was indeed a process. There were many other authorities which spoke to the proposition that an election was a process. Therefore the process of getting a voter to freely cast his vote, and more importantly to have that vote count on an equal basis with those of other voters was as important as the result of the election itself.

23. Following the 2007 post-election violence, the Government formed the Independent Review Commission (IREC), commonly known as the Kriegler Commission, to inquire into the conduct of the 2007 elections and the cause of that violence. One of the critical areas of that Commission's focus was the integrity of vote counting, tallying and announcement of presidential election results. Among the significant recommendations the Kriegler Commission made related to the use of technology in the electoral process. Pursuant to those recommendations, the process of integrating technology into the conduct of elections was undertaken starting with the use of biometric voter registration (BVR) equipment to register voters on a pilot basis in the run up to the 2010 referendum.

24. In the 2013 elections technology was applied for registration of voters, voter identification and results transmission. However, that did not work very well in the 2013 general election and it was one of the key issues that was raised in the 2013 presidential petition before the Supreme Court. Consequently, in 2016 the Joint Parliamentary Select Committee on matters relating to the bi-partisan IEBC was formed, discussed the use of technology in elections and made far-reaching recommendations which led, to amongst others, extensive amendments to the Elections Act to provide for use of technology and also technology dedicated regulations, the Elections (Technology) Regulations 2017.

25. The changes were meant to re-align several pieces of election-related legislation, with the principles of the Constitution and the electoral jurisprudence that had been developed by the courts. The cumulative effect of those changes was the establishment of what was being referred to as the Kenya Integrated Election Management System (KIEMS). Henceforth, technology would be deployed to the process of voter registration, voter identification and the transmission of results to the constituency and national tallying centers. Regarding the

voter register, the court in the 2013 *Raila Odinga* decision had observed that there was no single voter register but an aggregation of several parts into one register. All those legislative enactments had one objective; to ensure that in conformity with the Constitution, the elections were free, fair, transparent and credible.

26. The terms 'simple, accurate, verifiable, secure, accountable and transparent' engrafted were the selfsame constitutional principles in articles 10, 38, 81 and 86. It was in that context that the court would determine whether, the 1st respondent, conducted the presidential election in accordance with the principles laid down in the Constitution and the law.

27. Regulation 87(3)(b) provided that: "upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the IEBC shall tally and complete Form 34C." However, the 1st respondent had to modify Form 34C to reflect the entry of Forms 34B, which was the form declared by the Court of Appeal to be the source document to determine the winner of a presidential election, instead of Forms 34A.

28. From a reading of the Court of Appeal decision in the *Maina Kiai case,* nowhere in that decision did that court suggest that by affirming the High Court's decision which had declared section 39(2) and (3) of the Elections Act unconstitutional, the Court of Appeal, somehow for unstated reasons, lent judicial *imprimatur* to the 1st and 2nd respondent to either circumvent, or simply ignore the provisions of section 39(1C) of the Elections Act. On the contrary, the appellate court's decision was an unstinting reaffirmation, if not a restatement of the letter and spirit of the constitutional principles embodied in articles 81, 86, and 138(3)(c), relating to the conduct of elections.

29. With section 39(1C) of the Elections Act in mind, the Court of Appeal in the *Maina Kiai* case was categorical that the elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, was a critical way of safeguarding the accuracy of the outcome of elections, and the appellant or any of its officers (1st respondent) could vary or even purport to verify those results. The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of President electronically transmitted to it from the near 40,000 polling stations, was required to tally and "verify" the result.

30. The polling station was the true *locus* for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Elections Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, meant, as it must, that the count was clothed with a finality not to be exposed to any risk of variation or subversion.

31. Neither the 1st nor the 2nd respondent had offered any plausible response to the question as to whether all Forms 34A had been electronically transmitted to the national tallying center (NTC) as required by section 39 (1C) of the Elections Act. What remained uncontroverted however was the admission that as of August 14, 2017, three days after the declaration of results, the 1st respondent was not in a position to supply the petitioner with all Forms 34A.

Counsel for the 1st and 2nd respondents, by insisting that the presidential results were declared on the basis of Forms 34B, all of which were available, also implicitly admitted that not all Forms 34A were available by the time the 2nd respondent declared the 'final results' for the election of the President.

32. Pursuant to an application by the petitioners, the court issued an order requiring the 1st respondent to supply the petitioners and the 3rd respondent with all the scanned and transmitted Forms 34A and 34B from all the 40, 883 polling stations on a read only basis with the option to copy in soft version. Had the court's order been complied with, it would have unraveled the mysterious puzzle surrounding Forms 34A. Regrettably, according to the information made available to court, by its appointed experts, the 1st respondent only allowed read-only access to that information without the option to copy in soft version only two hours to the closure of court proceedings which never fully happened anyway. By that time however, the puzzle had been unraveled in the mind of the court.

33. Failure to access or catch 3G and/or 4G network was not a failure of technology. The IEBC's ICT officials must have known that there were some areas where network was weak or totally lacking and should have made provision for alternative transmission. It could not have dawned on IEBC's ICT officials, two days to the elections, that it could not access network in some areas. Under regulations 21, 22, and 23 of the Elections (Technology) Regulations 2017, IEBC was required to engage a consortium of telecommunication network service providers and publish the network coverage at least 45 days prior to the elections. In that regard, in one of its press briefings preceding the elections, IEBC assured the country that it had carefully considered every conceivable eventuality regarding the issue of the electronic transmission of the presidential election results, and categorically stated that technology was not going to fail them. IEBC indeed affirmed that it had engaged three internet service providers to deal with any network challenges. The IEBC's explanation of alleged failure of technology in the transmission of the presidential election results could not be therefore accepted. The so-called failure of transmission was a clear violation of the law.

34. Among the 11, 0000 polling stations that IEBC claimed were off the 3G and 4G range, most parts of the counties where the polling stations fell under had fairly good road network infrastructure. Even if all of them were off the 3G and/or 4G network range, it would take, at most, a few hours for the presiding officers to travel to vantage points from where they would electronically transmit the results. That they failed to do that, was an inexcusable contravention of section 39(1C) of the Elections Act.

35. The understanding of the process was that the figures keyed into the KIEMS corresponded with those on the scanned images of Forms 34A. In the circumstances, it could not be understood why those figures, which counsel referred to as mere "statistics" that did not go into the determination of the outcome of the results, differed. In the circumstances, bearing in mind that IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election

especially on the transmission of the presidential election results and it failed to discharge that burden.

36. IEBC opposed the application for access to its servers, claiming that such access would compromise the security of the data in those servers. The objection was overruled and the application was partly allowed. Though the IEBC's claim of compromising the security of its servers was not accepted, considering the fact that having spent billions of taxpayers' money IEBC should have set a robust backup system, nevertheless to assuage those fears, a "read only access" was granted which included copying where the petitioners so wished. The report from the court appointed IT experts, holders of PhDs on IT and lecturers in Strathmore and Kabianga Universities respectively, showed clear reluctance on the part of IEBC to fully comply with the court's order of August 28, 2017 to provide the information requested.

37. In summary the following were the items that were not availed to the petitioners; the 3rd respondent and the court.

a. Firewalls without disclosure of the software version. IBEC refused to provide information on internal firewall configuration contending that doing so would compromise and affect the vulnerability of their system. The court appointed ICT Experts disagreed with that contention and said it was difficult to ascertain whether or not there were any hacking activities.

b. IEBC was also required to provide certified copies of the certificates of penetration tests conducted on the IEBC election technology system prior to and during the 2017 election pursuant to regulation 10 of the Elections (Technology) Regulations 2017. They were not provided. Instead IEBC issued uncertified documents and certificates by professionals which did not conform to that regulation.

c. IEBC was also required to provide specific GPRS location of each KIEMS kit used during the presidential election for the period between August 5, 2017 and August 11, 2017. That was not provided. IEBC instead provided the GPS locations for the polling stations which was never ordered to be granted.

d. Documents for allocated and non-allocated KIEMS kits procured were provided. However, the information on whether the kits were deployed or not were incomprehensive.

e. The court ordered access to technical partnership agreements for IEBC election technology system including a list of technical partners, kind of access they had and list of APIs for exchange of data with partners. The documents were issued with the exception of the list of APIs. The court appointed ICT experts said full information on APIs would have enabled determination of what kind of activities may have taken place.

f. The court had also ordered IEBC to provide the petitioners with the log in trail of users and equipment into the IEBC servers, the log in trails of users and equipment

into the KIEMS database management systems and the administrative access log into the IEBC public portal between August 5, 2017 to date (being the date of the court order which was on August 28, 2017). They were also not provided. Instead, IEBC provided pre-downloaded logs in a hard disk whose source it refused to disclose. The IT experts agreed with the petitioners' contention that the 1st respondent should have demonstrated that the logs emanated from IEBC servers by allowing all parties to have read only access. Alternatively, the 1st respondent could have accessed the information in the presence of the petitioners' agents. Partial live access was also only purportedly provided on August 29, 2017 at about 3.50pm without ability to access the logs or even view them. The exercise was therefore a complete violation of the court order and the access was not useful to the parties or the court.

38. IEBC 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 county tallying centers (CTCs). Those were the forms that section 39(1C) specifically required to be scanned and electronically transmitted to the CTCs and the NTC. In other words, the 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. However the IEBC contumaciously disobeyed the order in the critical areas.

39. Failure to comply with a lawful demand, leave alone a specific court order, left the court with no option but to draw an adverse inference against the party refusing to comply. In the case, IEBC's contumacious disobedience of the court's order of August 28, 2017 in critical areas left 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.

40. The petitioners claimed that while 15,558,038 people voted for the presidential candidates, 15,098,646 voted for gubernatorial candidates and 15,008,818 voted for Members of Parliament (MPs) raising questions as to the validity of the extra votes in the presidential election. No satisfactory answer was given and the 1st respondent was responsible for that unexplained yet important issue.

41. The transmission of results was done in a manner inconsistent with the expectations of section 39(1C) of the Elections Act. The principles in articles 81 and 86 of the Constitution had the expectations of transparency, accountability, simplicity, security, accuracy, efficiency

and especially, verifiability of the electoral process. Those terms should be understood to refer to:

a. An accurate and competent conduct of elections where ballots were properly counted and tabulated to yield correct totals and mathematically precise results;
b. an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media;
c. a secure election whose electoral processes and materials used in it were protected from manipulation, interference, loss and damage;
d. an accountable election, whose polling station, constituency and national tallies together with the ballot papers used in it were capable of being audited; and
e. a transparent election whose polling, counting and tallying processes as well as the announcement of results were open to observation by and copies of election documents easily accessible to the polling agents, election observers, stakeholders and the public and, as required by law, a prompt publication of the polling results forms was made on the public portal.

42. Verifiability must have had strong significance in the August 8th election because the presiding officers were required to verify the polling station's results in the presence of polling agents before sending them to the CTC and NTC using the KIEMS KIT. The *Maina Kiai* decision, made it clear that Form 34A being the primary document, became the basis for all subsequent verifications.

43. The whole exercise of limited access to the 1st respondent's IT system was meant to conform and verify both the efficiency of the technology and also verify the authenticity of the transmissions allegedly made to the CTC and NTC. Non-compliance and failure, refusal or denial by IEBC to do as ordered, had to be held against it.

44. The critical element under article 138(3)(c) of the Constitution was the duty placed upon the IEBC to verify the results before declaring them. To ensure that the results declared were the ones recorded at the polling station. Not to vary, change or alter the results.

45. The duty to verify in article 138 of the Constitution was squarely placed upon the IEBC. That duty ran all the way, from the polling station to the constituency level and finally, to the NTC. There was no disjuncture in the performance of the duty to verify. It was exercised by the various agents or officers of the IEBC, that was to say that the presiding officer at a polling station, the returning officer at the constituency level, and the Chair at the NTC. The verification process at all those levels was elaborately provided for in the Elections Act and the Regulations thereunder.

46. The simultaneous electronic transmission of results from the polling station to the constituency and national tallying centre, was not only intended to facilitate that verification process, but also acted as an insurance against, potential electoral fraud by eliminating human intervention/intermeddling in the results tallying chain. That, the system did, by ensuring that there was no variance between, the declared results and the transmitted ones.

47. In the presidential election of August 8, 2017 however, the picture that emerged, was that things did not follow that elaborate, but clear constitutional and legislative road map. It had been established that at the time the 2nd respondent declared the final results for the election of the President on August 11, 2017, not all results as tabulated in Forms 34A, had been electronically and simultaneously transmitted from the polling stations, to the NTC. The 2nd respondent could not therefore be said to have verified the results before declaring them.

48. The verification could only have been possible if, before declaring the results, the 2nd respondent had checked the aggregated tallies in Forms 34B against the scanned Forms 34A as transmitted in accordance with section 39(1C) of the Elections Act. Given the fact that all Forms 34 B were generated from the aggregates of Forms 34A, there could be no logical explanation as to why, in tallying the Forms 34B into the Form 34C, the primary document (Form 34A), was completely disregarded.

49. Even if one were to argue, which at any at rate, was not the case in the instant matter, that the verification was done against the original Forms 34A from all the polling stations, which had been manually ferried to the tallying centre, that would beg the question as to where the scanned forms were, and why the manually transmitted ones, arrived faster than the electronic ones.

50. The failure by the IEBC to verify the results, in consultation with the 2nd respondent, before the latter declared them, therefore went against the expectation of article 138(3)(c) of the Constitution, just as the failure to electronically and simultaneously transmit the results from all the polling stations to the NTC violated the provisions of section 39(1C) of the Elections Act. Those violations of the Constitution and the law, called into serious doubt as to whether the election could be said to have been a free expression of the will of the people as contemplated by article 38 of the Constitution.

51. The *Maina Kiai case* did not restrain the IEBC from verifying the results before declaring them, or relieve the former from the statutory duty of electronically transmitting the results. What the 2nd respondent was barred from doing by the Court of Appeal and the High Court was to vary, alter, or change the results relayed to the NTC from the polling stations and CTCs under the guise of verifying.

52. Article 86 of the Constitution placed upon the IEBC the onerous responsibility of devising and deploying election systems that the voter could understand. The IEBC must further be expected to provide access to crucial information that could enable either a candidate or a voter to cross check the results declared by it with a view to determining, the integrity and accuracy thereof. In other words, the numbers must just add up even where Parliament found it necessary to make provision for a complementary system, it would not escape from the dictates of article 86 of the Constitution, hence section 44A of the Elections Act.

53. When called upon to explain why all the Forms 34A had not been scanned, transmitted and published on an online portal, in line with section 39 of the Elections Act, the IEBC, through counsel, alluded to some form of complementary mechanism. However, the description

of such a mechanism did not appear to meet the yardsticks of verifiability inbuilt in the Constitution and section 44A of the Elections Act.

54. No election was perfect, even the law recognized that reality. It was however difficult to categorize the violations of the law as minor inadvertent errors. IEBC behaved as though the provisions of sections 39, 44 and 44A of the Elections Act and the provisions of article 88(5) of the Constitution requiring it to exercise its powers and perform its functions in accordance with the Constitution and the national legislation, did not exist. IEBC failed to observe the mandatory provisions of article 86 of the Constitution requiring it to conduct the elections in a simple, accurate, verifiable, secure, accountable and transparent manner. There was no transparency or verifiability when IEBC, contrary to articles 35 and 47 of the Constitution, worse still, in contumacious disobedience of the court's order, refused to open its servers and logs for inspection.

55. The petitioners had discharged the legal burden of proving that the 2nd respondent, declared the final results for the election of the President, before the IEBC had received all the results from Forms 34A from all the 40,883 polling stations contrary to the Constitution and the applicable electoral law. The 2nd respondent, declared, the results solely, on the basis of Forms 34B, some of which were of dubious authenticity. The 1st respondent in disregard of the provisions of section 39(1C), of the Elections Act, either failed, or neglected to electronically transmit, in the prescribed form, the tabulated results of an election of the president, from many polling stations to the NTC.

56. No evidence had been placed to suggest that, the processes of voter registration, voter identification, manual voting, and vote counting were not conducted in accordance with the law. As a matter of fact, nobody disputed the fact that on August 8, 2017, Kenyans turned out in large numbers, endured long hours on queues and peacefully cast their votes. However, the system thereafter went opaquely awry and whether or not the 3rd respondent received a large number of votes became irrelevant because, read together, sections 39(1C) and 83 of the Elections Act stated otherwise.

57. Whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before the court pointed to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports could not therefore be used to authenticate the transmission and eventual declaration of results.

58. The 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections in that it was, *inter alia*, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation given to section 83 of the Elections Act, the presidential election had to be nullified.

59. While the impugned election was conducted in violation of relevant constitutional principles, the same was also alleged to have been fraught with illegalities and irregularities that rendered its result unverifiable and thus indeterminate. Illegalities referred to breach of

the substance of specific law while irregularities denoted violation of specific regulations and administrative arrangements put in place.

60. On allegations of undue influence, bribery and voter intimidation, it was deposed that the 3rd respondent brazenly violated section 14 of the Elections Offences Act by advertising and publishing in the print and electronic as well as on billboards, achievements of his Government. Section 14 provided that no Government shall publish any advertisements of achievements of the respective Government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period. That prohibition was what article 81(e)(ii) of the Constitution referred to as improper influence. The rationale behind that prohibition, in the context of the case was that whatever achievements the current Government may have made, resulting from expenditure of public funds, should not be taken advantage of by the Government as a campaign tool. However in that regard, the 1st petitioner had not attached any material evidence to support his allegations of undue influence, bribery and voter intimidation. That being the case, no determination on that issue could be made for the lack of material particulars.

61. The 3rd respondent had submitted that the question whether he was allegedly sponsoring the advertisement of the Government's achievement in the print and electronic media was pending at the High Court and the petitioners did not contest that averment. The Supreme Court could not adjudicate on an issue which was the subject of judicial determination at the High Court.

62. The letter by the 2nd respondent to the EACC did not apply to the holder of the office of the presidency in which category the 3rd respondent fell. Furthermore, section 14(3) of the Election Offences Act which provided for the IEBC's enforcement powers, did not apply to persons holding the office of the President. The interpretation of section 14 of the Election Offences Act was a live matter at the High Court; any allegation that touched on that section could not be addressed.

63. Undue influence in the context of election offences was defined under section 10 of the Election Offences Act. Though the wording of the Indian Penal Code section 171(C) was materially different from section 10 of the Election Offences Act, the meaning injected into the Indian Penal Code showed its applicability in the Kenyan context. The Supreme Court of India in the consolidated cases explicitly stated that the test was whether there was interference or an attempted interference with the free exercise of any electoral right. Similarly, section 10 of the Election Offences Act, whose marginal note was 'undue influence', forbade any impediment of a person's exercise of the electoral right. In India, the electoral right of an elector, was defined under section 171A(b) of the Indian Penal Code, as the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election. That was comparable to article 38(3) of the Constitution of Kenya, 2010 which conferred certain political rights on every citizen without any restrictions including the right to vote by secret ballot in an election.

64. The Indian courts laid down a distinction between mere canvassing for votes and acts of undue influence. In doing so, the Supreme Court pronounced itself that if the mere act of canvassing in favour of one candidate as against another were to amount to undue influence, the very process of a democratic election shall have been stifled because, the right to canvass support for a candidate was as much important as the right to vote for a candidate of one's choice. Therefore, in order that the offence of undue influence could be said to have been made out within the meaning of section 171C of the Indian Penal Code, something more than the mere act of canvassing for a candidate must be shown to have been done by the offender. The act alleged as constituting undue influence must be in the nature of a pressure or tyranny on the mind of the candidate or the voter. The mere act of canvassing for a candidate could not amount to undue influence within the meaning of section 171C of the Indian Penal Code.

65. The language used in the definition of undue influence implied that an offence of undue influence would be held to have been committed if the elector having made up his mind to cast a vote for a particular candidate did not do so because of the act of the offender, and that could only be if he was under the threat or fear of some adverse consequence. Whenever any threat of adverse consequences was given, it would tend to divert the elector from freely exercising his electoral right by voting for the candidate chosen by him for the purpose. But, in cases where the only act done was for the purpose of convincing the voter that a particular candidate was not the proper candidate to whom the vote should be given, that act could not be held to be one which interfered with the free exercise of the electoral, right.

66. The test of undue influence was whether the 3rd respondent's conduct, if satisfactorily proved, created an impression in the mind of a voter that adverse consequences would follow as a result of their exercise of their political choices. Words alone, without any other demonstrable evidence were not sufficient to enable the court make a conclusive finding on the issue. Further, the evidence of Dr. Kibicho, explaining the context within which the 3rd respondent uttered the words, remained undisputed. Consequently, the petitioners had not proved their case on the issue to the required standard.

67. It was alleged that the 3rd respondent improperly influenced voters by issuing cheques to internally displaced persons (IDPs) during campaign rallies. A perusal of the attached video transcript, which was in the form of an interview conducted by one of the local news reporting station showed that the transcript did not contain a satisfactory basis or convincing evidence to the effect that the 3rd respondent acted in any inappropriate manner with regard to the release of funds to IDPs.

68. The petitioners submitted that since Cabinet Secretaries were State Officers, they ought to be impartial, but that section 23 of the Leadership and Integrity Act gave them leeway for impartiality and hence sought to have the section declared unconstitutional. The Supreme Court may in exercise of its jurisdiction interpret the Constitution and in doing so, where the need required, declare an offending provision of the law to be unconstitutional. Such

was a natural consequence of any legal reasoning if the court were to maintain its fidelity to the law. However, the instant scenario was peculiar in the sense that, the petitioners did not at the very first instance, through their pleadings, indicate their intentions to declare section 23 to be unconstitutional.

69. The rule of the thumb had always been that parties must be bound by their pleadings and especially in a case such as the instant one was where the petitioner was asking the court to address its mind to the possible unconstitutionality of a legal provision. For proper consideration therefore, and especially in order to do justice to both the parties and the greater public interest, there was disadvantage placed upon the 3rd respondent especially who had no benefit to bring his thoughts into that cause. In the circumstances, section 23 of the Leadership and Integrity Act could not be found unconstitutional. The matter should be addressed in the right proceedings in the right circumstances.

70. A number of conclusions/observations could be made from the scrutiny exercise ordered by the court: Firstly, the Form 34C, that was availed for scrutiny was not original. Whereas the copy availed for scrutiny was certified as a copy original, no explanation was forthcoming to account for the whereabouts of the original form. Regulation 87(3) obligated the 2nd respondent to tally and complete Form 34C and to sign and date the forms and make available a copy to any candidate or chief agent present. That regulation presupposed that the Chairman of IEBC retained the original. The 2nd respondent was required to avail the original Form 34C for purposes of access and to that extent the 2nd respondent did not.

71. From the report on Forms 34B, the Registrar outrightly made an observation that some of the forms were photocopies, carbon copies and not signed. Out of the 291 forms, 56 did not have the watermark feature while 31 did not bear the serial numbers. A further 5 were not signed at all and 2 were only stamped by the returning officers but not signed. In addition, a further 32 Forms were not signed by agents. The above incidences were singled out since they were incidences where the accountability and transparency of the forms were in question.

72. The affidavit of a Director of the IEBC enumerated all the security features of statutory forms which differed completely with the abundance of caution submission by counsel for IEBC and the 'not in the law' argument by the IEBC. There was a reasonable expectation that all the forms ought to be in a standard form and format; and though there was no specific provision requiring the forms to have watermarks and serial numbers as security features, there was no plausible explanation for that discrepancy more so when it had been deponed that all forms had those features.

73. The schedule to the Elections Act provided for a sample of the format of the Form 34B. As was evident from the schedule, the 'Hand Over' section was filled when the Forms 34A were submitted to the constituency returning officer whereas the 'Taking Over' section was filled when the Chairperson received the Forms 34A. Indeed regulation 82(1) required the presiding officer to physically ferry the actual results to the constituency returning officer. Further, regulation 87(1)(b) required the constituency returning officer to deliver to the

NTC all the Forms 34A from the respective polling stations and the summary collation forms. Regulation 87(3)(a) went on to provide that, upon the receipt of Form 34A from the constituency returning officer, the Chairperson of the IEBC would verify the results against Forms 34A and 34B received from the constituency returning officer. It could not be understood how the 1st and 2nd respondent could deny the receipt of the prescribed forms. In any case, during the hearing of the scrutiny application, counsel for the 1st respondent submitted that the IEBC was in possession of all the original Forms 34A and 34B and went ahead to suggest that, it was willing to release the same forms for inspection. During the scrutiny exercise that was subsequently carried out, the IEBC produced majority of those original forms.

74. The purpose of including the requirement for indicating the number of forms received by various officers was to ensure accountability and transparency. It was therefore unfortunate that, out of the random sample of 4,299 Forms 34A examined, a total of 189 Forms had not been filled in the hand-over section, whereas 287 forms had not been filled in the take-over section. Such kind of scenario raised the question as to the kind of verification done, if at all, by the Chairperson of the IEBC.

75. As for Forms 34A, the sampled 4,299 forms revealed that 481 of them were carbon copies, 269 were not stamped while 257 of the carbon copies were not stamped. 11 forms had no water mark while 46 of the photocopies were not signed. 58 forms were not stamped. Considering the sample size, the discrepancies were widespread.

76. Elections were the surest way through which the people expressed their sovereignty. The Constitution was founded upon the immutable principle of the sovereign will of the people. The fact that, it was the people, and they alone, in whom all power resided; be it moral, political, or legal. They exercised such power, either directly, or through the representatives whom they democratically elected in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.

77. Article 38 of the Constitution provided *inter alia,* that every citizen was free to make political choices, which included the right to free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors. That mother principle must be read and applied together with articles 81 and 86 of the Constitution, for to read article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, was to nurture a mirage, an illusion of free will, hence a still-born democracy. It was also against that background that the impact of the irregularities that characterized the presidential election would be considered.

78. Not every irregularity, not every infraction of the law was enough to nullify an election. Were it to be so, there would hardly be any election in the Kenya, if not the world, that

would withstand judicial scrutiny. The correct approach therefore, was for a court of law, to not only determine whether the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

79. In view of the interpretation of section 83 of the Elections Act rendered, that inquiry about the effect of electoral irregularities and other malpractices, became only necessary where an election court had concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it was good judicial practice for the court to inquire into the potential effect of any irregularities that may have been noted upon an election. That helped to put the agencies charged with the responsibility of conducting elections on notice.

80. In the impugned presidential election, one of the most glaring irregularities that came to the fore was the deployment by the IEBC of prescribed forms that either lacked or had different security features.

81. Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. That Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and many more were photocopies. Five of the Forms 34B were not signed by the returning officers. It was not clear why a returning officer or a presiding officer could fail or neglect to append his signature to a document whose contents, he/she had generated. The appending of a signature to a form bearing the tabulated results was the last solemn act of assurance to the voter by such officer, that he stood by the numbers on that form.

82. Where the quantitative difference in numbers was negligible, the court should not disturb an election. The illegalities and irregularities committed by the IEBC were of such a substantial nature that no court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC could, in good conscience, declare that they did not matter, and that the will of the people was expressed nonetheless. The electoral law was amended to ensure that in substance and form, the electoral process and results were simple, yet accurate and verifiable. The presidential election of August 8, 2017, did not meet that simple test and could hence not be validated, the results notwithstanding.

83. The court had the mandate, to invalidate a presidential election under article 140(3) of the Constitution as read with section 83 of the Elections Act, *inter alia*, for reasons that there had been non-compliance with the principles in articles 10, 38, 81 and 86 of the Constitution as well as in the electoral laws. One of the clear reliefs in article 140(3) was

that should a presidential election be invalidated, then a fresh election would be held within 60 days of the court's decision in that regard. Parties at the hearing of the petition did not address the court on the issue, however, and so it was not fit to delve into an interpretation of that term in the judgment. The term fresh election was addressed in the 2013 *Raila Odinga case* and was the subject of an application by the 1st interested party within the instant petition. The application had been fixed for hearing on September 21, 2017 and the court would deal with it on its merits.

84. IEBC did not conduct the August 8, 2017 presidential election in conformity with the Constitution and electoral law. Irregularities and illegalities were also committed in a manner inconsistent with the requirement that the electoral system ought to be *inter alia* simple, verifiable, efficient, accurate and accountable. Although the petitioners claimed that various electoral offences were committed by the officials of the IEBC no evidence was placed before the court to prove that allegation. What was in evidence was a systemic institutional problem and there was no specific finger prints of individuals who may have played a role in commission of illegalities. It was therefore not possible to impute any criminal intent or culpability on either the 1st and 2nd respondent, or any other commissioner or member of the 1st respondent. There was also no evidence of misconduct on the part of the 3rd respondent.

85. Costs generally followed the event, but the instant petition had brought to the fore the need for IEBC to adhere strictly to its mandate and not to exhibit the casual attitude it did in the conduct of the impugned election and in defence of the petition. It was a heavily public funded constitutional organ and to burden Kenyans tax payers with litigation costs would be a grave matter which the court deemed unnecessary in the petition.

86. The constitutional mandate placed upon the IEBC was a heavy yet, noble one. In conducting the fresh election and indeed in conducting any future election, IEBC must do so in conformity with the Constitution and the law. In conducting the fresh election, IEBC must put in place a complementary system that accords with the provisions of section 44(A) of the Elections Act. Such a system only came into play when technology failed.

87. The petitioners had discharged the legal burden of proof as to squarely shift it to the 1st and 2nd respondent. Having so shifted, the burden had not in turn been discharged by the 1st and 2nd respondent as to raise substantial doubt with regard to the petitioners' case.

88. **[*Obiter*] "**The greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution."

89. **[*Obiter*]** "Have we in executing our mandate lowered the threshold for proof in presidential elections? Have we made it easy to overturn the popular will of the people? We do not think so. No election is perfect and technology is not perfect either. However, where there is a

context in which the two Houses of Parliament jointly prepare a technological roadmap for conduct of elections and insert a clear and simple technological process in Section 39(1C) of the Elections Act, with the sole aim of ensuring a verifiable transmission and declaration of results system, how can this court close its eyes to an obvious near total negation of that transparent system?"

Dissenting opinion

Per JB Ojwang, SCJ

1. The objective merits of the case must be drawn from the foundation of fact. Fact was defined as something that actually existed; an aspect of reality. Therefore, fact was as reliable as the concrete foundations of a skyscraper; and it was to be counted upon as a basis of objectivity and truth. The practice of law and more particularly, the motions of the judicial process *via* the minds and hands of judges – society's trustees for justice – were invariably lodged upon the pillars of fact, this being proffered through evidence.
2. The petitioners did not seek an ascertainment of the true number of votes cast for the 1st petitioner and for the 3rd respondent. The petitioners had focused the burden of their case on apprehensions as to the perfect security of the transmission system. They claimed an improper tallying of votes from different polling stations, though that was denied, on the basis of specific evidence, and exhibits showing the contrary. They further alleged improper conduct during election, on the part of certain Government officials, said to have unduly benefited the 3rd respondent's electoral platform – but those attributions to the 3rd respondent of improper influence, intimidation and corruption, were not just unsubstantiated, but also failed to meet the high standards of proof required for criminal charges.
3. The petitioners asserted, in broad terms, that the 1st respondent, in the conduct of elections, did not abide by the terms of article 86 of the Constitution, which required elections to be conducted in a manner that was simple, accurate, verifiable, secure, accountable and transparent. Yet the use of the manual ballot paper would clearly meet such conditions: the voter had no difficulty in marking it; its reality and visibility was not in doubt; it was verifiable, as a check so readily revealed the voter's exercise of his or her right of choice; it was secure; it was transparent; it was accountable.
4. The votes cast had been announced at the polling stations, where they were tabulated and results announced. From that initial ascertainment of the voting situation, the results were collated at the CTC and announced at that level. The IEBC thereafter provided the Forms 34A from all polling stations; Forms 34B from CTCs; and Forms 34C at the NTC– which was signed by all the presidential election agents, save for the petitioners' agent. Thus, from the evidence on record, the claim of non-compliance with the terms of article 86 of the Constitution could not stand.

5. Judges entertaining the competing claims of parties, constantly had to form an opinion, and, from objective criteria and conviction, eliminate the credible from the incredible, the truth from the untruth. That had to be done in the instant case. More substantial and persuasive evidence had emanated from the respondents' side. The respondents' factual accounts were firm and gripping. They were credible, and represented the substantial truth. However, no account of equal strength was beckoning from the petitioners.
6. On facts conveyed through evidence, in support of the petitioners' case, they were on weak grounds, as compared to the respondents. In establishing the merits of their case, the petitioners had both the ultimate legal burden of proof, and the shifting evidential burdens falling upon them. They did not discharge even the early evidential burden – the effect being, in the end, that they made no valid case against the respondents.
7. The petitioners' claims as to the conduct and management of the presidential elections by the 1st respondent invoked the question as to the 1st respondent's compliance with the law in every detail, though without necessarily adverting to the objective facts, as borne by the evidence. The court had to consider whether such contentions should be a basis for annulling the outcome of the presidential election held on August 8, 2017.
8. The Constitution which represented the people's much laboured initiatives to find a pacific, rational and humane regulatory structure for governance, bore certain principles, and it safeguarded certain rights and values in unambiguous terms. It safeguarded the rule of law, democracy, participation of the people and political rights, in detailed terms which included the provision that every adult citizen had the right, without unreasonable restrictions, to vote by secret ballot in any election; and to be a candidate for public office, and, if elected, to hold office. Such sacrosanct safeguards had to be so interpreted as to accord them true operational meaning. The same Constitution entrusted the interpretive mandate to the courts, to which, for the faithful discharge of the task, the voters had entrusted their adjudicative sovereignty.
9. Under article 20(4)(a) of the Constitution, the Supreme Court, just like the other courts, was under obligation to promote the values that underlay an open and democratic society based on human dignity, equality, equity and freedom. The Supreme Court, just like the other courts, in the course of performing its safeguarded interpretive mandate, was under obligation to be guided by the principles; that justice should be administered without undue regard to procedural technicalities, and that the purpose and principles of the Constitution should be protected and promoted.
10. The Constitution enjoined all courts, in the exercise of their interpretive mandate, to adhere to certain well-defined paths:
    a. a manner that promoted the Constitution's purposes, values and principles;
    b. a manner that advanced the rule of law, the human rights and fundamental freedoms in the Bill of Rights;
    c. a manner that contributed to good governance.

11. The prescriptions, in the context of the exercise of the people's electoral rights as took place on August 8, 2017, were the firm foundation upon which the dissent opinion was founded from the majority opinion, in the critical election petition. The majority decision had not only done short shrift to the governing terms of the Constitution, but also failed to adhere to the clear path of the law which had evolved, including the court's precedents on electoral law.
12. Just as with the Constitution itself, so with the regulatory set of norms, including the statutes and regulations: they all fell to the interpretive mandate of the courts. That fact, on the plane of legal scholarship, ought to be apprehended as the inherent common law chain that ran through the motions of judicialism in Kenya, as in so many other countries of the common law world. The long-established rationales of the judicial method still remain, and they ordained the espousal of the doctrine of precedent – a universal concept which, was expressly replicated in the Constitution.
13. Case law, the law as interpreted and applied by judges, on the recorded merits of each matter, had forever been the cornerstone of the common law. It was precisely the common law's focused and authentic appraisal of the facts of each case, that made it ever so compelling, as a defining strand in the judicial contribution to progressive, modern governance in conditions of democracy.
14. The challenges of adjudication dictate that, the gains of the past, authoritative interpretation by a discerning and responsible court, be perceived as representing a precious juristic civilization; and those were for keeps, as a reference-point for the conscientious and effective resolution of later disputes.
15. The judicial approach in the sphere of electoral law was obviously inseparable from the Constitution's values and the principles of democracy. It thus behooved the court to pay due deference to the fundamentals of the sets of cases that had, in the last several years, been determined by the Supreme Court, on the subject of elections – including presidential elections. Such was, quite conclusively, the most dependable course of the law that Kenya's lawyers should engage, in the first place.
16. In the 2013 *Raila Odinga* case, the court took into account the nature of the governance mandate under the Constitution, and, in response to a challenge to the integrity of the presidential election, laid down a set of guiding parameters. It observed that the office of the President was the focal point of political leadership in a democratic system, and was constituted strictly on the basis of majoritarian expression. The whole national population had a clear interest in the occupancy of that office which, they themselves renew from time to time through the popular vote. Flowing from the crucial majoritarian factor in the filling of the primary office of the Executive branch, the Supreme Court, in that case, defined its orientation as regards the resolution of an electoral dispute, such as the instant case before the court.
17. As a basic principle, it was not for the court to determine who occupied the presidential office; save that the court, as the ultimate judicial forum entrusted under the Supreme

Court Act, 2011 with the obligation to assert the supremacy of the Constitution and the sovereignty of the people of Kenya, should safeguard the electoral process and ensure that individuals acceded to power in the presidential office, only in compliance with the law regarding elections. The foregoing principle, in the Supreme Court's perception, dictated that even though the court must uphold the clear popular, electoral choice, it would hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of the Presidential office, in case there was any major breach of the electoral law. Such guiding principles were clear enough, were attended with special merit and they represented the vital backdrop to Kenya's electoral law.

18. The precedent-setting decision (the 2013 *Raila Odinga* case) was distinctly endorsed by subsequent electoral dispute cases: and it must be regarded as the pillar of the scheme of electoral law in Kenya – founded upon a beneficent interpretation of the Constitution, and of the whole body of electoral law. The point was consistent with the comparative adjudicatory experience in election matters.

19. The Supreme Court clearly defined the operative electoral law, on the basis of the *Raila Odinga* petition of 2013, in the subsequent petitions. The court was scrupulously affirming the synchrony of two express edicts of the Constitution*:* the first defining the sovereignty of the people, and the second delimiting the judicial authority. By article 1(3) of the Constitution, the people's sovereign power was partly delegated to the Judiciary and independent tribunals; while article 159(1) of the Constitution, which constituted the judicial authority was derived from the people and vested in, and should be exercised by the courts and tribunals established by or under the Constitution.

20. The general guiding path for the disposal of electoral disputes, such as the instant one, was by the design of the general principles of the electoral system, and of voting, in articles 81 and 86 of the Constitution, it was envisaged that no electoral malpractice or impropriety would occur that impaired the conduct of elections. That was the basis for the public expectation that elections were valid until the contrary was shown.

21. A consideration of the merits of an electoral petition such as the instant one, took one straight back to the evidence tendered. There was an inseparable link between constitutional principle, and the pillars of evidence. Since, the petition herein failed on the pillars of evidence, it was clear that the majority decision lacked validity from the standpoint of governing principles.

22. Evidence was the bearer of tell-tale signs of electoral victory, or of electoral defeat. The physical form of the ballot was directly visible, and was readily subjected to the test of simplicity, accuracy, verifiability, security, accountability and transparency. The physical evidence was the natural starting point in ascertaining who had won an election: and hence the majority judgment would have been expected to begin from a foundation of numerical assessment, before invoking any other parameters. For such other elements were essentially

subjective and were inherently destined to compromise the sovereign will of the voters which the Constitution expressly safeguarded.

23. Only from such a foundation of the physical vote-count, did one secure a proper viewpoint for the other dimensions of the electoral process, including the credibility of the entire operation. Indeed, in view of the relative strength of the evidence emanating from the two sides, the only objective conclusion would have been that, within the measure of the possible, the conduct of the election by the IEBC was entirely credible.

24. The emerging principle regarding the initiation of claims by way of election petitions was that all proof should commence from the foundation of the physical ascertainment of voting records. All other claims then, must revolve around that pillar and must establish that some gross impropriety had affected the electoral process, and should lead to its annulment. The court (minority) was constrained to propose that scheme as a proper agenda for the reform of Kenya's electoral law. Such legal reform would need to institute all appropriate security back-ups around the physical records, and would ensure the establishment of safety-nets around the votes cast.

25. The Constitution, while safeguarding the Judiciary's adjudicatory space, entrusted certain governance-spaces to other agencies – primarily the Legislature and the Executive: and that was the basis for the constitutional principle, separation of powers – a principle the validity of which, in the Kenyan constitutional order, had not ever been seriously contested. The Judiciary was the trustee of the people's sovereign power with regard to the interpretation and application of all the terms of the Constitution and of all other law. A substantial initiative in the motions of the entire sphere of law, legality and jurisprudence had been reserved to the courts.

26. Unlike the Judiciary, the work-orbit of which was lined up with laws, principles and jurisprudential yardsticks, both the Legislature and the Executive in view of their electoral and policy foundations, may quite properly be described as political agencies. They related to the largest number of Kenyan people, in a close and direct proximity; they influenced and were influenced by the momentary concerns which, therefore, justified the conception and espousal of policy and politics conceived and executed within short time-frames. That was in stark contrast with the relationship between the ordinary citizen, and the courts of law: and if the courts overlooked that reality, it would constitute a groundswell for failure of judicial responses in line with the professional, juristic remit.

27. The prolonged history of judicialism, in all democratic countries, demonstrated that the proper role of the courts had been professional, judicial, and founded upon cardinal principles which drew lines of correctness and propriety in situations of dispute, so as to secure a certain optimum level of safeguards for the rights of the citizen. Beyond that level of safeguard and fulfilment, it fell to the political agencies to pursue constantly, such policy stands as would satisfy, and give fulfilment to the national populace.

28. On the principles of institutional disposition, it followed that it fell not to the court to make undue haste in assuming the policy mantle; a stampede was destined not only to disrupt the delicate institutional balances, but to weaken the reliable jurisprudential bedrock which assured the citizens of ultimate governance safety-net.
29. The majority on the instant petition had made a precarious move that was destined to prove detrimental to the dependable setting of relations among essential governance entities – to the detriment of the rights and legitimate expectations of the citizen. Such a determination was in clear departure from the state of the evidence. The petitioners' case rested on just one dimension of the electoral process – electronic transmission of results. Moreover, the bulk of the assertions made as regards transmission, were just that, contentions, with only limited testimonial ingredient: it was hardly evidence.
30. Evidence in the true sense, a set of probative facts, was what came forth from the respondents: and its tenor and effect was that, there were only limited instances of failure of results-transmission; only limited cases of irregularity in vote-addition and tabulation, not affecting the ultimate compilation and summation; the lawful complementary device was put in service, in cases of failure in the transmission process; all the physical voting records were available, and indeed, had been timeously availed to the Supreme Court Registry and could have been re-counted, to confirm that the 3rd respondent had been properly declared as the President-elect. Thus, on basic elements of trial, the essence of the burden of proof was undischarged and it was in effect a reversal of the conventional process of judicial inquiry and determination – making a finding in favour of the petitioners.
31. The majority would appear to have taken leave of the juristic obligation to interpret the terms of the articles of the Constitution invoked by the petitioners; the obligation to break them down, so as to ascertain the discrete demands of the law; the obligation to consider the pertinence of the specific statements of evidence from the petitioners, such as would answer to the constitutional and legal principles invoked.
32. The majority departed, as it would seem, from the placid frame of the juridical setting and assumed direct responsibility for the immediate calls of policy or politics – by altering the design of momentary, popular inclinations which were, by the terms of the Constitution, legitimate in all respects. The damage such as may flow from such a deportment was not yet plain to all as was quite clear from common perceptions recorded in the media ever since the delivery of the majority judgment.
33. The general perception associated the majority judgment with an overtly political inclination. That was the judgment's obvious departure from the professional plane of jurisprudence as the proper platform of the judicial arm of the State. By the magic jolt of September 1, 2017, general political history would have been made, even though that represented a departure from the jurisprudence of democratic systems, which so much cherished the separation of powers, and which so studiously committed the Judiciary to

the professional task of line-drawing to ensure the sustenance of regular safeguards of the Constitution and the law, for all.

34. In future inquiries, it may be established that the law, as advanced by its interpreters and scholars, had its anchorage on the adjectival plane, from which it addressed the primary motions of social, economic and political activity. The law stood to be formulated, molded, interpreted and applied, not for its own sake and in its own cause, but in relation to the primary motions which preoccupied citizens and communities. Thus, in the instant case, the electoral process had taken place and its motions had to be matched to the law as interpreted. By the interpretive scheme of the law, it did not stand the test of rationality or efficacy to merely allege some unspecified impropriety in the electoral process.

35. The relevant clause of the Constitution must be taken through an analytical process and subjected to definite categorizations which crystalized the specific concepts and elements said to have been violated. By that criterion, most of the contentions of the petitioners in the instant case, on account of their broad generality, would not stand. The interpretive task as it related to the adjectival essence of the law was inherently professional – and was reflected in the concept of jurisprudence, which dealt with thought about law.

36. The court, in the normal performance of its role under the Constitution, was engaged in the specialized process of jurisprudence. It followed that the more immediate, urgent and primary motions of basic policy-making, inherently devolved to the political arms of the State, rather than the more specialized entity which was the Judiciary.

37. [***Obiter***] "The judgment, apart from the occasion it proffers for a reflection on the law relating to elections, is a basis for a rethink on law as a concept, and as a professional engagement, defined in a regulatory framework applicable to the citizens' primary undertakings. From such a platform, it emerges that the law's design in the hands of the judge, the lawyer and the scholar, rests in unity with the fundamentals of constitutional governance – an important element of which is the independence of the Judiciary. On the basis of this principle, it is to be recognized that the judge's proper mandate lies several removes from the citizen's momentary policy and political desires and expectations – which generally devolves to the state's political agencies. By this perception, the judge's proper remit has its focus upon professional engagement, founded upon objective scenarios, or criteria...Such a perception of law and legal process, in retrospect, will be found to be in conformity with the analytical schemes that mark the dedicated works of great jurists of the past."

38. [***Obiter***] "The special contribution of these judges and law scholars is to light up the orbit of jurisprudence, as a dedicated sphere of thought, learning and preoccupation, that secures the requisite motions of the different spheres of human activity, while affirming the perceptions of integrity and propriety...Such is the jurisprudential context in which I have considered the petition herein. The majority decision, in effect, holds that the court may, quite directly, engage the course of national history – through a precipitate assumption of recurrent policy-

making or political inclinations and mandates. In my considered opinion, judges, where the making of history devolves to them, should focus their attention in the first place, upon the intellectual and jurisprudential domain – rather than upon the workaday motions of general policy and politics which devolve to the citizens themselves, and to the political agencies of state."

39. The petition would have been dismissed with costs.

Per SN Ndungu, SCJ

1. The Supreme Court had the first original, exclusive and final resort for any party challenging the election of any person to the Office of the President. It determined presidential election petitions to the exclusion of all other courts. That jurisdiction was also limited in time. The Constitution required one to petition quickly and particularly. That restriction, on extent and time was not without basis. The parties had to present a clear, concise case supported by cogent evidence. The jurisdiction even though limited in time and scope, revolved around critical constitutional questions. The requirement for particularity was therefore important to ensure that the case presented before the court was properly of.
2. The Supreme Court when discharging its mandate as an election court, remained the precedent-setting forum in Kenya and its decisions had to be carefully analysed to ensure that a jurisprudential crisis or confusion did not ensue. Were that to happen, the court would have failed the Constitution and the people.
3. The Constitution was Kenya's guiding order. It had organized Kenya's governance character and infused accountable governance, public service and responsible citizenship. The Judiciary had the enviable, but extremely difficult and rewarding duty of giving the Constitution comprehensible interpretation that was stable, consistent, predictable, certain and true to the sovereignty of the people. Undergirding that sovereignty was the ability of every Kenyan to enjoy his/her full human-character guaranteed by an elaborate charter on rights. A determination of a dispute akin to the one that was presented before the Supreme Court could not therefore be mechanically disposed of without paying due regard not just to the letter or spirit but also the conception of the Constitution itself. At the core of the Constitution was sovereign will, at the soul of sovereign will were the people and central to the people were their rights.
4. An election cause was a right-centric cause. At the heart of a petition challenging the results of a presidential election was the right to vote in free and fair elections. That right was at the epicenter of Kenya's democratic character as a republican state. Interpretation and application of the constitutional provisions touching on elections had to therefore be read holistically with each provision reinforcing the other. That approach had been consistently applied by other courts in the region and embedded in the theory of constitutional interpretation in Kenya's own jurisdiction.
5. Evidence was the epicenter of any trial. The nature of a presidential election petition did not displace the basis of the law of evidence outlined in the Law of Evidence Act, section 80 of

the Elections Act, 2011 expressed that among the powers of an election court in exercise of its jurisdiction was: summoning and swearing in witnesses in the same manner, or as nearly as circumstance admitted, as in a trial by a court in exercise of its civil jurisdiction. As per article 163(3)(a) of the Constitution, the proceedings before the Supreme Court, although regulated by the Supreme Court Act, 2012 and the attendant Presidential Election Petition Rules, 2017 allowed reliance on affidavit evidence. In order for that evidence to bear cogent value, it had to meet the demands of proof.

6. The Supreme Court's role in exercise of its exclusive original jurisdiction ought to be thorough in fact-finding and interpretation of the Constitution and the law. In cases of factual prerequisite such as the petition, interpretation of the law devoid of complete and exhaustive factual examination was by itself, an insufficient basis upon which to make the final determination contemplated under article 140(2) of the Constitution. The evidence adduced had to be clear to show that what was declared was not the result.

7. Electoral processes had assumed a fair presumption of correctness. To rebut the presumption required proof to a high degree that the resulting declaration was not trustworthy. That was drawn from the democratic legitimacy accorded to elections by the Constitution. The test of invalidating an election had to be a clear one. A new election ought to be conducted only when voters had been completely prevented from accurately registering their intended preference in numbers sufficient to affect the outcome. A determination to hold a fresh election in terms of article 140(3) of the Constitution should only be made if the following questions were considered, analysed and determined conclusively:

   a. Was the final outcome of the election the result of fraud, mistake or omission which precluded the certified vote total from correctly aggregating all voters independent, non-coerced and non-procured preferences?
   b. Is the outcome incapable of being trusted to reflect the will of the people?
   c. Can a reliable outcome be determined in a manner other than holding a fresh election?

8. The right to vote in free and fair elections was violated when a court, without comprehensive understanding and analyzing of the evidence displaced the electorate by halting an election and deciding the outcome itself. An election, unless clearly proven to have been conducted in gross violation of the Constitution and the law, affecting the ultimate outcome, must never be taken away from the voters. The electorate, by dint of article 1 of the Constitution were entitled to be represented by men and women of their choice. In resolving electoral disputes, the Judiciary must set upon that duty as a judicial and not a political actor. In so doing, its guiding force must be proper exercise of judicial authority granted under article 159 of the Constitution. It must consider rights not form.

9. The majority based their decision on an interpretation of section 83 of the Elections Act and in doing so they read-in the provisions of articles 81 and 86 of the Constitution. They stated that the electoral process had not met the requirements as listed in those articles. That was

a narrow and restrictive interpretation of the law. The majority in doing so, limited itself to operational and aspirational constitutional principles but failed to address the substratum of the issue at hand, the *grund* norm of the Constitution, the sovereignty of the people and the centrality of the people in the entire architecture of the Constitution of Kenya, 2010, but secondly used a restrictive test in assessing whether a claim that the right to vote had been violated in any way had been made.

10. In interpreting and applying any provision of the Constitution, the Elections Act and Regulations, the Supreme Court must adopt an interpretation that promoted the *grund* norm in article 1 and the right to vote in article 38 of the Constitution.

11. Articles 81 and 86 of the Constitution reinforced the right to vote elaborated under article 38 of the Constitution. Those constitutional provisions had to therefore be applied to the core right and not vice versa. Articles 81 and 86 were to be facilitative of the fundamental rights under article 38, in addition to other provisions of the Constitution. In fact, there were many other articles of the Constitution, legislation and regulations whose purpose was intended to give effect to, facilitate and support the right to vote as provided for under article 38. In the application and implementation of those provisions, the centrality of article 38 as the primary purpose for their existence must never be lost.

12. A reading of the majority decision appeared to presume that the only test for ascertaining the credibility of the election process, or more correctly for assessing any violation of the rights under article 38 of the Constitution, lay in articles 81 and 86 of the Constitution. That was not the case. Articles 82 and 83 of the Constitution also went to the specifics of the electoral process that supported the right under article 38. Article 82 and 83 addressed the registration of voters and article 83 underlined the requirements of the voting exercise itself as simple, accurate, and taking into account those with special needs.

13. Article 83(3) of the Constitution provided that administrative arrangements for the registration of voters and the conduct of elections had to be designed to facilitate and would not deny, an eligible citizen the rights to vote or stand for election. The upshot being that the test for assessing a violation claim under article 38 of the Constitution had to be more comprehensive than the aspirational guidelines set under articles 81 and 86 of the Constitution. Cherry-picking constitutional provisions to determine a right-centric cause on the basis of formal considerations the choice of form over rights undermined a purposive approach to the interpretation and application of the Constitution.

14. The Constitution in article 259(1) displayed the framework of applicable principles while interpreting the Constitution. Further the Constitution provided under article 20(3)(a) and (b) that in applying a provision of the Bill of Rights, a court had to develop the law to the extent that it did not give effect to a right or fundamental freedom and adopt the interpretation that most favored the enforcement of a right or fundamental freedom. The majority in the petition had not given effect to the people's right to franchise and had not interpreted the Constitution broadly and in a manner that most favored its enforcement.

The case for the advancement of the Bill of Rights had to therefore be at the forefront of any judicial determination under the Constitution.

15. Even if there could have been a perception that a competing rights situation existed between articles 38, 81 and 86 of the Constitution there had to be a balancing and an application of proportionality to effect a judicial outcome that served the dictates of the Constitution. One had to recognize that not all claims would be equal before the law. Some claims were afforded a higher legal status and greater protection than others.

16. While there were many situations in which rights, principles and values could seem to conflict or compete when evaluating situations of competing rights, human rights, especially those provided in the Bill of Rights would usually hold a higher status than principles and values. That rationale was underlined by the architecture of the Constitution, which actually ring-fenced the Bill of Rights from amendment which could be made only through referendum by the people of Kenya unlike the principles in article 81 and 86 of the Constitution which could be amended by elected leaders in Parliament. That plebiscite protection in itself placed the Bill of Rights higher in the pecking order of competing provisions in the Constitution. The principle therefore should complement the right not vice versa.

17. The principles in article 81 and 86 of the Constitution could not trump the fundamental rights as provided for under article 38 of the Constitution and certainly they could not undermine the provisions of article 1 of the Constitution on the sovereignty of the people. Further, they ought not compete with all international treaties that provided and protected the right to vote and to which Kenya was a signatory and which were part and parcel of Kenya's constitutional order under article 2.

18. Fundamental rights constituted the foundation of any Constitution and any accompanying values and principles were to be complementary and not to detract from the Constitution. The rights in article 38 of the Constitution remained central to any election cause and it was a claim of the violation of those rights that ought to take center-stage in such a cause and not the form that accompanied it in the periphery.

19. The collectivity and interlocking nature of constitutional provisions in the scheme of rights, values, principles and administrative directives were infused into the Elections Act and Regulations and in determining claims of commission or omission in electoral disputes, a court had to consider:

    a. The nature of the commission or omission, in general.
    b. The source of such omission or commission.
    c. Foreseeability and mitigation, that was, whether the commission or omission could be foretold were there to be steps to avert it.
    d. The effect of the commission or omission on a right, a duty or the consequence of a duty thereof such as effect upon the result of an election.
    e. The effect of the commission or omission on the individual and the collective.

f. Possible remedies and directions.

20. Article 86 of the Constitution provided a strict quantitative language regulating voting at an election. The article required the voting method employed to be simple, accurate, verifiable, secure, accountable and transparent. The petitioners' claim was that the results from the polling stations, the CTCs could not be verified by their agents at the NTC. The process of verification was not a two-step process. Verification in a presidential election was a continuous process traceable from the date of registration of voters to the determination of a presidential election petition in an election court. In other words, the plurality of persons engaged in the conduct of an election, including the ultimate determination of that election's validity, were all agents of verification in ascertaining the credibility of an election. To examine the integrity of the election, the election court was obliged to consider all the relevant steps of the verification process.

21. Section 6 of the Elections Act mandated the IEBC to avail the register of voters to be inspected by the public at all times for purposes of rectifying the particulars therein. Verification of one's registration details, including biometric data, was therefore a critical part of verification essential to the conduct of an election and enjoyment of the right to vote. The IEBC was also mandated to open the register for inspection by the public, ninety days from the date of the notice of a general election. That assured the public of the correctness of the registration details entered into the register and guaranteed certain key components of the right to vote under article 38. That process was undertaken in the months of May and June, 2017.

22. Kenya's electoral system was instituted on the basis of multi-party democracy founded on the national values and principles outlined under article 10 of the Constitution. The general principles of the electoral system and the interlocking constitutional provisions, including article 81 were engaged in an exercise of sovereign guardianship. Therefore, the Supreme Court by dint of its jurisdiction was the final verifying agency, if called upon to do so, in a presidential election petition. That duty was enabled by the Supreme Court's inherent powers as an election court to order; -

a. scrutiny;
b. recount;
c. re-tally;
d. discovery of documents;
e. inspection of ballots; and
f. orders that facilitated the court to establish the people's sovereign will.

23. The court had to give full weight to the constitutional commitment to free and fair elections and the safeguard it provided of the right and ability of all who so wished to offer themselves for election to public office. It was essential to hold the IEBC to the high standards that its constitutional duties imposed upon it. It was insufficient for the court to say that it had doubted, or had a feeling of disquiet, or was uncomfortable about the freedom and fairness

of the election. It had to be satisfied on all the evidence placed before it that there were real not speculative or imaginary grounds for concluding that the elections were not free and fair.

24. The preservation of election material for a period of three years was also an enabler of the verification process. In cases where a court was in grave doubt as to the outcome of the election, as the majority in the case decided they were, the ballots existed to enable a final inspection/verification process by an election court. The people spoke through the ballot and the ballots, once marked and cast, in turn, spoke for themselves anonymous of the voter, preserving the principle of secrecy under article 38 (3)(b) of the Constitution.

25. Verification was an exercise that comprised the entire electoral process commencing from registration of voters, inspection of the voters register, verification of registration, verification of an elector's details where the electronic identification failed, audit of the register, identification of voters, presence of candidates, agents, accredited observers and media, the process of counting and the limited right of recount, signing the declaration forms and the entitlement of candidates or agents to a copy, displaying the declaration of results for access by the public, sealing of ballot boxes and handing over of election materials, the tallying process and the right to challenge the declaration of results in an election court. All those processes activated several inbuilt principles of the electoral system under article 81 of the Constitution. They also provided an opportunity for electoral quality assurance. The hierarchy was that any shortfalls in the preceding process could be detected in a consequent process forming a basis for a pre-election or post-election dispute.

26. A proper test for verification of an electoral process must always prioritize the primary instrument for declaration of the result or outcome of the voters' choice. The voter was identified at the polling station, he voted at the polling station, ballots were counted at the polling station. The agents, candidates, observers were allowed access into the polling stations to verify the inner sanctum of the voice of the electorate, the altar of the voter's choice. What happened there was what determined the parameters of verification. Any doubt as to the credibility or integrity of the election had to be tested against the various layers of verification, including the election material in the custody of the returning officer. A single want of form in the elaborate scheme of verification could not be a basis for nullifying a presidential election.

27. The electoral process was conducted in accordance with the directions of the Court of Appeal in the *Maina Kiai* case. Processes that had been put in place before the determination by the Court of Appeal declaring section 39(2) and (3) of the Elections Act, 2011 and regulation 87(2)(c) of the Elections (General) Regulations, 2012 unconstitutional were adjusted to; -

    a. eliminate provisional results; and
    b. adjust Form 34C to reflect a collation of Forms 34B from the constituency returning officers who had verified and tabulated the final results from the polling stations in Forms 34A.

28. The declaration by the 2nd respondent of the results of the election per county was in keeping with the constitutional requirement that the candidate declared elected as President received at least twenty-five per cent of the votes cast in each of more than half of the counties.
29. The *Maina Kiai* decision, delivered on June 23, 2017, 35 days prior to the conduct of the presidential election in August, 2017, was definitive of the status of the law at that time. As such, the 1st and 2nd respondent's adherence to those guidelines was an answer to the duty in article 10 of the Constitution, binding all State organs and State officers to the national values and principles, in the case, the rule of law, whenever any of them such as the 1st and 2nd respondents applied or interpreted the Constitution, enacted, applied or interpreted any law; or made or implemented public policy decisions. The only challenge was that the system of data transmission from the polling station to the NTC had already been set up.
30. The case of *Maina Kiai*, though in many respects was similar to *Hassan Ali Joho & another v Suleiman Said Shahbal and others* [2013] eKLR, Supreme Court Petition No 10 of 2013; the (*Joho* case), was a play of different legal and constitutional provisions. While the *Joho* case interrogated the plurality of declaration processes for a gubernatorial election, a three-tier election with no requirement of a county or national threshold, the *Maina Kiai* case addressed itself to the declaration processes in a presidential election; a two-tier election process under article 138(3)(c) of the Constitution with a mandatory national and county threshold under article 138(4)(a) and (b), and a defined mode of declaration under article 138(10)(a). The two cases were in different electoral law amendment periods. The foregoing aspects therefore signaled an imperative to distinguish *Joho* from the *Maina Kiai* case.
31. The polling station was the true *locus* for the free exercise of the voter's will and once the counting of votes as elaborated in the Elections Act, 2011 and Regulations thereunder, with its open, transparent and participatory character using the ballot as the primary material meant, as it had to, that the count there was clothed with finality not to be exposed to any risk of variation or subversion. Consequently, the concept of provisional results did not exist in Kenya's constitutional electoral practice. As such, the Supreme Court upheld the determination by the Court of Appeal in the *Maina Kiai* case that sections 39(2) and (3) of the Elections Act, 2011 were inconsistent with the Constitution and to that extent, null and void. However, the judge departed from the decision by the appellate court to the extent that; -
    a. it endorsed another layer of tallying and verification of the result of the presidential vote in the form of the CTC; and
    b. incapacitated the chairperson of the IEBC, an integral part of the declaration process in a presidential election, from verifying the polling results.
32. The word "declared" in article 180(4) of the Constitution (in the petition, article 138), had been used to depict the finality culminating in the declaration of the winner of an election. Article 138(3)(c) of the Constitution was the pace setter of the declaration process. It called on the IEBC to tally and verify the count before declaring the result. That formula was in

terms of article 86(a) of the Constitution, simple, verifiable, transparent and accountable. Article 138(3)(c) eliminated the need for the polling results in a presidential election to be tallied at the CTC before being declared. Presidential election results were declared at the NTC by the chairperson of the IEBC. Before that declaration could be made, several things had to be done; -

a. the polling results had to be tallied - article 138(3)(c);
b. the count had to be verified - article 138(3)(c);
c. the national threshold had to be met - article 138(4)(a); and
d. the county threshold had to be met - article 138(2)(c).

33. The prerequisites could only be done at the NTC by the chairperson of the IEBC who was also the person who was to return the results of the presidential election in accordance with the Constitution.

34. Whilst it was the case that the role of the returning officer was indispensable to the election process, it was the case that he/she, in fulfilling that role, was a creature of statute and was bound by the terms of the express legislative provisions. Accordingly, in the performance of his/her duties and functions he/she had to be guided by the principles laid down in such legislation, within which was set out the framework where those whose names were validly on the register of electors could give effect to the franchise vested in them.

35. The returning officer must not exceed the limits of the competence so conferred on him, he was therefore confined to what could legitimately be extracted from the provisions in issue, either by way of express conferment or necessary intendment. He could not operate in excess of those limitations. He could not, for example, justify any act or action, however desirable his intentions could be, based on any form of inherent power for the simple reason that his office was not amenable to attract competence in that way. When an occasion arose it would therefore become a matter of statutory interpretation as to whether or not the act or omission complained of was within the competence of his office to perform.

36. Ordinarily a question regarding the interpretation or application of the Constitution could arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it. Therefore article 138 of the Constitution had to be interpreted liberally and in a manner that none of its sub-articles would strike down the other.

37. Although the petitioners' expert witness on cyber security outlined the six principles which the transmission systems and database ought to have been tested against, the source of that opinion was not provided. Sufficient evidence to prove the link between those principles, the imperatives of electoral conduct and elaborate omission by the 1st respondent, supported by any evidence, was not provided. Experts, when admitted before the court in person or by deposition, would have a primary function to educate the court in the technology they would come as teachers, as makers of the mantle for the court to don. Further, as a

practical matter a well-constructed expert report containing opinion evidence would set out the opinion and the reasons for it. If the reasons stood up the opinion did, if not, then the opinion would not.

38. Article 86 of the Constitution lay down the parameters of voting in furtherance of the right to vote in free and fair elections pursuant to article 38 of the Constitution. The system of voting ought to be simple, accurate, verifiable, secure, accountable and transparent. It was peculiar that with regard to voting, article 86 did not make any direct reference to transmission of the election results. However, transmission was an integral part of the electoral process. It was the mode through which the results left the polling station to the CTC and the NTC. In order to enable voting and give full effect to the right to vote, appropriate structures had to be set up. According to article 86(d), those structures and mechanisms ought to eliminate electoral malpractice. The KIEMS system was one such mechanism.

39. Upon signing Form 34A and ensuring the same was signed by the agents of the candidates present in the polling station, the presiding officer manually input the results and the scanned form in the designated electronic kit and electronically transmitted the results to the constituency, county and national tallying centres. The KIEMS kit applied for that purpose required 3G or 4G network in order to transmit the results. In the areas where that nature of network was not available, the presiding officer would have been required to move to an area where that network was available in order to electronically transmit the results. A copy of the form containing the declared results was also to be pinned on the door of the polling station.

40. The counting of the votes and the declaration of the results at the polling station was manual but the transmission was electronic. Nonetheless, by dint of section 44A of the Elections Act, 2011, if the electronic transmission of the results failed then the presiding officer was to revert back to the manual system of transmission in which case he would have to physically deliver the Form 34A to the constituency returning officer.

41. Kenya's electoral process could not be said to be purely electronic. It comprised of both manual and electronic components. It was a rather ugly grouchy and reluctant mongrel of two very distinct processes. In fact, it was a largely manual system. It was therefore very distinct from electronic electoral processes exhibited in foreign jurisdictions such as India, Australia, the United States of America, Canada, and Brazil among others.

42. In Kenya, the system of voting was partly manual and partly electronic with the option of reverting to the manual processes should the electronic processes fail. However, the counting of votes, tallying, collation and verification of the results was entirely manual. An interpretation of section 44A of the Elections Act was incomplete without due consideration to article 38 and 86(d) of the Constitution and section 39 and 44 of the Elections Act. The High Court considered it only in light of section 44 advancing an incomplete conclusion.

43. Section 39(1)(C) of the Elections Act had mandated that for purposes of a presidential election, the IEBC would electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the CTC. Technology, however, per section 44 of the Elections Act was used subject to the provisions of the entire section, meaning that there were prerequisites to be met before technology could be employed. Parliament was keen to introduce conditions preceding the use of technology in elections. The conditions were in-built in the provision as follows:

a. A policy for progressive use of technology in the electoral process (section 44(2)).
b. The technology would be simple, accurate, verifiable, secure, accountable and transparent (section 44(3) which was in terms of article 86(a) of the Constitution)
c. In an open and transparent manner, procure the technology at least 120 days before such elections.
d. Deploy the technology at least sixty days before a general election.
e. Enact regulations in consultation with relevant agencies, institutions, stakeholders, including political parties for the aspects listed under section 44 (5) (a-j).
f. Technology shall be restricted to voter registration, identification and results transmission
g. Establish a technical committee to oversee the adoption of technology and its implementation for the conduct of the general elections.

44. The use of technology was progressive. Electronic technology had not provided perfect solutions. Such technology had been inherently undependable and its adoption and application had been only incremental over time. It was not surprising that the applicable law had entrusted discretion to IEBC on the application of such technology as could be found appropriate. Since such technology had not yet achieved a level of reliability, it could not as yet have been considered a permanent or irreversible foundation for the conduct of the electoral process. It negated the petitioner's contention that, in the instant case, injustice or illegality in the conduct of election would result if IEBC did not consistently employ electronic technology. The petitioner's case, insofar as it attributed nullity to the presidential election on grounds of failed technological devices, was not sustainable.

45. The Constitution and the entire electoral code enliven the mechanism, the manual identification of voters and manual transmission of results in the prescribed instruments of transmission, verifiable by various agents including an election court using election material expressly referenced under article 86(d) of the Constitution and defined under section 2 of the Elections Act. The essence of the section was to save the sovereign will of the people from the unpredictable nature of technology and to introduce a layer of verifiability to the electoral process. Parliament was clear, by the terms of section 44A of the Elections Act that the complementary mechanism which existed as the manual system of result transmission in the prescribed instruments of declaration and whose finality was only questionable before

an election court was sufficient to deliver a presidential election, as happened in areas where there was no 3G or 4G network coverage.

46. The public nature of elections required that all essential steps in the elections were subject to examinability, unless other constitutional interests justified an exception. The examination ought to be possible, by the voter/public, without special expert knowledge. Therefore, the voter in Kenya understood the function of the ballot and the critical importance of entries in the statutory Forms 34A, 34B and 34C. Election results were displayed in the relevant forms after the close of polling for all to see and scrutinize. Any mechanism that purported to complicate the simplicity was at variance with the Constitution. Technology reinforced the efficient and fast translation of the will of the people into an ascertainable return. It however did not supplant the critical primary instrument-form 34A generated at the primary *locus* of the election and challengeable only in a court of law.

47. The claim of a consistent variance of 11% between the results for the 3rd respondent and the 1st petitioner was not proved. Having determined that failure of technology could not supplant the will of the people recorded in verifiable ballots and other election material and the results declared in available, ascertainable, unchallenged and proper statutory instruments of declaration, the petitioners' case to have excluded results from 11,000 polling stations which were out of 3G and 4G network would be an affront to the Constitution and the right to franchise.

48. In accordance with article 138(4) of the Constitution, a candidate would be declared elected as President if the candidate had received more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties. That meant that in order for a candidate to be declared President-elect, he/she ought to receive more than fifty (50) per cent of the votes cast in the election, or what had been commonly referred to as the threshold of 50 plus 1. If no candidate met the threshold, then fresh elections ought to be held at which only the two candidates with the highest number of votes in the first round would participate. In the second round, it was the candidate who received the largest number of votes or a simple majority, who would be declared President-elect. Therefore, percentage point played a critical role in determining the winner of a presidential election in the first round and whether there would be a second round of elections. Consequently, any factor that would affect the percentage of votes attained by a candidate needed to be addressed.

49. A non-compliant ballot paper yielded a rejected vote which was invalid and therefore conferred no advantage upon any candidate. Due to its numerical inconsequence on any candidate's final tally, it should not be considered while computing the final percentage outcomes in a presidential election.

50. Although the Constitution did not define the term cast, the Black's Law dictionary defined "cast 'as "to formally deposit (a ballot) or signal one's choice. Therefore, the act of a voter secretly marking his/her ballot paper by putting a cross, a tick, thumbprint or any other

mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom the voter wished to vote, constituted, a vote. However, that vote only counted to the final computation and was deemed cast, if the elector complied with the applicable standards elaborated under the Constitution and the electoral law and regulations.

51. In certain instances, at the time the voter placed his/her marked ballot paper in the ballot box, it remained a ballot that could be rejected unless the voter had satisfied the requirements necessary to render their intention, a vote cast. The ballot paper however bore a mark against the name and symbol of the person whom the voter wished to vote. The process of marking the ballot paper was therefore an expression of the voter's wish/will to elect a particular candidate. That act, alongside other enabling electoral processes such as voter registration comprised the voter's exercise of his/her political rights in line with article 38(2) of the Constitution.

52. In order for a ballot to translate into a verifiable vote (a vote cast), it had to be clear in whose favour the vote was cast without identifying the voter. Meaning, that a vote was cast only when a presiding officer, during counting, declared that the intention of the voter was clear and that the vote was made in favour of a particular candidate. The intention of the voter in a voting process that was by secret ballot was a core component of an individual's political right pursuant to article 38 of the Constitution. Therefore, spoilt ballots did not constitute votes eligible to be included in the tally of the final results in a presidential election.

53. Rejected ballots in accordance with regulations 77 and 78 of the Elections (General) Regulations, 2012 were void and were not counted unless in terms of regulation 77(2). Viewed purposively it could be concluded that regulations 2,69,70,71,77 and 78 of the Elections (General) Regulations, 2012 excluded rejected ballots from the total votes cast which were considered for purposes of computing the final results in a presidential election

54. The petitioners' logic collectivizing all votes as cast and therefore applicable in computing the final results of a presidential election did not distinguish the presidential election from other elections held on the same day. That reasoning accepted that stray ballots also ought to form part of the votes considered in computing the final percentages. A stray ballot paper meant a ballot paper cast in the wrong ballot box.

55. If any ballot for another election, for instance, Senate or Gubernatorial was placed in the presidential ballot box, then that vote was not cast in the presidential election. It was for all intents and purposes, a foreign object that could not be considered a vote cast in that election. Consequently, it could not be taken into account when considering the total number of votes cast in that election. Rejected ballots belonged to no candidate. That however, was not to understate the statistical need to record rejected ballots. Such statistics could be helpful in assessing voter turnout and also acting as a barometer for evaluating civic education programs for voters.

56. In an election petition, the burden of proof at the very onset lay on the petitioner to prove the facts that he alleged. Once the petitioner discharged that, burden it shifted to the respondent(s) to rebut the claims made.
57. The court elaborated on the distinction between the legal burden and the evidentiary burden, noting that the legal burden was the initial burden on the petitioner to prove the facts pleaded in the petition. Once the petitioner discharged that legal burden to the standard required, then the burden shifted to the respondent to disprove those claims; that being the evidentiary burden.
58. The petitioner had to discharge the initial legal burden for the 1st respondent to be under the evidentiary burden with respect to the register and the declared results. The evidential burden regarding the contents of the register and declared results lay on the IEBC; save that, that burden was activated, in an election petition only when the initial legal burden had been discharged.
59. The petitioner must discharge the burden of proof in order to succeed in their pursuit to invalidate the declared results. The petitioner was not only required to prove that the irregularity was committed but also that the irregularity materially affected the election result. Section 83 of the Elections Act, 2011, specifically required that no election would be declared void by reason of non-compliance with written law if it appeared that the election was conducted in accordance with the Constitution and with written law or that the non-compliance did not affect the result of the election.
60. Where a claim of electoral malpractice was made, the standard of proof was one above a balance of probabilities but below beyond reasonable doubt. Where a claim of commission of an election offence was made, the standard of proof was similar to that in a criminal matter, which was beyond reasonable doubt. Where the claim related to data-specific electoral requirements, the standard of proof was also beyond reasonable doubt.
61. Where the petitioner assailed the declared results on the allegation that the returned candidate committed election offences it was imperative for the petitioner to prove beyond reasonable doubt that the returned candidate or his agents working under his instructions committed the alleged offence. Where an election offence was alleged in an election petition, the standard of proof was beyond reasonable doubt similar to that in criminal matters due to the quasi-criminal nature of the cause.
62. With regard to the allegation that the Cabinet Secretaries committed the alleged electoral offences, the petitioners were required to show firstly that the offences were committed and that secondly, they were acting under the instructions of the 3rd respondent. They had to show the nexus between the person who was alleged to have committed the offence and the returned candidate and they should have shown the full particulars of the allegation.
63. Where a petitioner imputed electoral offences on the part of the returned candidate, the burden of proof lay on the petitioner to prove the commission of the electoral offences by the returned candidate or by his agents or by other persons with his consent, which claim

had to be supported by cogent evidence, bare allegations, without more, that the offence was committed would not suffice. If the evidence supplied failed to meet the set standard the petition had to fail.

64. The law was clear that cabinet secretaries were exempt from the prohibition that public officers should not engage in the activities of a political nature and for good reason. Cabinet secretaries and county executives' members served at the pleasure of either the President or Governor. They were political appointees with the express purpose of delivering the manifesto of their appointing authority or political party. That was an essential part of a political Government in any democracy. A change in the presidency signaled the immediate resignation or replacement of the political appointees not so with the rest of the civil service whose tenure was protected against the vagaries of politics. That was why civil servants did not and should not participate in active politics as they should remain apolitical.

65. There was need by major stakeholders, in a process such as the one forming the subject matter of the instant petition (the presidential election), to gain access to all the relevant documents containing all the material facts relating to the process. Therefore, the need for the petitioners to get all the relevant forms from the 1st respondent was completely justifiable. However, the 1st respondents had been tasked with an immense constitutional mandate to conduct six elections on the same day which ran concurrently. Though that was humanly possible it was a daunting task to count, tally and verify the results of all the six elections and more specifically the presidential election within the constitutional timeline of seven (7) days from the date of the election.

66. One could not lose sight of the fact that the IEBC's officials had been working round the clock during the election period, therefore the reduced efficiency that ordinarily came with long working hours and lethargy was inevitable irrespective of a person's will power to efficiently accomplish such a sacrosanct process that normally came once in every five years. The performance by the IEBC and availing all the Forms 34B to the public and to the petitioners within 4 days of the declaration was commendable in view of the fact that the KIEMS system was being used by the 1st respondent for the first time. The delay by the IEBC of about four days to supply the petitioners with the Forms 34A could not be construed to be completely unwarranted under the circumstances.

67. If after the presidential election results had been declared, a person was desirous of accessing the prescribed declaration forms relating to the presidential election which the law did not expressly stipulate were to be availed to a party, such a party should seek access to such forms through the court.

68. The petitioner in most of the allegations made did not discharge the onus of proof on them. In that regard the burden did not shift to the respondent to counter the allegations since they bore reinforcement by cogent evidence. In the instances in which the petitioners did discharge the burden, the respondents sufficiently supplied cogent evidence in rebuttal. On the other hand where the respondents admitted the allegations such as those

of administrative errors credible evidence was supplied to prove that the errors did not materially affect the results and they were not in favour of any particular candidate.

69. The terms of the court's orders were met to the best extent possible. Although the parties differed on the interpretation of the orders, they were very clear and free from misconstruction. The orders were of access to information and read-only access which included copying if necessary. The court's orders were very clear, they were also very distinct from the prayers originally sought in the application. The court took the concerns of all the parties into consideration before making a determination on the application. Any inference into the intent or assumed order of the court could not therefore be left to flourish.

70. The basic principles applicable to construing documents, applied to the construction of a court's judgment or order. The court's intention was to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. As in the case of a document, the judgment or order and the court's reasons for giving it, must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order was clear and unambiguous, no extrinsic fact or evidence was admissible to contradict, vary, qualify, or supplement it.

71. The IEBC was an independent constitutional body with the powers to regulate vital procedures such as the deployment of technology in elections. Although the petitioners prayed for unfettered access into the servers, the court, in consideration of the security concerns and in line with principles of justice and equity did not grant that but granted only specific limited orders to information, which were met. The Supreme Court did not give orders for the petitioner to access the servers of the 1st respondent, what was given was access to particular read only information. The location of servers, the entry and penetration into the servers, were not part of the orders given. It would have been dangerous to expose the IEBC to any administrative incapacity in the future. The court had a responsibility to preserve the working systems of the IEBC for future elections.

72. The 1st and 2nd respondents were not in contempt of the Supreme Court's orders and there was no basis to nullify the presidential election on the basis of any information revealed or otherwise in the Report. The allegations of inconsistency in Forms 34A and 34B was verifiable using the existing paper-trail which was also in the possession of the petitioner having requested the court vide a letter dated August 23, 2017 and the entire set of primary records provided in scanned form on August 24, 2017. As such an order for nullification based on that exercise that was merely based on controvertible and speculative grounds, and was well below the standards set for nullifying an election, especially, where other remedies, such as inspection of ballots, existed.

73. The majority did not address themselves to any other evidence in arriving at their determination, had they systematically analysed the evidence, they would not have determined the election on a tangential issue whose determination could easily have been

settled through reference, by the court itself, to the evidence deposited by the 1st respondent 48 hours after filing the petition.

74. The Supreme Court consistently applied the test in section 83 with the result of the election in mind. The qualitative component (the result of an election) was an integral element of election causes. In a Presidential election petition, the petitioner challenges the election of the President-elect under article 140(1). The result of the election of the President by constitutional requirement could only be ascertained when the formula under article 138(4) of the Constitution has been met. Anyone challenging an election had to therefore challenge both the quantitative and qualitative aspects of the election.

75. The constitutional threshold in a presidential election was anchored on the numbers and the formula. The drafters of the Constitution were very clear that Kenyans ought to elect, as President, a person who was acceptable to more than half of the voters in Kenya and one supported by at least 25% of the votes cast in each of more than half the counties. It was only such a person who had garnered that percentage threshold in terms of popular support that was to be declared elected as President. That was one of the irreducible minimums for a transformative change in Kenya's electoral architecture. There was a purpose to that formula, the need for national cohesion, a unifying personality and a nationally popular individual. In a petition relating to such an election, an election court had to therefore ascertain that any question as to the quality of the election had affected the constitutional quantitative threshold.

76. The legal position was that election results would be upheld unless it had been proved in court that the irregularities or illegalities changed the result of an election or made it impossible to determine the will of the electorate. The upshot was that the alleged illegalities or irregularities ought to have had a nexus with the declared result.

77. The decisions of the Supreme Court triggered various processes in legal reform or the constitutional performance of institutional mandate. Therefore, a critical aspect of precedent was to preserve the certainty and predictability of the law. Although the doctrine of precedent did not stand in the way of progressive interpretation of the law, that power must be used in a sparing and cautious manner to guarantee continuity, certainty and adaptability. Those three aspects had to however be balanced with the requirement that justice be done. Judicial guidance was an integral part of directing people's relations. That critical aspect was wasted if it became impossible to direct actions appropriately when similar facts and circumstances were subjected to different standards of the law.

78. Section 3 of the Supreme Court Act and the body of jurisprudence from the Supreme Court was central on the preservation, protection and affirmation of the Constitution. The framers of the Constitution were fully aware that the Supreme Court was the only court that could reverse itself as it was not bound by its own decisions. However, considerations for reversal or departure had to be carefully weighed against various considerations. Departure from electoral jurisprudence was inviting of an even firmer and higher restraint from departure

of well-settled principles. The Judiciary was one of several critical institutions that acted as anchors to the Constitution. The others were the people, the Executive, the Legislature, independent commissions, State offices and officers. All those institutions interacted with the law and with each other in a manner that was clear, certain, stable and predictable. A different approach would threaten the fabric of institutional legal interaction. The law was a primary limb of the body politic.

79. A judge stood before a dilemma to follow precedent previously determined by his court, or deviate from it. The judge must use his discretion reasonably. The reasonableness test required the judge to consider on the one hand all considerations supporting the honoring and following of the precedent. On the other hand the judge must consider the full scope of considerations pointing toward deviation from precedent and choosing new law. The judge must assign each one of those systems of considerations its proper weight. Having done that, the judge must place both on the scale. The judge must choose the prevailing ruling, the judge must choose the ruling whose utility was greater than the damage caused by it. The guiding principle should be that: it was appropriate to deviate from a previous precedent if the new precedent's contribution to the bridging of the gap between law and society and to the protection of the Constitution and its values after setting off the damage caused by the change was greater than the contribution of the previous precedent to the realisation of those goals. Deviation from precedent, particularly precedent of the highest court was a serious matter, great sensitivity was needed to weigh all the considerations.

80. Although the Supreme Court was not bound by its decisions and could review or depart from them, such considerations only ought to be in the clearest of cases, and distinguishable in fact, circumstances and relevance. The majority had failed that critical test. The value of their deviation from precedent damaged more than it offered utility. It would cause damage to the legal system because it turned the entire electoral jurisprudence on its head.

81. Every arm of Government had the unique role of defending the Constitution, the Bill or Rights and the sovereignty of the people. The essence of a system of checks and balances was to ensure that when one constitutional branch threatened the entire schematic ordering of the Constitution and the State, the other was ready to check those actions. Having been part of the inaugural Supreme Court and having steadily and consistently settled the law on elections, the interpretation of section 83 of the Elections Act by the majority would unleash jurisprudential confusion never before witnessed. Unfortunately, Kenya was part of the common law system, encumbered by rules requiring lower courts to pay due deference to the courts above. Parliament must therefore untie the hands of courts below by clarifying the meaning of section 83. That was the only way that Kenya could avert a crisis of jurisprudence in such a sensitive area of law as elections.

82. The Supreme Court could not roll over the defined range of the electoral process like a colossus. The court must take care not to usurp the jurisdiction of the lower courts in electoral disputes. The annulment of a presidential election would not necessarily vitiate the

entire general election and the annulment of a presidential election needed not occasion a constitutional crisis, as the authority to declare a presidential election invalid was granted by the Constitution itself.

83. The petition contained numerous allegations of irregularity, illegality and electoral offences, enough, if proved to the required burden and standard, and if it affected the result to void the presidential election. The allegations were however not proved and where evidence was adduced, there was sufficient evidence to rebut the allegations.

84. The Supreme Court should never abdicate its duty as an election court exercising exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under article 140 of the Constitution. As an election court, the court must not narrow the scope of its remedies nor delegate its powers to the parties. The zeal of the voter to participate in elections and the overwhelming responsibility of every State organ and stakeholders to conduct free, fair and peaceful elections must be matched by equal zeal from the court.

85. The majority nullified the conduct of the presidential elections solely on the basis that some Forms 34A and 34B lacked security features which were elected by the IEBC and spread in different versions across most forms. The majority, in the aftermath of the Registrar's report did not even attempt to peruse the enormous evidence deposited by the 1st and 2nd respondents bearing certified copies of Forms 34A and 34B of the Constitution and against which they ought to have checked the alleged irregularities. By subjecting the integrity of the election to considerations of design, that were neither statutory nor regulatory, the majority had not only threatened the people's belief in the electoral system, it had overburdened and in fact, negated the electorate's right to franchise.

86. In election causes, the majority ought to have disengaged the mechanical gear of appellate jurisdiction and fully considered the evidence against the dictates of the burden and standard of proof. The absence of time was not a sufficient excuse. The court had a competent institution of research and was well facilitated to be able to perform the role of an election court as a final verifying agent in cases of monumental importance such as the instant petition.

87. Just as Parliament was expected to operate within its constitutional powers as an arm of Government so must the Judiciary. The system of checks and balances that prevented autocracy, restrained institutional excesses and prevented abuse of power, applied equally to the Executive, the Legislature and the Judiciary. No one arm of Government was infallible and all were equally vulnerable to the dangers of acting *ultra vires* the Constitution. Whereas, the Executive and the Legislature were regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected judicial arm of Government was largely self-regulatory. The parameters of encroachment on the powers of other arms of government had to be therefore clearly delineated, limits

acknowledged and restraint fully exercised. It was only through practice of such cautionary measures that the remotest possibility of judicial tyranny could be avoided.

88. Had the majority been engaged in the mode of a court of exclusive original jurisdiction, it would have found that each and every allegation in the petition was addressed to a satisfactory standard and where and if, the burden of proof shifted, the IEBC discharged it satisfactorily.

89. Petition would have been dismissed with costs.

Petition allowed.

Orders

a. *A declaration was issued that the presidential election held on August 8, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.*

b. *A declaration was issued that the irregularities and illegalities in the presidential election of August 8, 2017 were substantial and significant that they affected the integrity of the election, the results not-withstanding.*

c. *A declaration was issued that the 3rd respondent was not validly declared as the President elect and that the declaration was invalid, null and void.*

d. *An order was issued directing the IEBC to organize and conduct a fresh presidential election in strict conformity with the Constitution and the applicable election laws within 60 days of the determination of September 1, 2017 under article 140(3) of the Constitution.*

e. *Each party to bear its own costs.*

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13. *Union of India v Association for Democratic Reforms & another* Appeal (Civil) 7178 of 2001; [2002] AIR 2112 - (Explained)

14. *Vashist Narain Sharma v Dev Chandra & others* 1954 AIR 513; 1955 SCR 509 - (Explained)

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Mr Peter Wanyama for 2nd Respondent
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September 20, 2017, the Court delivered the following Judgment:

A. Introduction

1. Kenya is a sovereign Republic and a constitutional democracy founded on national values and principles of governance in article 10 of her *Constitution*. All sovereign power in the Republic is reserved to her people but delegated to

> " Parliament and legislative assemblies in the County Governments; the national executive and the executive structures in the County Governments; and the Judiciary and the independent tribunals.[1]"

In the election of her representatives, Kenya holds general elections on the second Tuesday of August in every fifth year.[2]

2. On August 8, 2017, Kenya held her second general election under the *Constitution, 2010* and Kenyans from all walks of life trooped to 40,883 polling stations across the country to exercise their rights to free, fair and regular elections under article 38(2) of the *Constitution*. That date is significant because it was the first time that a general election was being held pursuant to article 101(1) of the *Constitution* which decrees the holding of general elections every five years on the second Tuesday of August in the fifth year.

3. The general election was also held for the first time under an elaborate regime of electoral laws including amendments to the *Elections Act* made to introduce the Kenya Integrated Electoral Management System (KIEMS) which was a new devise intended to be used in the biometric voter registration, and, on the election day, for voter identification as well as the transmission of election results from polling stations simultaneously to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC). The membership of the 1st respondent, the Independent Electoral and Boundaries Commission (IEBC), had also been changed barely seven months to the general election.

1 *Constitution of Kenya, 2010*, article 1.

2 *Constitution of Kenya, 2010*, Articles 101 (1), 136(2)(a), 177(1)(a) and 180(1).

4. The number of registered votes in the country was 19, 646, 673 and on August 11, 2017, the 2nd respondent, exercising his mandate under article 138(10) of the *Constitution*, as the Returning Officer of the Presidential election, declared the 3rd respondent, Uhuru Muigai Kenyatta, the winner of the election with 8,203,290 votes and the 1st petitioner, Raila Amollo Odinga, the runner's up with 6,762,224 votes.

5. On August 18, 2017, Raila Amolo Odinga and Stephen Kalonzo Musyoka, who were the presidential and deputy presidential candidates respectively of the National Super Alliance (NASA) Coalition of parties, running on an Orange Democratic Movement (ODM) party ticket and Wiper Democratic Movement ticket respectively, filed this petition challenging the declared result of that Presidential election (the election).

6. The petitioners in the petition aver that the Independent Electoral and Boundaries Commission (IEBC), conducted the election so badly that it failed to comply with the governing principles established under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the *Constitution of Kenya* and the *Elections Act* (No 24 of 2011).

B. The Parties

7. The IEBC, the 1st respondent, is an independent Commission established under article 88 as read together with articles 248 and 249 of the *Constitution of Kenya* and the *IEBC Act* No 9 of 2011. It is constitutionally charged with the mandate and responsibility of conducting and/or supervising referenda and elections to any elective body or office established by the *Constitution*, as well as any other elections as prescribed by the *Elections Act*.

8. The 2nd respondent, the Chairperson of IEBC, who is also the Returning Officer for the Presidential election, is constitutionally mandated under article 138(10) of the *Constitution of Kenya* to declare the result of the presidential election and deliver a written notification of the result to the Chief Justice and the incumbent President.

9. The 3rd respondent is the President of the Republic of Kenya and was the presidential candidate of the Jubilee Party in the August 2017 presidential elections and was declared the winner of the said elections by the 1st respondent on August 11, 2017.

C. Interlocutory Applications

10. Prior to the hearing of the petition, a number of applications were filed by persons/entities seeking either to be enjoined as amici curiae or as interested parties. On August 27, 2017, the court rendered rulings in those applications with the consequence that:

    (i) The Attorney General and the Law Society of Kenya were enjoined as amici curiae while;

(ii) Dr Ekuru Aukot and Prof Michael Wainaina were enjoined as interested parties.

11. The applications by Mr Charles Kanjama, Advocate and the Information Communication Technology Association for joinder as amici curiae were disallowed as were those of Mr Benjamin Wafula Barasa and Isaac Aluoch Aluochier to be enjoined as interested parties.

12. Applications by the petitioners to strike out all the respondents' responses to the petition were also disallowed as were the respondents' applications to strike out some of the petitioners' affidavits and annextures in support of the petition.

13. The petitioners' application dated August 25, 2017 seeking orders of access to and scrutiny of forms 34A, 34B and 34C used in the presidential election, as well as access to certain information relating to the 1st respondent's electoral technology system, was allowed. The exercise of access was conducted under the direction of the Registrar of this court, two ICT experts appointed by this court with each of the principal parties being represented by initially two and later, five agents. The reports from that exercise will be addressed later in this Judgment.

D. Petitioners' and the 1st Interested Party's Case

14. This petition is anchored on the grounds that the conduct of the 2017 presidential election violated the principles of a free and fair election as well as the electoral process set out in the *Constitution*, electoral laws and regulations and that the respondents committed errors in the voting, counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result; illegally declared as rejected unprecedented and contradictory quantity of votes; failed in the entire process of relaying and transmitting election results as required by law; and generally committed other contraventions and violations of the electoral process.

i. Violation of the Principles Set out in the *Constitution*, Electoral Laws and Regulations

15. On violation of the principles set out in the *Constitution* as well as the electoral laws and regulations, the petitioners' case as contained in the affidavits in support of the petition and the written and oral submissions of their counsel was that in relation to elections, the citizenry's fundamental political rights under article 38 are encapsulated in the principles of free and fair elections in article 81(e) and IEBC's obligation to conduct elections in a simple, accurate, verifiable, secure, accountable and transparent manner as stated in article 86 of the *Constitution*. The petitioners also argue that IEBC, like all other state organs and persons, is bound by the principle of constitutional supremacy under article 2(1) of the *Constitution*. It follows then that, in the conduct of any election, any of its acts that violates those principles, shall by dint of article 2(4) of the *Constitution*, be *ipso facto* invalid and

any election conducted contrary to those principles shall be nothing but a usurpation of the people's sovereignty under article 4 and shall produce masqueraders who do not represent the people's will and are not accountable to them.

16. It was further submitted that instead of protecting and safeguarding the sovereign will of the people of Kenya, IEBC so badly conducted, administered and managed the presidential election, giving rise to this petition and that it flouted the governing principles set out in articles 1, 2, 4, 10, 35(2), 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the *Constitution*, the *Elections Act* and the *Regulations*. The petitioners thus contended that in the conduct of the August 8th Presidential Election, IEBC flagrantly flouted the principles of a free and fair election under article 81(e) of the *Constitution* as read together with the *Elections Act*, the *Election Regulations*, and section 25 of the *IEBC Act*.

17. Furthermore, according to the petitioners, IEBC's was under obligation to conduct elections in a simple, accurate, verifiable, secure, accountable and transparent manner as required by article 86 of the *Constitution*. The petitioners further aver that instead of complying with the above imperatives, contrary to article 88(5) of the *Constitution* which requires IEBC to

> "... exercise its powers and perform its functions in accordance with the *Constitution* and national legislation",

in the conduct and management of the election, IEBC became a law and Institution unto itself and instead of giving effect to the sovereign will of the Kenyan people, it delivered preconceived and predetermined computer generated leaders thereby subverting the will of the people. It thus did not administer election in an impartial, neutral, efficient, accurate and accountable manner.

18. They also argue that the IEBC committed massive systemic, and systematic irregularities which go to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Kenya and thus undermined the foundation of the Kenyan system as a Sovereign Republic where the people are sovereign and the very rubric and framework of Kenya as a nation state.

ii. Improper Influence, Corruption, Misconduct and Undue Influence

19. It was the petitioners' case that the election was marred and significantly compromised by intimidation and improper influence or corruption. They submitted in that regard that with impunity, the 3rd respondent contravened the rule of law and the principles of conduct of a free and fair election through the use of intimidation, coercion of public officers and improper influence of voters. Relying on the averments in the affidavit of Raila Odinga, the

petitioners argued that on August 2, 2017, the 3rd respondent directly threatened Chiefs in Makueni County for not supporting him.

20. The petitioners also accused the 3rd respondent of sponsoring or causing sponsorship during the election period of publications and advertisements in the print and electronic media as well as on billboards contrary to section 14 of the *Election Offences Act*, No 37 of 2016. Under the guise of launching official state projects and paying reparations to victims of 2007 post-election violence, it was further argued that the 3rd respondent, improperly influenced voters by issuing cheques to Internally Displaced Persons (IDPs) during campaign rallies.

21. The petitioners also imputed improper conduct on several Cabinet Secretaries for allegedly campaigning for the 3rd respondent. They argued that, Cabinet Secretaries being Public Officers, are prohibited by the *Constitution*, the *Political Parties Act* (No 11 of 2011), the *Public Officer Ethics Act* (No 4 of 2003) and the *Election Offences Act* from participating in political activities. They thus demanded that the Cabinet Secretaries who campaigned for the 3rd respondent should be prosecuted.

22. The petitioners in addition urged the court to declare section 23 of the *Leadership and Integrity Act*, cap 182 of the Laws of Kenya, as unconstitutional for exempting Cabinet Secretaries from the requirement of impartiality contrary to article 232 of the *Constitution*.

iii. Failure in the Process of Relaying and Transmitting Results

23. In his affidavit in support of the petition, Raila Odinga, deposed that following the history of electoral malpractices in this country, the law was amended to require the IEBC to obtain and operationalise the Kenya Integrated Electoral Management System (KIEMS) to be used in voter registration, voter identification and the transmission of results. The said system was thus intended to ensure that no malpractices in those activities are committed.

24. To avoid manipulation and to make the Presidential Election results secure, accurate, verifiable, accountable and transparent as required by article 86 of the *Constitution*, Raila Odinga further deposed that the *Elections Act* was amended to add section 39(1C) which provided for simultaneous electronic transmission of results from the polling stations to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC) immediately after the counting process at the polling station. Contrary to this mandatory provision, after polling stations were closed on August 8, 2017, IEBC inordinately delayed in the transmission of the results. As a matter of fact, on August 17, 2017, (9 days after the elections) the IEBC's CEO, Ezra Chiloba, allegedly admitted that IEBC had not received all Forms 34A and 34B. That delay, coupled with the fact that IEBC had ignored advice from the Communication Authority of Kenya (CAK) to host in Kenya its primary and disaster recovery sites but had gone ahead and contracted OP Morpho SAS of France to host it,

compromised the security of KIEMS exposing it to unlawful interference and manipulation of results by third parties rendering the 2017 Presidential Election a sham.

25. Raila Odinga further deposed that contrary to the provisions of section 44 of the *Elections Act* which required the technology to be used in the election to be procured and put in place at least 8 months and be tested and deployed at least 60 days before the election, IEBC tested it only 2 days to the elections. That together with the disbandment of the Elections Technology Advisory Committee (ETAC) and IEBC's unsuccessful attempt to declare section 39(1C) of the *Elections Act* unconstitutional through the case of *Collins Kipchumba Tallam v the AG*[3], is clear testimony that IEBC was not keen to electronically transmit election results.

26. Basing their submissions on those averments, counsel for the petitioners argued that the delay and/or failure to electronically transmit the results in the prescribed forms meant that IEBC's conduct of elections was not simple, accurate, verifiable, secure, accountable, and transparent contrary to article 81(e)(iv) and (v) of the *Constitution*. Moreover, counsel further argued, the data on Forms 34A, the primary election results documents, was inconsistent with the one on Forms 34B as well as the numbers IEBC kept beaming on TV screens hence unverifiable. As a matter of fact, counsel argued, 10,056 polling stations had results submitted without Forms 34A.

27. The petitioners further urged that contrary to the Court of Appeal decision in *Independent and Electoral Boundaries Commission v Maina Kiai & 5 others*[4] [Maina Kiai case] the IEBC failed to electronically collate, tally and transmit the results accurately, and declared results per county thus failing to recognize the finality of the results at the polling stations.

28. Relying on the averments in the affidavits of Ole Kina Koitamet, Godfrey Osotsi and Olga Karani, counsel for the petitioners also contended that at the time of declaration of the results, IEBC did not have results from 10,000 polling stations representing approximately 5 million voters and 187 Forms 34B hence the declaration was invalid and illegal.

29. The petitioners also submitted that given the unprecedented case of varying results in the IEBC's portal and Form 34B provided; inconsistencies between the results displayed and those in the Forms 34A and 34B, the electronic system of transmission was compromised by third parties who manipulated it and generated numbers for transmission to the NTC.

3 *Collins Kipchumba Tallam v the Attorney General*, Petition No 415 of 2016.

4 *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Civil Appeal No 105 of 2017

30. Counsel for the petitioners cited the cases of *William Kabogo Gitau v George Thuo & 2 others*[5] and *Benard Shinali Masaka v Boni Khalwale & 2 others*[6] and urged the court to look at the entire electoral processes rather than results alone as contended by their counterparts.

31. In the petitioners' view, all these violations of the law fundamentally compromised the credibility of the presidential election and this court has no choice but to annul it.

iv Substantive Non-compliance, Irregularities and Improprieties that Affected Results

32. It was the petitioners' case that the election was so badly conducted and marred with irregularities that it does not matter who won or was declared winner. The irregularities committed significantly affected the results to the extent that IEBC cannot accurately and verifiably determine what results any of the candidates got, so the petitioners contended.

v Errors in the Voting, Counting and Tabulation of Results

33. Relying on the affidavit of George Kegoro of 'Kura Yangu Sauti Yangu initiative', counsel for the petitioners submitted on the above issues that the results announced by the Returning Officers were not openly and accurately collated. They contended that the results tabulated in Forms 34A differed significantly from those captured in Forms 34B and also those displayed in the IEBC maintained public portal.

34. Counsel contended that in numerous instances, IEBC deliberately inflated votes cast in favour of the 3rdrespondent. As a consequence, they further argued, it is impossible to determine who actually won the presidential election and/or whether the threshold for winning the election under the *Constitution* was met.

35. On the averments in the affidavits of Mohamud Noor Bare and Ibrahim Mohamed Ibrahim, it was contended that IEBC illegally and fraudulently established un-gazetted polling stations in Mandera County which were manned by un-gazetted and undesignated returning and presiding officers.

36. Based on the averments in the affidavits of Dr Nyangasi Oduwo and Godfrey Osotsi, the petitioners contended that on the August 8, 2017, at around 5.07 pm, barely 10 minutes after closure of the polling stations, IEBC started streaming in purported results of the presidential vote through the IEBC web portal and the media with constant percentages of 54% and 44% being maintained in favour of the 3rdrespondent and the 1st petitioner respectively.

5 *William Kabogo Gitau v George Thuo & 2 others*; Civil Appeal No 126 of 2008; [2009] eKLR.

6 *Benard Shinali Masaka v Boni Khalwale & 2 others*, Election Petition 2 of 2008; [2011] eKLR.

37. The petitioners also argued that a whooping 14,078 Forms supplied by IEBC had fatal and irredeemable irregularities and that some Forms 34A and 34B lacked the names of Returning Officers; some lacked the IEBC authentication stamp; some were not signed by the candidates' agents and no reasons were given for that failure; different polling stations bore the name of the same person as the presiding officer; several Forms 34A were altered and tampered with; the number of Forms 34A handed over was not clear; several Forms 34As were signed by un-gazetted presiding officers; some forms were illegible; the handwriting and signatures on Forms 34A appeared made up; some Forms 34A were filled in the same handwriting; and some Forms 34A did not relate to any of the existing gazetted polling stations/tallying centres; and contrary to regulations 79(2)(a) and 87(1)(a), IEBC used different Forms 34A and 34B at some polling stations and constituency tallying centres.

38. On the further averments of Dr Nyangasi Oduwo, the petitioners also contended that upon examining about 5000 Forms 34A, serious discrepancies were noted between the figures on Forms 34A given to the petitioners' agents at various polling stations and those posted on IEBC's website and a number of Forms 34B uploaded on to the IEBC's website were incomplete. Dr Nyangasi also deposed that from the records he examined, while 15,558,038 people voted for the presidential candidate, 15,098,646 voted for gubernatorial candidates and 15,008,818 voted for MPs raising questions as to the validity of the extra votes in the presidential election.

39. The petitioners submitted that at the time of declaration of results, IEBC publicly admitted that it had not received results from 11,883 polling stations and 17 constituency tallying centres. In its letter of August 15, 2017, IEBC also admitted that it had not received authentic Forms 34A from 5,015 polling stations representing 3.5 million votes. Lastly, the petitioners claimed they had knowledge that more than 10, 000 Forms 34A were not available at the time of declaration of the results and that they were being scanned at Bomas and Anniversary Towers even during the pendency of this petition.

vi. Unprecedented and Contradictory Quantity of Rejected Votes

40. The petitioners took issue with the large number of rejected votes accounting for at least 2.6% of the total votes cast arguing that that has an effect on the final results and the outcome of the presidential election. In this regard, the petitioners urged the court to reconsider its finding on rejected votes in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*[7] and hold that rejected votes should be taken into account in the computation to determine the threshold under article 138(4) of the *Constitution*.

7 *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, Petition No 5 of 2013; [2013] eKLR.

41. The First interested party, Dr Ekuru Aukot, buttressed the petitioners' case. He submitted that the massive non-compliance with the law by IEBC's officials constitute grounds for nullifying the presidential election. He produced a report compiled by his party's Chairman, Mr Miruru Waweru on the irregularities committed by IEBC. Some of the alleged irregularities contained in the report included different Forms 34B originating from the same constituency like Bahati in Nakuru County and Kuresoi South; Forms 34A issued but not used; and several of them having differing serial numbers.

42. Dr Aukot also raised issue with the declaration of the presidential results without all Forms 34A, which he stated was non-compliant with section 39 of *Elections Act* as directed in the *Maina Kiai* decision. He echoed the petitioners' case that the whole process of counting, tallying and transmission of results from polling stations to the CTC and finally to the NTC lacked fairness and transparency.

43. In addition, the petitioners faulted the late publication of the public notice on polling stations lacking network coverage for being unlawful, arbitrary and non-verifiable and contrary to the requirement of 45 days publication before the general elections which was in breach of regulation 21, 22 and 23 of the *Elections (Technology) Regulations 2017*. They urged that the 1st respondent's averments were misleading and contradicted the publicly available *Communications Authority of Kenya Access Gap Study Report 2016* which shows that only 164 sub-locations are not network covered and that 94% of the population is covered by at least 2G network services.

vii. Interpretation and Application of section 83 of the *Elections Act*

44. On the law, the petitioners argued that by the use of the term 'or" in section 83 of the *Elections Act* unlike the term "and" in the English equivalent *Act*, the two limbs of that provision are disjunctive and not conjunctive. They therefore urged the court to depart from its interpretation of section 83 of the *Elections Act* in the 2013 *Raila Odinga* case. They argued that despite the conjunctive nature of the English section, the same was given a disjunctive interpretation in the famous case of *Morgan v Simpson*.[8]

45. The first interested party supported the petitioners' case on the interpretation of section 83 of the *Elections Act* and urged that the provision should not be used to sanctify all manner of illegalities and irregularities which may occur during the electoral process so as to render them immaterial.

46. On the standard of proof to be applied, the petitioners submitted that this court erred in the 2013 *Raila Odinga* case in holding that save where criminal allegations are made in a

8 Morgan v Simpson [1974] 3 All ER 722

petition, the standard of proof in election cases is the intermediate one, above a balance of probabilities but below the one for criminal cases of beyond reasonable doubt.

47. Appreciating that the court had reviewed several positions held by various jurisdictions in setting the standard of proof in the 2013 *Raila Odinga* case, the petitioners submitted that the emerging jurisprudence set out by the House of Lords in England is that in law, there exists only two standards of proof, the criminal standard of beyond reasonable doubt and the civil standard of balance of probabilities. They cited the case of *Re B (Children)*[9] in support of that proposition.

48. It was further urged that besides Canada, the position held by the House of Lords has recently been emulated by the Constitutional Court of Seychelles in *Wavel John Charles Ramkalawan v The Electoral Commission*.[10]

49. Citing the decision of the Canadian Supreme Court in the case of *FH v McDougall*[11], the petitioners contended that the elevation of the civil standard of proof in respect of matters which are not criminal in nature on the basis that they are deemed as serious matters' is improper. In the circumstances, they urged the court to find that the applicable standard of proof in the presidential election petition is on a balance of probabilities.

50. The petitioners concluded by submitting that their petition is merited and should be allowed in the following terms:

    a. Immediately upon the filing of the petition, the 1st respondent do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours.

    b. Immediately upon the filing of the petition, the 1st respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st respondent in respect of the Presidential Election within 48 hours.

    c. A specific order for scrutiny of the rejected and spoilt votes.

    d. A declaration that the rejected and spoilt votes count toward the total votes cast and in the computation of the final tally of the Presidential Election.

    e. An Order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C.

9 *Re B (Children)* 2008 UKHL 35

10 *Wavel John Charles Ramkalawan v The Electoral Commission* (2016) SCCC 11.

11 *FH v McDougall* (2008) 3 SCR 41

f. An Order for scrutiny and audit of the system and technology used by the 1st respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/portal.

g. A declaration that the non-compliance, irregularities and improprieties in the Presidential Election were substantial and significant that they affected the result thereof.

h. A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off from the final tally and computation of the Presidential Election.

i. A declaration that the Presidential election held on August 8, 2017 was not conducted in accordance with the *Constitution* and the applicable law rendering the declared result invalid, null and void.

j. A declaration that the 3rdrespondent was not validly declared as the President elect and that the declaration is invalid, null and void.

k. An order directing the 1st respondent to organize and conduct a fresh Presidential Election in strict conformity with the *Constitution* and the *Elections Act*.

l. A declaration that each and all of the respondents jointly and severally committed election irregularities.

m. Costs of the petition.

n. Any other orders that the honourable court may deem just and fit to grant.

E. Respondents And 2nd Interested Party's Case

51. On August 24, 2017, the 1st and 2nd respondents filed a joint response, while the 3rdrespondent filed a separate response to the petition. They all opposed the petition and urged the court to find that IEBC conducted a free, fair and credible election in which the 1st petitioner garnered 6,762,224 votes, being 44.74% of the votes case, while the 3rdrespondent garnered 8,203,290 votes being 54.27% of the votes cast. In addition, the 1st petitioner and the 3rdrespondent also garnered at least 25% of the total votes cast in 29 and 35 counties, respectively. These are the results that the 2nd respondent declared on August 8, 2017, as deponed in his supporting affidavit.

i. Violation of the Principles Set Out in the *Constitution*, Electoral Laws and Regulations

52. It is the respondents' case that the presidential election was conducted in accordance with the *Constitution*, the *IEBC Act*, the *Elections Act*, the regulations thereunder, and all other relevant provisions of the law. Further, that the presidential election process was backed by an elaborate electoral management system supported by various electoral laws, which included several layers of safeguards to ensure an open, transparent, participatory and accountable system so as to guarantee free and fair elections pursuant to articles 81 and 86 of the *Constitution*.

53. In addition, the 1st respondent submitted that it had put in place a strategic plan (2015-2020) setting out key priorities for strengthening electoral systems and processes in Kenya. It also had a two year election operation plan, 2015-2017 as a roadmap towards free, fair and credible 2017 election. In execution of this plan, Mr Muite, learned counsel for IEBC, submitted that the presidential election was conducted in accordance with the *Constitution* and the people's sovereign will in article 1 thereof was duly realized. Learned counsel urged that even observers during the period found no fault in the conduct of the election and it would be a wrong interpretation of article 1 of the *Constitution* if this court nullified the election.

54. Citing the advisory opinion *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*[12], the 1st and 2nd respondents submitted that the election of a president is a process, involving a plurality of stages, beginning from party primaries elections to the final election leading to the identification of a president elect. These processes were adhered to, according to them.

55. On his part, the 3rdrespondent agreed with the 1st and 2nd respondents ' contention that the petitioners had not demonstrated, orally or by documentary evidence, how the conduct of the election failed to comply with the governing law. In that context, he cited the case of *Bush v Gore*[13] and urged that the court in determining the petition before it, should keep in mind the role of the court in presidential election petitions. The Supreme Court of the United States of America in that case had held:

> ... None are more conscious of the vital limits on judicial authority than are the members of this court, and none stand more in admiration of the *Constitution*'s

12 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Reference No 2 of 2012; [2012] eKLR

13 *Bush v Gore* 531 US 98 (2000)

> design to leave the selection of the President to the people, through their legislatures, and to the political sphere...

56. Consequently, all the respondents dismissed the petitioners' contention that IEBC abdicated its role and duty and averred that IEBC discharged its mandate in accordance with the *Constitution* and applicable body of electoral laws and the sovereign power of the people was exercised through the presidential election held on August 8, 2017. It was their case therefore that the results were accurately tallied, collated and declared in accordance with article 138(10) of the *Constitution*.

ii. Failure in the process of relay and transmission of results

57. The respondents submitted that, contrary to the allegations of the petitioners, the process of relay and transmission of results from the polling stations to the CTC and to the NTC, and from the CTC to the NTC was simple, accurate, verifiable, secure, accountable, transparent, open and prompt as required by article 81 (e) (iv) and (v) of the *Constitution*. They also urged that the transmission of results was in strict accord with section 39(1C) of the *Elections Act* and in conformity with the *Maina Kiai* case.

58. It was also submitted that the completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage. Hence, in respect of areas lacking 3G or 4G network coverage, there were established alternative mechanisms to ensure completion in transmission of the image of the Form 34A.

59. The 1st respondent relied on the affidavit of James Muhati who averred that following a mapping exercise carried out by the Commission and analysis by Mobile Network Operators (MNOs) it was ascertained that about 11,155 polling stations within the country were not effectively covered by either 3G or 4G network and this communication was sent out to the public vide a notice dated August 6, 2017. He stated that it thus became necessary to instruct presiding officers to ensure that they move to points where there was network coverage or in the alternative to constituency tallying centres in order to transmit results. He further stated that the Commission was nevertheless able to avail all Forms 34A in the public portal by the date of declaration of results.

60. On the basis of the averments in the affidavit of Winnie Guchu, therefore, it was contended for the 3rdrespondent that there was no legal obligation that the data entered into the KIEMS kits must be sent simultaneously with images of the Forms 34A. Consequently, no legal sanction ought to attach where there is a failure to simultaneously transmit the result data and the scanned image of the Form 34A. Accordingly, the 3rdrespondent dismissed the petitioners' contention that there was a legitimate expectation that the data and the Forms would be transmitted concurrently. In this regard, Ms Guchu deponed that under section

44A of the *Elections Act*, IEBC has a statutory discretion to use a complementary mechanism where technology either fails to work or is unable to meet the constitutional threshold of what a free and fair election should constitute.

61. Mr Nyamondi, counsel for the 1st respondent outlined to the court the mode of the transmission process of the results and submitted that after the manual filling in of the Form 34A, the Presiding Officers then keyed in the results into the KIEMS kit, took the image of the Form 34A and then simultaneously transmitted the same to the constituency and national tallying centres. In his view however, the figures in the KIEMS kit had no legal status, and they did not go into the determination of the outcome of the result which could only be authenticated by Forms 34A and 34C.

62. The respondents denied the petitioners' allegation that the results entered into the KIEMS kits varied from the results on Forms 34A in respect of more than 10,000 polling stations and further urged that the statistics' entered into the KIEMS kits was not the result and is therefore not comparable with the results recorded in Forms 34A. And that if there were any discrepancies in the statistics entered in the KIEMS kits, the same would be as a result of inadvertent human errors during the transfer of figures from Forms 34A to the KIEMS kits; and if there were, they did not materially affect the outcome of the presidential elections.

63. Upon transmission, it was submitted by the 1st and 2nd respondents that in accordance with section 39(1C) of the *Elections Act*, IEBC published the images of Forms 34A and 34B on its public portal. They contended in that regard that the petitioners confused the public portal where the Forms 34A and 34B were published with the statistics' that were displayed by the media and instead they should have understood that all polling stations transmitted the statistics of the results through KIEMS kits accompanied by the electronic image of Forms 34A, and that at the time of declaration of the results, the 1st and 2nd respondents had in their possession all the requisite forMs Mr Nyamodi said that what he called statistics were variously called data in the respondents' submissions.

64. The 1st and 2nd respondents further relied on the affidavits of Wafula Chebukati and Immaculate Kassait to make the point that the declaration of results was based on the results contained in Forms 34B from each of the 290 constituencies and the diaspora as Form 34B is an aggregation of Forms 34A in each constituency. That therefore the results declared by IEBC were not affected by any variances or errors that may have occurred at the point of data entry into KIEMS kits.

65. It was also the respondents' case that the role of the constituency returning officer as set out in regulation 83 (1) of the *Elections (General) Regulations* is limited to tallying and verifying the count of the votes as contained in Forms 34A from the polling stations and collating them in Form 34B. Thereafter he declares the results and delivers to IEBC such results at the

NTC. On the other hand, the 2nd respondent's role is to tally and collate the results received at the NTC in Form 34C pursuant to Regulation 83 (2). In that context, in his supporting affidavit, the 2nd respondent deposed that between 8th and August 11, 2017, he was present at the NTC where he tallied and validated the Forms 34B that were being electronically transmitted by the constituency returning officers and upon receipt of these Forms 34B, he proceeded to execute his mandate as by law provided.

66. Mr Ezra Chiloba on his part deposed that IEBC unsuccessfully defended the case of *Kenneth Otieno v Attorney-General & another*[14], which declared section 44(8) of the *Elections Act* unconstitutional for establishing a technical committee to oversee the adoption of technology and implement use of that technology in the conduct of elections. The court held that, the composition of the committee and the functions given to it threatened the structural independence of IEBC and hence was in conflict with article 88 and 249(2) of the *Constitution*. The 1st respondent further asserts that it is unfair and malicious to accuse IEBC of filing *Collins Kipchumba Tallam v the Attorney-General*[15], to which it was not a party.

67. In his affidavit, Mr James Muhati refuted the petitioners' claim that IEBC did not verify the KIEMS system and instead deposed that the Commission undertook the verification exercise between May 10th and June 10th 2017. It was his further testimony therefore that IEBC fully and successfully deployed the use of ICT in the following manner: First, the Commission developed and implemented a policy to regulate the progressive use of technology in the process as required by section 44(2) of the *Elections Act*. Secondly, prior to deployment of KIEMS, the Commission undertook a series of tests including a public test carried out on June 9, 2017, (60 days before the elections) and a simulation done on August 2, 2017. Lastly, as part of preparations for the deployment and use of ICT in the elections, the Commission developed a robust training manual and schedule aimed at building capacity and competence of all its staff members which included training of candidates' agents on the KIEMS systeMs

68. Replying to the petitioners' allegations, which she termed mischievous that the results started streaming in at 5.07 pm, very soon after the closure of polling stations, Immaculate Kassait deposed that in polling stations such as Boyani Primary School, Tsimba Golini Ward, Matuga Constituency, Arabrow, Benanre Ward, Wajir South Constituency, Ya Algana Dukana Ward, North Horr Constituency and Lowangina Primary School, Muthara Ward, Tigania East Constituency among others, with between 1-10 registered voters, it was possible to count and tally votes within a short period of time after closure of polling.

69. Equally the 3rdrespondent, through the affidavit of Davis Chirchir, submitted that the posting of results as above was not irregular and gave the example of polling stations within

14 *Kenneth Otieno v Attorney-General & another*, Petition 127 of 2017; [2017] eKLR

15 *Collins Kipchumba Tallam v the Attorney-General*, Petition 415 of 2016;

Narok Main Prison where results were transmitted between the hours of 5.08pm, 5.09pm, 5.12pm and 5.14pm. Counsel for the 3rdRespondent, Mr Ngatia contended in that regard that rather than be castigated, IEBC should be commended for such promptness and efficiency of transmission of results.

iii. Intimidation and Improper Influence or Corruption

70. With regard to the allegation that the Commission failed to take steps against the 3rdrespondent for alleged breach of the provisions of section 14 of the *Election Offences Act*, Mr Chiloba deposed that on June 21, 2017, he wrote a letter to the Director of Public Prosecutions (DPP) informing him of the alleged breaches for his action. The DPP in turn directed the Director of Criminal investigations to take action and therefore IEBC cannot be accused of not having taken appropriate action when the complaint was made to it.

71. The 3rdrespondent also sought to disabuse the petitioners' allegations of intimidation of voters and in that regard Mr Ngatia submitted that the 3rdrespondent, on receiving intelligence information reports from among others, Dr Karanja Kibicho, Principal Secretary, simply warned Chiefs against campaigning for any politician as they were public servants of whom impartiality was expected. Counsel thus argued that a warning to people not to engage in politics is not an act of intimidation as alleged. Mr Ngatia also wondered how the voters could have been intimidated when the petitioner garnered over 130,000 votes against the 3rdrespondent's 27, 000 votes in Makueni County and in any case, there is no evidence of action having been taken against any of those Chiefs for taking sides in politics

72. As regards the payments made to IDPs in Kisii County, Mr Ngatia, referring to the affidavit of Dr Kibicho submitted that the settlement of IDPs is a continuous process being undertaken by a body known as the National Consultative Coordination Committee on IDPs (NCCC) established under the *Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012* and the funds alluded to were approved for disbursement by Parliament and not the 3rdrespondent. Counsel further argued that there is no evidence that any of the beneficiaries were influenced by that payment to vote for the 3rdrespondent.

73. In her affidavit, Winnie Guchu also refuted the claim that the 3rdrespondent advertised Government projects. She instead stated that there is no provision in the *Constitution* that requires ongoing government programs to be suspended during the election period. And that because article 35 of the *Constitution* guarantees the right to information, what is called advertisement is actually information made available to members of the public through the various available channels. In any case, that there are two pending cases in the High Court

namely; *Apollo Mboya v Attorney General & 3 others*[16] and *Jack Munialo & 12 others v Attorney General and Independent Electoral and Boundaries Commission*,[17] challenging the constitutionality of section 14 of the *Election Offences Act* and that therefore therein is the right forum for the petitioners to raise their complaints.

iv Substantial Non-compliance, Irregularities and Improprieties that Affected the Results

74. The respondents submitted that the alleged inaccuracies and inconsistencies in Forms 34A and 34B were minor, inadvertent and in their totality did not materially affect the declared results. They thus urged the court to find that the petitioners have not substantiated the claim that the said irregularities affected at least 7 million votes.

75. The respondents' case in this regard was supported by the 2nd interested party, Prof Wainaina who, through his counsel, Mr Kinyanjui, submitted that the alleged irregularities were not proved and did not affect the results in any event.

v. Voting, Counting and Tabulation of Results

76. It was urged by the respondents on the above issue that the results from the polling stations and the constituency tallying centres were counted, tabulated and accurately collated in compliance with article 86 (b) and (c) of the *Constitution* as read together with the *Elections Act*. The respondents argued therefore that there were no inconsistencies in the votes cast as captured in Form 34A and Form 34B and averred that the results in Forms 34B included all polling stations within constituencies.

77. The 3rdrespondent, through the affidavit of Winnie Guchu also contended that upon the conclusion of voting, the counting exercise commenced in the presence of all agents present, observers, police officers and all other authorized persons. She further stated that according to the Elections Observation Group (ELOG), a local observer group, which deployed one of the largest observer delegates, the petitioners had very good representation of agents, and even where agents failed to sign the prescribed Forms, that does not on itself invalidate the results as provided for under regulations 62(3) and 79(6) of the *Elections (General) Regulations, 2012*.

vi. Unprecedented and contradictory quantity of rejected votes

78. According to the 1st and 2nd respondents , the rejected votes did not account for 2.6% of the total votes cast as contended by the petitioners. They submitted instead that the total number of rejected ballots was 81,685 as declared in Form34C, a percentage of 0.54% of

16 *Apollo Mboya v Attorney General & 3 others*, Petition 162 of 2017.

17 *Jack Munialo & 12 others v Attorney General and Independent Electoral and Boundaries Commission*, Petition 182 of 2017.

the votes cast. They thus urged that the rejected ballots were properly excluded from valid votes in accordance with the law and this court's decision in the 2013 Raila Odinga case. They therefore reiterated that the figures on the public portal and media were not results but statistics hence cannot be taken as proof of rejected votes. Mr Chiloba further deposed that any variance between the actual number of rejected votes on Form 34C and the public portal were as a result of human error and did not affect significantly the outcome of the election.

79. In response to the petitioners' contention that the Supreme Court ought to re-visit its decision in the 2013 *Raila Odinga* case on rejected votes, the 1st and 2nd respondents submitted that in arriving at that decision, the court considered the relevant provisions of the *Constitution*, the *Elections Act* and *Regulations*, hence that decision was a correct interpretation of the law. All respondents thus urged the court not to depart from it.

80. In her affidavit, Winnie Guchu further stated that in a few polling stations, presiding officers inserted the number of registered voters in the column reserved for rejected votes but the correct numbers of votes each candidate garnered were not affected. However, she also contended that since the final results were declared on the basis of the 290 Forms 34B which had been compiled from the physical Forms 34A, any error of transmission did not occur and/or affect the results.

vii. Interpretation and Application of section 83 of the *Elections Act*

81. The 1st and 2nd respondents submitted that preponderance of legal authorities shows that, the non-compliance with the law alone, without evidence that the electoral process or the results had been materially or fundamentally affected is not a basis for invalidating an electoral outcome. Some of the cases cited were the 2013 *Raila Odinga* case, *Hassan Ali Joho v Nyange & another*[18], and *John Kiarie Waweru v Beth Wambui Mugo & 2 others*[19]. Comparatively, they cited the Botswana case of *Pilane v Molomo & another*[20], and the Nigerian cases of *Buhari v Obasanjo*[21] and *Olusola Adeyeye v Simeon Oduoye & others*[22].

82. It was further urged by the respondents that this court should not render section 83 of the *Act* unconstitutional since such an interpretation as advanced by the petitioners would derogate from the well laid down and solid foundation of law and jurisprudence of this court

18 *Hassan Ali Joho v Nyange & another* [2008] 3 KLR (EP) 500

19 *John Kiarie Waweru v Beth Wambui Mugo & 2 others,* Petition 13 of 2008; [2008] eKLR

20 *Pilane v Molomo & another* (1990) BLR 214 (HC)

21 *Buhari v Obasanjo* (2003) 17 NWLR (PT 850) 587; (2003) 11 SC 74

22 *Olusola Adeyeye v Simeon Oduoye & other* (2010) LPELR_CA/I/EPT/NA/67/08

in the 2013 *Raila Odinga* case. Through counsel Mr Wekesa, it was submitted for the 1st respondent that the 2013 *Raila Odinga* case is good law as was subsequently adopted and applied by this court in the *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others,*[23] and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others.*[24]

83. The 3rdrespondent in addition to the above urged that a party seeking the nullification of a presidential election, bears the burden of proving that not only was there non-compliance with the election law but that the non-compliance also affected the results of the election. He thus submitted that the only way the petitioners can impugn the results reflected in Forms 34A and 34B is through demonstrating either that legal votes were rejected or that illegal votes were allowed and that this had an effect on the election. In support of his proposition, the 2013 *Raila Odinga* case and other comparative cases from the Supreme Court of Uganda, in the case of *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others*,[25] the Canadian case of *Opitz v Wrzesnewskj*[26] and the Nigerian case of *Abubakar v Yar'adua*.[27]

84. Through Mr, Ahmednassir SC, it was submitted for the 3rdrespondent that the 2013 *Raila Odinga* case is a bedrock of precedent and should not be departed from. He also urged that the Supreme Court was created to develop jurisprudence that was coherent and sound and that the 2013 *Raila Odinga* case has settled the law as regards elections in Kenya on various aspects such as of burden and standard of proof and interpretation of section 83 aforesaid. Further, that before the establishment of the Supreme Court, the electoral legal regime in the country was in disarray and therefore this court should strictly adhere to the doctrine of stare decisis for consistency of its jurisprudence.

85. It was also the 3rdrespondent's submission that as a consequence of the many court cases filed by NASA (some of which are set out in the affidavit of Davis Chirchir) the courts made pronouncements on various specific aspects of elections, thereby checking the manner in which IEBC was to conduct the 2017 election.

86. Mr Kinyanjui, for the 2nd interested party, supported the respondents' position and urged that no sufficient evidence had been tendered to oust the prevailing interpretation of section 83 of the *Elections Act*. Counsel also argued that any non-compliance with the law ought not

23 *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others*, Supreme Court Petition 4 of 2014; [2014] eKLR

24 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition 2B of 2014; [2014] eKLR.

25 *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others*, Petition 1 of 2016; [2016] UGSC 3

26 *Opitz v Wrzesnewskj* (2012) SCC 55-2012-10-256

27 *Abubakar v Yar'adua* (2009) All FWLR (Petition 457) 1SC

to invalidate the election if the court is satisfied that the election was substantially conducted in accordance with the principles laid down in the *Constitution*.

viii. Alleged Specific Irregularities

87. IEBC refuted the petitioners' claim that it established secret and un-gazetted polling stations. It contended in that regard that pursuant to regulation 7 (1)(c) of the *Election (General) Regulations 2012*, it published in Gazette Notice Number 6396 of June 26, 2017 specifying the polling stations established in each constituency. The claim that results from any un-gazetted polling station were included in the final tally are therefore baseless, it submitted.

88. IEBC also stated that all Forms 34B were executed by duly gazetted and accredited constituency returning officers in accordance with the applicable Regulations. It contended in that context that it complied with the requirements of regulation 5 of the *Election (General) Regulations, 2012* and provided a list of persons proposed for appointment as presiding officers to political parties through the office of the Registrar of Political Parties. It is therefore not correct that a significant number of returns were signed by strangers, so it submitted.

89. It is furthermore the respondents' case that all Forms 34A and 34B were signed and/or stamped as required under the law. They thus denied that a number of Forms 34B did not indicate the names of the returning officers and a number did not bear IEBC's stamp or authentication stamp as alleged by the petitioners. They also denied the allegation that a substantial number of Forms 34A and Forms 34B do not bear the signatures of the candidates' agents or the reason for their refusal to sign the forms as is the law. In any event, it was further urged, the refusal by the agents to sign the said forms did not invalidate the results announced. In that regard, they cited the Ghanaian Supreme Court Case of *Nana Addo Dankwa Akufo- Addo & 3 others v John Dramani Mahama & 2 others*[28].

90. IEBC also dismissed as unfounded the allegation that in some instances one person was the presiding officer in a considerable number of polling stations. It submitted in that regard that it appointed presiding officers in respect of each of the polling stations in the country as by law prescribed.

91. As regards lack of handing over notes in the forms, the respondents contended that there is no obligation under Regulation 87 *Election (General) Regulations, 2012* for the constituency returning officers to indicate the number of Forms 34A handed over to them and that based on the *Maina Kiai* decision, the returning officers were exempted from physically availing the statutory forms at the NTC. Further, it was urged that the integrity of Forms 34A and Forms 34B was not compromised and the results contained therein are valid.

28 *Nana Addo Dankwa Akufo- Addo & 3 others v John Dramani Mahama & 2 others*, Writ No J 1/6/2013

IEBC also denied that it manufactured any results or that 14,078 Forms 34A have fatal and irredeemable irregularities. It asserted instead that the results of the presidential election were declared on the basis of the aggregate of Forms 34B which reflected the will of the people.

92. As regards the contention by the petitioners on lack of security features on the statutory forms, it was IEBC's submission that all Forms 34A and 34B issued to presiding and returning officers had serial numbers, barcodes and the IEBC watermarks. In addition that Forms 34A were carbonated to ensure that only one Form was filled by the presiding officer to generate 6 copies. These security features were meant to help authenticate the results at the polling centres before transmission.

93. In her affidavit, Ms Immaculate Kassait added that IEBC developed standards for its electoral materials prior to their procurement. The standards included specific security features for each ballot paper and statutory form in order to prevent duplication, misuse, piracy, fraud, counterfeiting and to improve controls. She explained that all the ballot papers and statutory forms used in the August 8, 2017 election contained certain and specific security features. These features included: guilloche patterns against which all background colours on the declaration forms had been printed, anti-copy patterns, watermarks, micro text, tapered serialization, invisible UV printing, polling station data personalization, self- carbonating element and barcodes. In addition, each ballot paper included different colour coding of the background.

94. Mr Muite SC submitting on behalf of IEBC, urged that in any case, though there was no legal requirement for the Forms to have security features and IEBC only introduced them suo motu out of abundant caution. That therefore no breach of any law was committed where the same features were found missing. Counsel further questioned why agents of both petitioners and 3rd respondent proceeded to sign on the Forms if the security features were a legal prerequisite yet in some instances they were missing. He argued in that context that one cannot execute a document and turn back and say it did not have security features.

95. On the allegation that legitimate petitioners' agents were thrown out of some polling stations, it was the respondents' case that none of these claims are substantiated and no particulars whatsoever were provided as required by law. It was submitted specifically that the allegations made by one Mr Wamuru, in his affidavit in support of the petition which were, at any rate not reported to the police, were of a general nature, false and mischievous. That the petitioners in any event neither identified the agents who were allegedly ejected nor the presiding officer(s) who allegedly ejected them. To the contrary, Immaculate Kassait and Marykaren Kigen deposed in their affidavits that the petitioners' agents duly executed Forms 34A in the identified polling stations signifying the fact that there were no anomalies detected.

96. Regarding the petitioners' alleged constant 11% difference between the 1st petitioner and the 3rdrespondent's election results, Immaculate Kassait deposed that the percentage ranged between a low of 9.095 to a high of 25.573. Hence there was no pre-conceived percentage that was constant.

97. On his part, the 3rdrespondent, through counsel Mr Ngatia, submitted that there was no pre-convinced formula used in the computation of the results, but that the results were streaming in, in a manner peculiar to the respective polling stations. He urged therefore that if at all there was any problem in the transmission, the fall back was available and includes a physical examination of all Forms 34A.

98. In summation, the 1st and 2nd respondents contended that if indeed there were any irregularities as alleged, the same were administrative, human, clerical, transcription, transposition, computation, data input, mathematical and erroneous recording errors which would not in any way affect the results. In this regard, they relied on the affidavits sworn by Rebeccah Abwaku, Samson Ojiem, Manco Mark Gikaro, David Kipkemoi, Julius Meja Okeyo, Moses Nyongesa Simiyu and Gilbert Kipchirchir. These were presiding and returning officers who deponed to having committed these minor administrative irregularities due to fatigue and inadvertence. They urged that the said irregularities were not pre-meditated and should be excused.

99. In reply to the depositions made by Ms Olga Karani in her affidavit, Winnie Guchu deposed that they are of such a generalized nature that it is impossible to respond to them with any specificity. She stated for example that the IEBC Commissioners alleged to have committed improprieties and illegalities are not identified and neither are the presiding officers named said to have done the same nor their polling stations identified. Furthermore, she stated that Ms Karani did not state what occurrences and events happened in Migori, Homabay and Kisumu County that would have affected the integrity of the impugned election. Moreover, she did not state the names of persons missing from the voters register. Further, she disputed Ms Karani's testimony that as at August 10, 2017, very few Forms 34A were available. On the contrary, the deponent stated that as at midnight on August 9, 2017, the information availed to political parties through the IEBC Application Program Interface showed that 39,426 Forms 34A results had been received.

100. In a nutshell, the respondents submitted that the petition is devoid of merit and should be dismissed with costs.

F. Amici Submissions

i. Attorney-General

101. The Attorney General was enjoined in this petition as the 1st *amicus curiae*. In his amicus brief he delineated the following questions for submission:

> "i. What is the proper constitutional and legal standard applicable to the conduct of presidential elections in Kenya as envisaged under both articles 81 and 86 of the *Constitution*.
>
> ii. What were the changes to the elections infrastructure post 2013 and their effect on the conduct of presidential elections: to wit, the Elections Laws (Amendment) Act No 36 of 2016 and Elections Laws (Amendment) Law No 1 of 2017.
>
> iii. How should the court treat rejected/spoilt votes in respect to votes cast in terms of article 138(4) of the *Constitution*.
>
> iv What is the proper constitutional and legal threshold for invalidating a presidential election under article 140 of the *Constitution*.
>
> (iv) What remedies can the court grant in determining a presidential election petition under article 140 of the *Constitution*."

102. On the first issue, the Attorney-General submitted that the determination of the Presidential election dispute should be made within the context of articles 81 and 86 of the *Constitution* which sets out both the qualitative and quantitative principles applicable to their conduct, where the qualitative context under articles 81(e) is as good as the process leading to those results, while quantitatively, the court is called upon to deal with numbers and figures regarding the threshold for declaration of Presidential results envisaged under article 138(4) of the *Constitution*.

103. Citing the scholarly text of Hon Justice (Prof) Otieno-Odek[29] of the Court of Appeal, he submitted that the qualitative requirements appraise the entire electoral process prior to and during voting, evaluating whether the environment was free and fair within the meaning of article 81 (e). He thus urged that substantial non- compliance with this requirement renders

[29] Paper by Hon Justice (Prof) Otieno-Odek titled *Election Technology Law and the Concept of "Did the irregularity affect the Results of the Election?"*

the entire electoral results void. For that proposition, he cited the case of *Winnie Babihunga v Masiko Winnie Komuhamhia & others*[30] where it was stated;

> The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test in most suitablewhere the quality of the entire process is questioned and the court has to determine whether or not the election was free and fair.

104. He further urged that determining whether an election was free and fair taking into account principles of impartiality, neutrality, efficiency, accuracy and accountability involves the interpretation of articles 81 (e) (v) and 86 of the *Constitution*. Ideally this means, he urged, that the principles listed under article 81 are meant to safeguard and promote the centrality of the voter as captured under article 38 of the *Constitution* which principles, he submitted, are universal and articulated in various international instruments.

105. The Attorney General further cited the decision of the constitutional Court of South Africa in *Richter v Minister for Home Affairs & others*[31] where it was pointed out that the right to vote is symbolic to citizenship and has constitutional importance, the exercise of which is a crucial working part of democracy. Accordingly, the court stated that we should approach any case concerning the right to vote mindful of the symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civil responsibilities and willing to take the trouble of exercising the right.

106. He also adopted the decision of the Supreme Court of Uganda in the case of *Rtd Col Dr Kiza Besigye v Yoweri Kaguta Museveni And Electoral Commission*[32], where the Court defined free and fair elections to be where, *inter alia*, the electoral process is free from intimidation, bribery, violence, coercion, and results are announced in good time.

107. Secondly, as regards the changes to the electoral law, he submitted that following the recommendation of a Bi-Partisan Joint Parliamentary Committee, the various amendments to election law, geared towards enhancing the conduct of free and fair elections, were made. They included Sections 39 and 44 of the *Elections Act* which were amended to provide for the manner in which Presidential election results would be declared and published after close of polling and the introduction of the use of technology in transmission of results. That regulation 79 of the *Elections (General) Regulations* as amended by L/N No 72/2017 also introduced Forms 34A, B, and C for the purposes of declaration of Presidential election

30 *Winnie Babihunga v Masiko Winnie Komuhamhia & others*, HTC-OO

31 *Richter v Minister for Home Affairs & others* CCT 09/09 [2009] ZACC 3; 2009 (3) Sa 615 (CC)

32 *Rtd Col Dr Kiza Besigye v Yoweri Kaguta Museveni And Electoral Commission*, Preseidential Petition 1 of 2001.

results while Regulation 83 was amended to introduce regulation 83(2) which provides that the Chairperson of the Commission shall tally and verify the results at the NTC. The KIEMS system to be introduced under section 44 further had a complementary manual system (which was upheld by the Court of Appeal in the case of N*ational Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 others*.[33]

108. It was his submission that the above reforms were made in an effort to ensure that the technology, restricted to biometric voter registration, biometric voter identification and electric result transmission system, would pave way for free and fair elections administered in an efficient, simple, accurate, verifiable, secure accountable and transparent manner.

109. Thirdly, in regard to rejected/spoilt votes cast, the Attorney General submitted that in terms of article 138 (4) of the *Constitution*, the phenomena' of rejected votes is still a continuing concern in developing jurisprudence in Kenya but nonetheless he urged that the court's decision in the 2013 Raila Odinga case on the subject case remains good law and should not be departed from.

110. Comparatively, he referred to sections 47-50 of the *Representation of the People's Act 1983* of the United Kingdom, in urging that a vote is included in deciding the election of a candidate only where a clear preference for that candidate is indicated; in New Zealand, sections 178-179 of the *Electoral Act 1993* makes a distinction between a vote and an informal vote where informal votes are rejected and not included in the vote; and finally in South Africa where section 47(3) of the *Electoral Act 1993* provides for the procedure for the rejection of votes and regulation 25 of the *Election Regulation 2004*, which indicates that rejected ballots are not counted as part of the votes.

111. Alluding to the views of Hon Justice (Prof) Otieno-Odek, he postulated that the rationale for excluding a rejected or spoilt ballot is exemplified as being where the will of the voter is not expressed and as such the vote holds no weight. He thus urged that the will of the voter is ring-fenced by the provisions of article 38 (2) of the *Constitution* which gives every citizen the right to free, fair and regular elections, based on universal suffrage and the free expression of the will of the electors.

112. The fourth issue the Attorney General submitted on was the proper constitutional and legal threshold for invalidating a presidential election under article 140 of the *Constitution*. He submitted on that issue that this should be considered within the context of the applicable legal and evidential burden of proof, the standard of proof and the irregularity in issue.

113. It was his further submission that there exists a rebuttable presumption in law as to the validity of election results by returning officers and the legal and evidentiary burden lies with

[33] *National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 others*, Civil Appeal 258 of 2017.

he who seeks to upset it. In that regard,he cited the Supreme court of India in *Jeet Mohinder Singh v Harmoniser Singh Jassi*[34], where the Court upheld the presumption of validity of election results. He also cited the 2013 Raila Odinga case in urging that he who alleges non – conformity with electoral law must not only prove non-compliance, but must also show that such non - compliance affected the validity of the elections. This burden of proof, he submitted, is captured in section 107 as read together with section 109 of the *Evidence Act* and must be discharged to the required standard.

114. As regards standard of proof, he submitted that presidential elections, being sui generis in character, the standard of proof varies between the balance of probability to beyond reasonable doubt depending on the allegation of irregularity or non – compliance with the electoral laws in issue. He cited the case of *Simmons v Khan*[35] in support of that proposition.

115. The Attorney General in addition urged that section 83 of the *Elections Act* captured the general standard in our jurisdiction. In his view, and citing the 2013 *Raila Odinga* case, the threshold required to disturb an election is one where evidence discloses profound irregularities in the management of the electoral process, and non-compliance that affected the validity of the election.

116. Comparatively, the Attorney General cited the Supreme Court of Ghana in *Nana Addo Dankwa Akufo Addo & Others v John Dramani Mahma & 2 Others*,[36] where the position of that court was that elections ought not to be held void by reasons of transgressions of the law without any corrupt motive by the returning officer or his subordinate, and where the court is satisfied that the election was, notwithstanding those transgressions, a real election and in substance was conducted under the existing election law. Also cited was *Woodward v Sarsons*[37] where the court was of the opinion that an election is declared void by the common law applicable, where the tribunal asked to void it is satisfied that there was no real election at all or that the election was not really conducted under the subsisting election law and that there were mishaps that prevented a majority from electing a preferred candidate.

117. Lastly on remedies, the Hon Attorney General submitted that while article 140 requires the court to declare the election valid or invalid, no other reliefs are provided for. however, he urged that article 163(8) mandates the Supreme Court to make rules to exercise its jurisdiction. In this regard, he submitted that the *Supreme Court (Presidential Election Petition) Rules, 2017* set out the powers of the court i.e dismissing the petition; declaring

[34] *Jeet Mohinder Singh v Harmoniser Singh Jassi*, 1999 Supp (4) Scr 33; AIR 2000 256

[35] *Simmons v Khan* EWHC B4 (QB) 2008.

[36] *Nana Addo Dankwa Akufo Addo & Others v John Dramani Mahma & 2 others*, writ No J 1/6/2013

[37] *Woodward v Sarsons* (1875) LR 10

the election of the president-elect to be valid or invalid; or invalidating the declaration made by IEBC.

118. He submitted further that considering that article 140(3) of the *Constitution* provides for only two reliefs, declaration of validity or invalidity of presidential election results, the court has to issue reliefs/remedies within the confines of article 140. The reliefs must be confined within the parameters of the law. He cited the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*[38] and the 2013 *Raila Odinga* case in urging the Court to be cautious of its jurisdictional limits. And thus submitted that the Court's final remedy is restricted to a declaration of validity or invalidity, which they can only affirm or annul.

119. Finally he urged that incidental to the final order, the court has inherent power to order for scrutiny of votes in order to determine the integrity and credibility of an electoral process as it *suo motu* invoked and ordered for the scrutiny of all Forms 34 and 36 in the 2013 *Raila Odinga* case.

ii. The Law Society of Kenya

120. The Law Society of Kenya (LSK) was admitted as the 2nd *amicus curiae* and limited by the court to make submissions in regard to the interpretation of section 83 of the *Elections Act*. Teaming up with Mr Ombati, Mr Mwenesi, learned counsel for the LSK, emphasized the centrality of a voter in a democratic form of government and urged that in interpreting the meaning and scope of section 83, this court should consider its history and constitutionality as well as its interpretation in the 2013 *Raila Odinga* case. The history of section 83 was thus traced to section 28 of the *National Assembly and Presidential Elections Act* (repealed) all the way to the English *Ballot Act 1872*. Reference was also made to the decision in *Morgan v Simpson*[39] where the court stated that an election conducted substantially in accordance with the law will not be invalidated by a breach of the rules or a mistake at the polls which did not affect the result.

121. The Society urged that section 83 was not straightforward and had posed difficulties in judicial interpretation as to what constitutes an administrative irregularity which can invalidate an election. It was submitted that in interpreting section 83 of the *Elections Act* in the 2013 *Raila Odinga* case, this court laid out a broad test: whether an alleged breach of law negates or distorts the expression of the people's electoral intent. It was contended in that regard that, from the court's interpretation, breach of the law, however grave, is not

[38] *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.

[39] *Morgan v Simpson* (1974) 3 All ER 722

by itself sufficient to invalidate an election, where it is not shown that the breach negated the voters' intent.

122. Counsel for LSK argued that the application of section 83 is limited in content and scope and only applies where the validity of an election is restricted to irregularities. He thus sought to distinguish between an illegality and an irregularity by contending that the former constitutes a violation of the *Constitution* or a substantive statutory or common law provision. Accordingly, it was urged that section 83 has no application where there is a violation of the *Constitution* or a substantive provision of election laws and Regulations. That it was only applicable where the validity of an election does not concern a violation of the *Constitution* or substantive statutory provision, but is applicable where there are minor irregularities which do not affect the overall outcome of the election. Counsel urged that giving the provision a different meaning leads to an absurdity that it is acceptable to violate the *Constitution* or substantive statutory law provided that it cannot be established how those violations affected the results.

123. Further, it was submitted on behalf of the Society that the repealed Constitution did not have the equivalent of articles 81 and 86 of the *Constitution* 2010 and therefore any interpretation of section 83 cannot make sense in that context because the said section was enacted before 2010. That fact alone would mean that the regulation of what the nature and quality of election was, should be left to statute without any reference to the *Constitution*. However, the Society urged that in constitutionalizing what constitutes a free and fair election, the 2010 Constitution created minimum and non-negotiable thresholds which the process and substance of an election must adhere to. In this regard, counsel cited the case of *Speaker of the Senate & another v Attorney-General & 4 others*[40], where the court was emphatic that procedures prescribed in the *Constitution* must be adhered to. Hence, it was urged in the alternative that if section 83 is to be applied to post 2010 circumstances, it cannot be read to oust a constitutional imperative or to regulate any aspect of the *Constitution*. Consequently, it was the Society's submission that a narrow reading of section 83 which confines the provision to determination of validity premised on an irregularity or technicality is good law.

124. Counsel further submitted that while article 140(3) of the *Constitution* requires this court to determine whether a presidential election is valid, section 83 of the *Elections Act* instead relates to voiding an election. Counsel contended that invalid connotes the existence of something that can be revived, while void has the essence of nothingness. It was therefore the submission of the Law Society of Kenya that section 83 is not applicable to the resolution of a presidential election dispute in that context. That the test of invalidating an election

40 *Speaker of the Senate & another v Attorney-General & 4 others*, Petition 2 of 2013; [2013] eKLR.

is provided for under article 81 of the *Constitution* and not section 83 of the *Elections Act*, which ignores fundamental constitutional principles.

G. Issues for Determination

125. The main issues for determination as crystallized from the petition, the responses thereto and the written as well as oral submissions by counsel, are as follows:

> "i. Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the *Constitution* and the law relating to elections.
>
> ii. Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election.
>
> iii. If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election"
>
> iv What consequential orders, declarations and reliefs should this court grant, if any"

126. Before addressing the specific issues highlighted above, we shall first discuss some of the identifiable legal principles emanating in this case, with the aim of setting the foundation for the ultimate determination of this matter.

H. Interrogating The Emerging Legal Principles

i. Burden of Proof

127. Counsel for the petitioners, and the 1st and 2nd respondents did not make substantive submissions on the burden of proof. It was, however, contended on behalf of the 3rdrespondent, that in election matters there is a presumption that the results declared by the electoral body are correct until the contrary is proved. In support of that proposition, reference was made to the decision of this court in *George Mike Wanjohi v Steven Kariuki & 2 others*[41] and that of the Supreme Court of Ghana in *Nana Addo Dankwa Akufo Addo & 2 others v John Dramani Mahama & 2 others*.[42]

128. Senior counsel Mr Ahmednassir emphasized that the party, in this case, the petitioners, seeking the nullification of the presidential election, bears the burden of proving that not only was there non-compliance with the election law but also that the non-compliance

41 *George Mike Wanjohi v Steven Kariuki & 2 others*, Petition 2A of 2014; [2014] eKLR

42 *Nana Addo Dankwa Akufo Addo & 2 others v John Dramani Mahama & 2 others*, Writ No J 1/6/2013

affected the results of the election. In buttressing this line of argument, senior counsel cited section 83 of the *Elections Act*, the decision of this court in the 2013 *Raila Odinga* case, the decision of the Supreme Court of Uganda in *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others*[43], (Amama Mbabazi case) majority decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*[44] and the Supreme Court of Nigeria in *Abubakar v Yar'adua*[45].

129. The common law concept of burden of proof (*onus probandi*) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue.[46] *Black's Law Dictionary*[47] defines the concept as [a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production. With that definition, the next issue is: who has the burden of proof"

130. The law places the common law principle of onus probandi on the person who asserts a fact to prove it. section 107 of the *Evidence Act*, cap 80 of the Laws of Kenya, legislates this principle in the words: Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In election disputes, as was stated by the Canadian Supreme Court in the case of *Opitz v Wrzesnewskyj*[48], an applicant who seeks to annul an election bears the legal burden of proof throughout. This court reiterated that position in the 2013 *Raila Odinga* case, thus:

> (195) There is, apparently, a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner....
>
> (196) This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.

43 *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others*, Petition No 01/2016; [2016] UGSE 3.

44 *Opitz v Wrzesnewskyj* 2012 SCC 55; [2012] 3 SCR 76

45 *Abubakar v Yar'adua* [2009] ALL FWLR (PT. 457) 1 SC.

46 Auburn J, '*Burden of Proof*' in Malik H (ed) '*Phipson on Evidence*, 17th (ed) Sweet and Maxwell, London, 2010 pp 149-151.

47 *Black's Law Dictionary* 8th ed (Bryan A Garner) (St Paul, MN: West Publishing Co, 2004), p 209.

48 *Opitz v Wrzesnewskyj* (2012) SC 55.

131. Thus 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[49] to the satisfaction of the court.[50] That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.[51] In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent's election as President of Kenya should be nullified.

132. Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout a trial[52] with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting"[53] and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."[54]

133. It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law. We shall revert to the issue of the shifting of the burden of proof later in this judgment.

ii. Standard of Proof

134. The standard of proof is the one which raised controversy in this petition. On the applicable standard of proof, the petitioners submitted that this court erred in the 2013 *Raila Odinga* case in holding that save where criminal allegations are made in a petition, the standard of

49 *Hassan Abdalla Albeity v Abu Mohamed Abu Chiaba & another*, petition 9 of 2013; [2013] eKLR.

50 *Col Dr Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission*, Election Petition No 1 of 2001.

51 Auburn J, '*Burden of Proof*' in Malik H (ed) '*Phipson on Evidence*, 17th (ed) Sweet and Maxwell, London, 2010 pp 149-151.

52 *Halsbury's Laws of England*, 4th Edition, Volume 17, para 13.

53 *Raila Odinga & others v Ahmed Issaack Hassan & others*, Petition 5 of 2013, para 195.

54 Charles Frederic, Joyce Chamberlayne, Howard C: '*The Modern Law of Evidence*' (1911-1916 V II Para 937 (Heinoline))

proof in election cases is the intermediate one: above a balance of probabilities but below the one for criminal cases of beyond reasonable doubt.

135. Appreciating that the court had reviewed several positions held by various jurisdictions in setting the standard of proof in the 2013 *Raila Odinga* case, the petitioners submitted that the emerging jurisprudence set out by the House of Lords in England is that in law, there exists only two standards of proof, the criminal standard of beyond reasonable doubt and the civil standard of balance of probabilities. They cited the case of *Re B (Children)*[55] in support of that proposition.

136. It was further urged that besides Canada, the position held by the House of Lords has recently been emulated by the Constitutional Court of Seychelles in *Wavel John Charles Ramkalawan v The Electoral Commission*.[56]

137. Citing the decision of the Canadian Supreme Court in the case of *FH v Ian Hugh McDougall*[57], the petitioners contended that the elevation of the civil standard of proof in respect of matters which are not criminal in nature on the basis that they are deemed as serious matters' is improper. In the circumstances, they urged the court to find that the applicable standard of proof in the presidential election petitions is on a balance of probabilities.

138. In contrast, the 1st and 2nd respondents argued that the 2013 Raila Odinga case is good law. It was submitted that the burden of proof lies with the petitioners while the standard of proof is higher than that in civil cases where election malpractice is imputed. In that regard, the respondents relied on the Zambian case of *Akashambatwa Lewanika & others v Fredrick Chiluba*[58], the decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*[59] and the Nigerian Supreme Court's decision in *Buhari v Obasanjo*[60].

139. For the 3rdrespondent, relying on this court's decision in the 2013 *Raila Odinga* case and *Amama Mbabazi* case, it was submitted that save where allegation of commission of election offences are made in respect of which the standard of proof is beyond reasonable doubt, the standard of proof in all other allegations is above the balance of probabilities but not beyond

55 *Re B (Children)* [2008] UKHL 35.

56 *Wavel John Charles Ramkalawan v The Electoral Commission* (2016) SCC 11

57 *FH v Ian Hugh McDougall* (2008) 3 SCR 41.

58 *Akashambatwa Lewanika & others v Fredrick Chiluba* (1999) 1 LRC 138.

59 *Opitz v Wrzesnewskyj* 2012 SCC 55; (2012) 3 SCr 76.

60 *Buhari v Obasanjo* (2005) CLR 7K (SC)

reasonable doubt. Counsel for the 3rd respondent dismissed the petitioners' call for a review of this court's decision in the 2013 *Raila Odinga* case, arguing that the law as set out in that case, which this court and other have applied in several subsequent cases, is still good law.

140. Although this court has jurisdiction to depart from its earlier decisions, counsel cited the decision of this court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*[61] and argued that to ensure predictability, certainty, uniformity and stability in the application of the law and on the doctrine of *stare decisis*, this court should be slow in reversing its decisions.

141. Counsel further submitted that under article 163(7) of the *Constitution*, it is the duty of the Supreme Court to create law, order and solidity where there is conflict in decisions over similar matters in the lower courts. To do otherwise, the court would give rise to anarchy. Referring to the article by Daniel A Farber & Suzanna Sherry[62], he maintained that once the court renders itself in interpretation of the *Constitution* it can't depart from such an interpretation.

142. On his part, the Attorney General submitted that presidential elections, being sui generis in character, the standard of proof varies between the balance of probability to beyond reasonable doubt depending on the allegation of irregularity or non – compliance with the electoral laws in issue. He cited the case of *Simmons v Khan*[63] in support of that proposition.

143. Besides the burden of proof, the law also imposes a degree of proof required to establish a fact. The extent of the proof required in each case is what, in legal parlance, is referred to as the standard of proof. *Black's Law Dictionary* defines it as [t]he degree or level of proof demanded in a specific case[64] in order for a party to succeed.[65]

144. Various jurisdictions across the globe have adopted different approaches on the question of the requisite standard of proof in relation to election petitions. From many decisions, three main categories of the standard of proof emerge: the application of the criminal standard of proof of beyond reasonable doubt; the application of the civil case standard of balance of probabilities'; and the application of an intermediate standard of proof.[66]

61 *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Petition 4 of 2012; [2013] eKLR.

62 Daniel A Farber & Suzanna Sherry, '*Judgment Calls: Principle and Politics on Constitutional Law*, (2009) 10 (2) Engage 135.

63 *Simmons v Khan* EWHC B4 (QB) 2008.

64 *Black's Law Dictionary* (9th Edition, 2009) 1535.

65 *Moses Wanjala Lukoye v Bernard Alfred Wekesa Sumbu & 3 others*, Petition 2 of 2013; [2013] eKLR.

66 John Hatchard, '*Election Pettitions and the Stanard of Proof*,' (2015) Vol 27 Denning Law Journal 291.

145. The application of the criminal standard of proof of beyond reasonable doubt' arises when the commission of criminal or quasi criminal acts are made in a petition. This is the standard the Supreme Court of India employed in the case of *Shiv Kirpal Singh v Shri V V Giri*[67] where it stated:

> " Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice."

146. Kenya adopts this standard of proof. In the 2013 *Raila Odinga* case, this court stated that where [there] are criminal charges linked to an election, ... the party bearing the legal burden of proof must discharge it beyond any reasonable doubt. Following this decision in *Khatib Abdalla Mwashetani v Gideon Mwangangi Wambua & 3 others*[68], the Court of Appeal stated that:

> " Purely from the consequences that flow from the finding that a person is guilty of improper influence, we must conclude that improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such kind of conduct is alleged, is proof beyond balance of probabilities.

147. In England, however, no such distinction is made. Whether or not allegations of a criminal or quasi-criminal nature are made in a petition, the ordinary civil litigation standard of proof on a balance of probabilities' applies. This came out clearly in the decision of the Judicial Committee of the Privy Council in *Jugnauth v Ringadoo and others*[69] where there was an allegation of bribery. Affirming the decision of the Supreme Court of Mauritius, the Privy Council stated that:

> [17] ...there is no question of the court applying any kind of intermediate standard...
>
> [19] It follows that the issue for the election court is whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition."

[67] *Shiv Kirpal Singh v Shri VV Giri* 1971 SCR (2) 197

[68] *Khatib Abdalla Mwashetani v Gideon Mwangangi Wambua & 3 others*, Civil Appeal 39 of 2013; [2014] eKLR.

[69] *Jugnauth v Ringadoo and others* [2008] UKPC 50

148. In many other jurisdictions including ours, where no allegations of a criminal or quasi-criminal nature are made in an election petition, an intermediate standard of proof', one beyond the ordinary civil litigation standard of proof on a balance of probabilities', but below the criminal standard of beyond reasonable doubt', is applied. In such cases, this court stated in the 2013 *Raila Odinga* case that [t]he threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt....

149. This is the standard of proof that has been applied in literally all election petitions in this country. For instance, in the case of M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others[70] the Court of Appeal observed that [f]rom the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question.

150. The rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation. As the Tanzanian High Court stated in the old case of *Madundo v Mweshemi & A-G Mwanza*[71]:

> " An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes ie their decision without satisfactory reasons.

151. In Kenya, Githua, J succinctly stated the rationale for this higher standard of proof in the case of *Sarah Mwangudza Kai v Mustafa Idd & 2 others*[72]–

> [29] ...it is important for this court to address its mind to the burden and standard of proof required in election petitions. This is because election petitions are not like ordinary civil suits. They are unique in many ways. Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under article 38 of the *Constitution*. This means that electoral disputes involve not only the parties to the petition but also the electorate in the electoral area concerned.

70 *M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others*, Civil Appeal 47 of 2013; [2014] eKLR

71 Madundo v Mweshemi & A-G Mwanza, HCMC No 10 of 1970.

72 *Sarah Mwangudza Kai v Mustafa Idd & 2 others*, Election Petition 8 of 2013; [2013] eKLR

> It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. And because of this peculiar nature of election petitions, the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases.

152. We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners' submissions that the court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

153. We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.

iii. Valid Versus Rejected Votes in a Presidential Election in Kenya

154. As in the 2013 *Raila Odinga* case, an issue of rejected votes has also arisen in this petition. Besides urging this court to find that the high number of rejected votes in this matter is unrealistic, the petitioners also urged this court to depart from its decision in the 2013 *Raila Odinga* case and take rejected votes into account in ascertaining if a candidate had met the constitutional threshold.

155. On their part, the 1st and 2nd respondents submitted that rejected votes were properly excluded from valid votes and in accordance to the law and in line with the court's sound finding in the 2013 *Raila Odinga* case. For the 3rdrespondent, it was submitted that the court in the 2013 *Raila Odinga* case had made a well-reasoned decision on whether spoilt, disputed and rejected votes should count as part of the votes cast in the computation of the constitutional requisite numerical threshold. They noted that while the Supreme Court is not bound by its own decisions, and no reasonable ground having been advanced for this court to reverse its decision in the 2013 *Raila Odinga* case, to ensure predictability, certainty, uniformity and stability in the application of the law, the petitioners' plea in this regard should be dismissed. It was further urged that the institutionalization of the play of the law gives scope for regularity in spheres of social and economic relations.

156. The Attorney-General as amicus, submitted that although in terms of article 138 (4) of the *Constitution*, the phenomena' of rejected votes is still a continuing concern in developing jurisprudence in Kenya, he referred to comparative jurisprudence and urged that the court's

decision in the 2013 *Raila Odinga* case on the matter remains good law and should not be departed from.

157. In presidential elections in Kenya, a candidate is elected president if he or she attains the threshold set out in article 138(4) of the *Constitution*. The article provides that [a] candidate shall be declared elected as President if the candidate receives more than half of all the votes cast in the election and at least 25% of the votes cast in each of more than half of the counties.

158. In the 2013 *Raila Odinga* case, in considering whether the President elect had attained the threshold of 50% + 1, the Supreme Court was faced with the question of what the phrase votes cast means. In answering this question, the court, in paragraph 285 of its judgment, interpreted the phrase votes cast, in article 138(4) of the *Constitution* as referring to only valid votes cast and not including ballot papers or votes inserted into presidential ballot boxes but which were later rejected for non-compliance with the law.

159. Varied opinions have since been expressed on the propriety of that decision. While some agree with that decision, others are of the view that the phrase votes cast should be understood to refer to all ballot papers inserted into the presidential ballot box. For instance, Francis Ang'ila Aywa[73] criticized this court's reliance on the Seychellois Court of Appeal decision in *Popular Democratic Movement v Electoral Commission*[74] and particularly for equating spoilt' with rejected' votes. He contended that [t]he two are different and spoilt votes' are never included in the tabulation of any election results. While conceding that it is a truism in the study and scientific analysis of elections that votes cast eventually get separated during the counting process into valid and rejected votes; he nevertheless takes the view that votes cast include selfsame rejected votes. He posits that [i]n determining whether rejected votes should be included in the computation, regard should only have been made on the law. And in this regard, in his view, article 138(4) of the *Constitution* leaves little to interpretation, especially when looked at against the context that it was drafted to replace the repealed *Constitution*'s section 5(3)(f). He does not address what informed the change.

160. Although he does not delve into the overall tallying for purposes of determining the threshold of 50% + 1, PLO Lumumba, in his article: "*From Jurisprudence to Poliprudence: The Kenyan Presidential Election Petition 2013*"[75], shares Aywa's position that a ballot paper that is inserted into a ballot box amounts to a vote. However, only a properly marked ballot paper, or vote, counts in favour of the intended candidate and this is the valid vote. The

73 In the Chapter "*A Critigue of the Raila Odinga v IEBC Decision in light of the Legal Standards for Presidential Elections in Kenya*" in Collins Odote & Dr Linda Musumba (eds) "*Balancing the Scales of Electoral Justice; Resolving Disputes From the 2013 Elections in Kenya and the Emerging Jurisprudence*" IDLO and JTI 2016.

74 *Popular Democratic Movement v Electoral Commission* (2011) SLR 385.

75 The Law Society of Kenya Journal Vol II 2015 No 1 Law Africa.

non-compliant ballot paper, or vote, on the other hand will not count in the tally of any candidate""it is not only rejected, but is invalid and confers no electoral advantage upon any candidate. In that sense, the rejected vote is void.

161. With respect, this court's decision in the 2013 *Raila Odinga* case was not based on the distinction between spoilt votes and/or rejected votes as Mr Aywa argues. This court's decision in that case was based on the reasoning that if rejected votes are not counted and/or assigned to any candidate, it would be illogical to take them into account for purposes of determining the threshold of 50% +1 in article 138(4) of the *Constitution*. In its analysis at paragraph 281 of its judgment in the 2013 *Raila Odinga* case, this court observed that even though both the *Elections Act* and its Regulations have used the terms vote and ballot paper interchangeably, in Kenya, no law or regulation brings out any distinction between them. The court thus noted that a ballot paper marked and inserted into the ballot box will be either a valid vote or a rejected vote.

162. Viewed from the prism of these observations, it is imperative that the meaning of the phrase votes cast in article 138(4) is clearly understood. In our view, no controversy arises as to the meaning of the word cast. In elections, the term refers to the ballot papers inserted into ballot boxes. The problem which arises is the correct meaning that should be ascribed to the term votes. Some, like Aywa[76] and Lumumba[77], take the view that all marked ballot papers and inserted into the presidential ballot box are votes, whether or not some are determined as valid and others as rejected votes at the time of counting. Others, for instance, this court in the 2013 *Raila Odinga* case and the Seychellois Court of Appeal decision in the *Popular Democratic Movement v Electoral Commission*[78], hold the view that only validly marked ballot papers amount to votes. In the circumstances, to determine the issue before us of what is meant by the votes cast to be taken into account in the computation to determine the threshold of 50% +1 under article 138(4), resort has to be had to the meaning of the words votes, cast and even ballot papers.

163. Section 2 of our *Elections Act* defines the phrase ballot paper to mean a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting. In their article From Intent to Outcome:

76 Supra.

77 Supra.

78 Supra.

Balloting and Tabulation Around the World, Birkenstock Joseph M & Sanderson Matthew T, define the term ballot in more or less the same way:

> " We use ballot' in the broadest sense of the word... [to mean] any instrument used in the act of voting, including paper ballots, optical scan sheets, punch cards, direct recording electronic voting machines.

164. Herrnson Paul S (*et al*) defines the ballot paper as the means through which voters register their intentions....[79] Echoing the same words, Isaacs J, sitting as a Court of Disputed Returns, in *Kean v Kerby*[80] observed that [t]he essential point to bear in mind in this connection is that the ballot itself is only a means to an end, and not the end itself.

165. Neither the Kenyan *Constitution* nor the *Elections Act* define the term vote. The *Elections Act*, however, defines the term voter to mean a person whose name is included in a current register of voters. *Black's Law Dictionary* defines a vote' as the expression of one's preference or option in a meeting or election by ballot, show of hands or other type of communication. The *Dictionary of Modern Legal Usage*[81] defines the term as an [o]pinion expressed, resolution or decision carried, by voting.

166. From these definitions, particularly the one in the *Black's Law Dictionary* referring to a vote as the expression of one's preference or option, the distinction between a ballot paper and a vote is clearly discernible. A ballot paper is the instrument in which a voter records his choice, while a vote is the actual choice made by a voter. A ballot paper does not become a vote by merely being inserted into the ballot box, as it may later turn out to be rejected. Such an interpretation can also be deduced from the wording of regulations 69(2) and 70 of the *Elections (General) Regulations, 2012* which provides:

> " 69(2) A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers""
>
> (a) Cast his or her votes in accordance with regulation 70 without undue delay."

On the other hand, regulation 70 provides:

> " (1) A voter shall, upon receiving a ballot paper under regulation 69(2)-

79 *'The Impact of the Ballot Type on Voter Errors' in American Journal of Political Science*, Vol 56 No 3 (July, 2012) pp 716-730.

80 *Kean v Kerby*, (1920) 27 CLR 449

81 2nd Edition, by Garner Bryan A.

a. Go immediately into one of the compartments of the polling station and secretly mark his or her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom that voter wishes to vote; and

b. Fold it up so as to conceal his or her vote, and shall then put the ballot paper into the ballot box in the presence of the presiding officer and in full view of the candidates or agents.

(2) The voter shall after following the procedure specified in sub regulation (1) put each ballot paper into the ballot box provided for the election concerned.

(3) ...

167. A voter therefore is said to have cast his or her vote when the procedure under regulation 70 is followed. This means that, upon receipt of the ballot paper, the voter proceeds to mark correctly, indicating his exact choice of the candidate he wishes to vote for, and then inserts that marked ballot paper into the respective ballot box for the election concerned.

168. Comparative jurisprudence from other jurisdictions, notably Australia; New Zealand; Canada; the United Kingdom; Ireland; the Netherlands; India and South Africa, also makes a clear distinction between a ballot paper and a vote. For instance, section 123 of the Australian Electoral Act of 1992, formally distinguishes between a valid and an invalid vote. It states in subsection (4) thereof that [i]f a ballot paper has effect to indicate a vote, it is a formal ballot paper. And in subsection (5) it adds that [i]f a ballot paper does not have effect to indicate a vote, it is an informal ballot paper. That Act then goes on to provide that an informal ballot paper does not count. A ballot paper is therefore counted as a vote if it is filled in accordance with the set down procedure.

169. In the US, the criterion for making the distinction between a ballot paper and a vote is the clear and discernible intention of the voter. This is manifest from the case of *Brown v Carr*[82],

82 *Brown v Carr* 47 S.E. 2d 401, 130 W. Va. 455

cited with approval by the US Supreme Court in *Bush v Gore*[83], in which the Supreme Court of Western Virginia stated that:

> " It is equally well settled that, in determining whether a ballot shall be counted, and, if so, for whom, depends on the intent of the voter, if his intention can be gleaned from the ballot being considered, or, in some special instances, from facts and circumstances surrounding the election. Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter, and in respect thereto follow a liberal policy, to the end that voters be not deprived of the exercise of their constitutional right of suffrage.

Adding that the investigation of the intent of the voter should be confined to the ballot itself, the court added:

> " Where the uncertainty as to the voter's intention is such as to cause a reasonable and unprejudiced mind to doubt what the voter intended, the ballot should not be counted.

170. We 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*. As we have stated, comparative jurisprudence from New Zealand; Canada; the United Kingdom; Ireland; the Netherlands; India and South Africa shows that rejected votes count for nothing. In the circumstances, we cannot see how a rejected vote, a vote which is void, a vote that accords no advantage to any candidate, can be used in the computation of determining the threshold of 50% + 1. In our view, a purposive interpretation of article 138(4) of the *Constitution*, in terms of article 259 of the *Constitution*, leads to only one logical conclusion: that the phrase votes cast in article 138(4) means valid votes. Consequently, we maintain this Court's view in the 2013 *Raila Odinga* case and accordingly reject the petitioners' invitation to reverse it.

iv The Meaning of section 83 of the *Elections Act*

171. If we understand it well, and we think we do, section 83 of the *Elections Act* is the fulcrum of this petition. Paragraph 17 0f the petition states that where an election is not conducted in accordance with the *Constitution* and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. Even though that is the petitioners' position, they further aver that IEBC conducted the presidential election with

83 *Bush v Gore* 531 US 98 (2000).

such serious irregularities which, standing alone would also invalidate the election. Section 83 provides that:

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

172. Both Messrs. Mutakha Kangu and Paul Mwangi, counsel for the petitioners, urged this Court to depart from its interpretation of section 83 of the *Elections Act*, in the 2013 *Raila Odinga* case. Counsel urged that by following the Nigerian case of *Buhari v Obasanjo*[84], the Court had devalued the effect of this section . In that case, the Supreme Court of Nigeria in interpreting the statutory version of section 83 stated thus:

> " The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result....There must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election."

173. It was counsel's submission that the approach taken by the Supreme Court of Nigeria meant that for a court to void an election, a petitioner would have to prove both limbs of the provision. Not only would one have to prove that the impugned election was not conducted in accordance with the principles of a written law relating to the election; the petitioner would also have to prove that such non-compliance affected the result of the election. Such an approach, argued counsel, was not only onerous to a petitioner, but made it almost impossible for an election to be successfully challenged in a court of law.

174. It was submitted for the petitioners that the conjunctive and narrow interpretation of section 83 of the *Elections Act* that this court gave the section in the 2013 *Raila Odinga* case undermines the supremacy of the *Constitution* under article 2 of the *Constitution* and suggests that an act can remain valid despite its transgression of the *Constitution* so long as it does not affect the result. It was submitted that the correct interpretation of the section is the disjunctive one, the English Court of Appeal gave the English equivalent in *Morgan v Simpson*[85] which has been followed in many cases in this country including *Hassan Ali Joho v Hotham Nyange & another*[86], *Moses Masika Wetangula v Musikari Nazi Kombo*[87] and *Abdikhaim Osman Mohammed v Independent Electoral and Boundaries Commission*[88].

84 *Buhari v Obasanjo* (2005) cLR 7(k) (SC).

85 *Morgan v Simpson* [1974] 3 All ER 722 at p 728.

86 *Hassan Ali Joho v Hotham Nyange & another* [2008] 3 KLR (EP) 500.

175. The petitioners further urged the court to adopt a purposive and progressive interpretation of section 83 to give effect to the spirit and letter of the law. It was submitted that the essence of section 83 was that for elections to be valid, they must comply with the principles laid down in the *Constitution*', written law and regulations. the constitutional principles are established in articles 38, 81 and 86 of the *Constitution*. article 81(e) has established principles of free and fair elections, which principles have been elevated to the status of fundamental rights under article 38 of the *Constitution*. article 86 focuses on system of election, and that most importantly, the *Constitution* imposes an obligation on the 1st respondent to ensure that the voting system used is simple, accurate, verifiable, secure, accountable and transparent. This is meant to avoid the possibility of manipulation of the system.

176. The petitioners urged that an election that does not comply with the constitutional principles results is a usurpation of the peoples' sovereignty by false representatives who do not represent the people's will and who are not accountable to them. This goes contrary to the essence of article 4 of the *Constitution*, which establishes Kenya as a sovereign Republic. They urged that Kenya being a Republic, it must conduct itself and its elections as a true Republic anchored on constitutional democracy.

177. Supporting the petitioners view, counsel for the 1st interested party submitted that section 83 should not be used to white wash all manner of sins and irregularities which may occur during the electoral process so as to render them immaterial.

178. For the 1st and 2nd respondents , it was submitted that non-compliance with the law alone without evidence that the electoral process or the result had been materially and fundamentally affected was not a basis for invalidating the electoral outcome. In the 1st and 2nd respondents ' view, the correct interpretation of section 83 is the one this court gave it in the 2013 *Raila Odinga* case.

179. Learned counsel for the 1st and 2nd respondents urged that to give the section the interpretation advanced by the petitioners would derogate from the well settled and solid foundation of law and jurisprudence as laid down by this court in the 2013 *Raila Odinga* case and render the section unconstitutional in as far as article 140 of the *Constitution* is concerned.

180. The 3rdrespondent through his advocate, Senior Counsel, Mr Ahmednassir, contended that a party seeking the nullification of the presidential election, bears the burden of proving that not only was there non- compliance with the election law but also that the non- compliance

87 *Moses Masika Wetangula v Musikari Nazi Kombo*, Civil Appeal 43 of 2013; [2014] eKLR.

88 *Abdikhaim Osman Mohammed v Independent Electoral and Boundaries Commission* [2014] eKLR.

affected the results of the election. In support of this submission, counsel referred to the decision of this court in the 2013 *Raila Odinga* case, the decision of the Supreme Court of Uganda in *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others*[89] majority decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*[90] and the Supreme Court of Nigeria decision in *Abubakar v Yar'adua*.[91]

181. Mr Kinyanjui learned Counsel for Prof Wainaina, the 2nd interested party, submitted that the 2017 Presidential Elections were free and fair. He argued that no sufficient evidence had been tendered to oust section 83 of the *Act*. Counsel argued that non-compliance with the law during the election ought not to invalidate the election if the court is satisfied that the election was substantially conducted in accordance with the principles laid down in the *Constitution*.

182. The Law Society of Kenya (LSK) as amicus curiae emphasized the centrality of a voter in a democratic government and urged that in interpreting the meaning and scope of section 83, this court should consider its history and meaning, its interpretation in the 2013 *Raila Odinga* case as well as its constitutionality.

183. Mr Mwenesi, learned Counsel for LSK urged that section 83 was not straightforward and posed difficulties in judicial interpretation as to what an administrative irregularity which can invalidate an election constitutes. Further, that in interpreting that section in the 2013 *Raila Odinga* case, this court laid out a broad test which is whether an alleged breach of law negates or distorts the expression of the people's electoral intent. Counsel contended that from the court's interpretation, breach of the law however grave is not by itself sufficient to invalidate an election, where it is not shown that the breach negated the voters' intent.

184. The LSK argued that the application of section 83 is limited in content and scope and only applies where the validity of an election is restricted to irregularities. According to LSK, section 83 has no application where there is violation of the *Constitution* or substantive provision of elections laws and Regulations. It was urged, that section 83 is only applicable where there are minor irregularities which do not affect the overall outcome of the election. It is the submission of LSK that giving the provision a different meaning leads to an absurdity.

185. The Attorney General submitted that the threshold required to disturb an election is one where evidence discloses profound irregularities in the management of the electoral process, and where the non-compliance affected the validity of the election. He concurred with the

89 *Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others*, PT No 01/2016.

90 *Opitz v Wrzesnewskyj*, 2012 SCC 55; [2012] 3 SCR 76.

91 *Abubakar v Yar'adua* [2009] ALL FWLR (PT 457) 1 SC.

decision of the Supreme Court in the 2013 *Raila Odinga* case where this court laid out the guiding criteria for disturbing an election result.

186. The Attorney General pointed out comparative judicial decisions which affirm the above position. He cited the Supreme Court in Ghana in *Nana Addo Dankwa Akufo Addo & 2 others v John Dramani Mahma & 2 others*[92], where the position was that elections ought not to be held void by reasons of transgressions of the law without any corrupt motive by the returning officer or his subordinate, and where the court is satisfied that notwithstanding the transgressions, an election was in substance conducted under the existing election law. He also relied on the case of *Woodward v Sarsons*[93] where the court was of the opinion that an election is declared void by the common law applicable, where the tribunal asked to void it is satisfied that there was no real election at all.

187. It is instructive to note that this court in the 2013 *Raila Odinga* case, did not render an authoritative interpretation of section 83 of the *Elections Act* as read together with the relevant provisions of the *Constitution*. At best, the court only made a tangential reference to this section while addressing the applicable twin questions of Burden and Standard of Proof in an election petition. We therefore think that now is the time this Court should pronounce itself on the meaning of section 83 of the *Elections Act*.

188. The forerunner to section 83 of our *Elections Act* is section 13 of the *English Ballot Act of 1872*, which provided:

> "No election shall be declared invalid by reason of a non-compliance with the rules contained in Schedule 1 of this Act, or any mistake in the use of the forms in Schedule 2 of this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non- compliance or mistake did not affect the result of the election.

189. The post-1872 versions of this provision in British Election Statutes (1949) and (1983), use slightly different phraseology. Instead of the words conducted in accordance with the principles laid down in the body of this Act the modern statutes use the phrase so conducted as to be substantially in accordance with the law as to elections. Judicial fora when called upon to interpret similar provisions have tended to assign the same meaning to the two phrases.

92 *Nana Addo Dankwa Akufo Addo & 2 others v John Dramani Mahma & 2 others*, Writ No J 1/6/2013.

93 *Woodward v Sarson* [1875] LR 10 CP 733.

190. The celebrated case of *Morgan v Simpson*[94], set the tempo on how courts in the Commonwealth would interpret versions of the *Representation of People Act*. At issue in *Morgan v Simpson*, was the interpretation and application of section 37 of the Representation of People Act (1949), which provided thus:

> "No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the elections or otherwise of the local election rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect the result."

191. Before the current Kenyan *Elections Act*, this provision was imported into the *National Assembly and Presidential Elections Act, 1992* (now repealed) section 28 of which provided as follows:

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

192. There are clearly two limbs to all the above quoted provisions: compliance with the law on elections, and irregularities that may affect the result of the election. The issue in the interpretation of the provisions is whether or not the two limbs are conjunctive or disjunctive.

193. It is unequivocally clear to us that, the use of the term and in the above cited English provisions renders the two limbs conjunctive under the English law. Save for minor changes, the conjunctive norm in the two limbs of this provision as captured in the two English provisions appears to have been borrowed lock, stock and barrel by many Commonwealth countries, notably Nigeria, Ghana, Zambia, Tanzania and Uganda to mention but a few.

However, under both the repealed *National Assembly and Presidential Elections Act* (section 28) and the current *Elections Act* (section 83) the term used is or instead of and appearing in the English Acts. The use of the word or clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting section 83 of our *Elections Act*, this distinction is borne in mind. In the circumstances, authorities from many Commonwealth countries, such as Nigeria, Ghana, Zambia, Tanzania and Uganda whose provisions are not in sync or exact *parri materia* with ours may not be useful.

[94] *Morgan v Simpson* [1974] 3 All ER 722.

194. That is not all. Our present provision is different from that in other countries in two other fundamental aspects. First, the Kenyan Act does not have the word substantially, which is in many of the provisions of other countries. Secondly, and fundamentally, in 2011, the *Elections Act* (No 24 of 2011) was enacted and repealed the *National Assembly and Presidential Elections Act*. Section 83 of the new *Elections Act*, obviously to harmonize it with our *Constitution*, added that to be valid, the conduct of our elections in our country must comply with the principles laid down in the *Constitution*. This addition was purposive given that the retired *Constitution* did not contain any constitutional principles relating to elections. In interpreting the section therefore, this court must first pay due regard to the meaning and import of the constitutional principles it envisages.

195. Among the well-established cannons of constitutional interpretation is the basic one that the *Constitution* must be read as an integrated whole. Mr Justice White, in his dissent (Fuller CJ, McKenna & Day concurring) captured this principle in the case of *State of South Dokota v State of North Carolina*[95] where he stated:

> "I take it to be an elementary rule of constitutional construction that no one provision of the *Constitution* is to be segregated from all the others and considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.

196. Whereas the petitioners listed a host of articles of the *Constitution* which they alleged to have been violated, we would like to zero in on article 10 which obliges all State organs, State Officers, public officers and all persons to observe national values (*inter alia*, good governance, integrity, transparency and accountability) whenever they apply and/or interpret the *Constitution* or other law or implement public policy decisions; article 38 which sets out the political rights including the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors; article 81 which sets out the principles to be observed in the conduct of free and fair elections; article 86 which sets out the manner of conducting referenda and elections; article 88 which establishes the IEBC and enumerates its functions the paramount one being conducting and supervising referenda and elections; and article 138 which sets out the procedure for conducting presidential elections. These articles have to be read together to effectuate the purpose of electoral processes in our country.

197. Particularly, under article 38, besides the right to be registered as a voter and to vote in any referenda or election as well as the right to contest in any public elective position, every citizen

95 *State of South Dokota v State of North Carolina* 192, U.S. 286 (24 S. Ct. 269, 48 L. Ed. 448).

of this country is entitled to the right to free, fair, and regular elections based on universal suffrage. article 81(e) requires, in mandatory terms, that our electoral system shall comply, *inter alia* with ... the principles ... of free and fair elections, which are—

i. by secret ballot;

ii. free from violence, intimidation, improper influence or corruption;

iii. conducted by an independent body;

iv transparent; and,

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

198. In addition to these principles, article 86 of the *Constitution* demands that [a]t every election, the Independent Electoral and Boundaries Commission shall ensure that—

a. whatever voting method that is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

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

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

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safe keeping of election materials. [Emphasis supplied]

199. Article 138 (3) (c) basically reiterates the provisions of article 86 and directs that after the counting of votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

200. The principles cutting across all these articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiability; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.

201. As we have stated, section 83 of the *Elections Act* was not in direct focus in the 2013 *Raila Odinga* case. That notwithstanding, critics of that decision assert that had this court disjunctively considered the two limbs of that section arguing that if it had, it would perhaps have reached a different conclusion. Those who support the court's observation in that case argue that a holistic interpretation of the section required the conjunctive application and,

according to them, that is the interpretation this court gave the section. What do we now make of these divergent contentions in the light of the pleadings in this petition"

202. Among the well-established cannons of statutory interpretation, is the requirement that in addition to reading the statutes as a whole[96], where the words are clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning. The language used must be construed in its natural and ordinary meaning. The sense must be that which the words used ordinarily bear.[97] Ours being a Constitutional System, the interpretation of our statutes must also be harmonized with the values and principles in our *Constitution*. The wording of section 83 of the *Elections Act* is clear and unambiguous. The words of the section must therefore be given their natural and ordinary meaning.

203. Guided by these principles, and given the use of the word or in section 83 of the *Elections Act* as well as some of our previous decisions[98], we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.

204. Even in the English Court of Appeal decision in *Morgan v Simpson*[99], which has extensively been cited and applied in many cases in this country, both Lords Denning and Stephenson were of the clear view that notwithstanding the use of the word and instead of the word or in their provision, the two limbs of the section should be applied disjunctively. In his words, Lord Denning asserted:

    1. <u>If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected.</u>

    2. <u>If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the polls-provided that the breach or mistake did not affect the result of the election.</u>

96 *Royal Media Services v AG*, Petition 346 of 2012; [2012] eKLR following Olum & another v AG of Uganda, (2002) 2 EA 508.

97 *Halsbury Laws of England* (3rdEd) para 52; *Caries on Statute Law* (6th Edn), Sweet & Maxwell (1963) p 66.

98 See decision of Maraga, J (as he then was) *Hassan Ali Joho v Hotham Nyange & another* [2008] 3 KLR (EP) 500 at page 512.

99 *Morgan v Simpson* [1974] All ER 722.

205. On his part, Lord Stephenson went even a step further and held that even trivial breaches of the election law should alone vitiate an election. This is how he put it:

> " Any breach of the local election rules which affects the result of the election is by itself enough to compel the tribunal to declare the election void. It is not also necessary that the election should be conducted not substantially in accordance with the law as to local elections...If substantial breaches of the law are, as I think enough to invalidate an election though they do not affect its result, it follows that, contrary to the opinion of the Divisional Court, trivial breaches which affect the result must also be enough. I cannot hold that both substantial breach and an effect on the result must be found in conjunction before the court can declare an election void.

206. Nearer home, we adopt the concurring opinion of Justice Professor Lilian Tibatemwa Ekirikubinza issued in the case of *Col DR Kizza Besigye v Attorney-General*[100] where, notwithstanding the conjunctive nature of the Ugandan provision, she opined:

> " Annulling of Presidential election results is a case by case analysis of the evidence adduced before the court. Although validity is not equivalent to perfection, if there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election."

207. Be that as it may, the issue as to how section 83 of the *Elections Act* ought to be interpreted by a court of law in determining the validity or otherwise of an election, was later authoritatively settled by this court in *Gatirau Peter Munya v Dickson Mwenda Githinji and 2 others* (2014) eKLR.

208. We are surprised that none of the counsel who canvassed this issue, made any reference to this case. This court, was never in any doubt as to the disjunctive character of section 83. The 7-judge bench was categorical, when stating thus:

> It is clear to us that an election should be conducted substantially in accordance with the principles of the *Constitution*, as set out in article 81(e). Voting is to be conducted in accordance with the principles set out in article 86. The *Elections Act*, and the regulations thereunder, constitute the substantive and procedural law for the conduct of elections... If it should be shown that an election was

[100] *Col DR Kizza Besigye v Attorney-General*, Petition Number 13 of 2009.

> conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election...Where an election is conducted in such a manner as demonstrably violates the principles of the *Constitution* and the law, such an election stands to be invalidated.[Emphasis added.]

209. Therefore, while we agree with the two Lord Justices in the *Morgan v Simpson* case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson's route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word substantially is not in our section, we would infer it in the words if it appears in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the *Constitution*, the *Elections Act* and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called "a sham or travesty of an election" or what Prof Ekirikubinza refers to as "a spurious imitation of what elections should be".

210. Contrary to the submissions for the Law Society of Kenya, we entertain no doubt whatsoever that section 83 of the *Elections Act* applies to the presidential election petitions as it does to all other election disputes. As stated, guided by the principles in articles 10, 38, 81 and 86 as well as the authorities referred to above, we therefore disagree with the respondents, the 2nd interested party as well as the Attorney General that the two limbs in section 83 of the *Elections Act* have to be given a conjunctive interpretation.

211. In our respectful view, the two limbs of section 83 of the *Elections Act* should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our *Constitution* as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our *Constitution* as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

212. Having analyzed the wording of section 83 of the *Elections Act*, bearing in mind its legislative history in Kenya and genesis from the *Ballot Act* and also in light of the need to keep in tune

with Kenya's transformative *Constitution*, it is clear to us that the correct interpretation of the section is one that ensures that elections are a true reflection of the will of the Kenyan people. Such an election must be one that meets the constitutional standards. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the *Constitution*. It is one where the winner of the presidential contest obtains more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties as stipulated in article 138(4) of the *Constitution*. In addition, the election which gives rise to this result must be held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in article 81. Besides the principles in the *Constitution* which we have enumerated that govern elections, section 83 of the *Elections Act* requires that elections be conducted in accordance with the principles laid down in that written law. The most important written law on elections is of course the *Elections Act* itself. That is not all. Under article 86 of the *Constitution*, IEBC is obliged to ensure, *inter alia*, that:

> Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

I. Analysis of Issues for Determination

213. With the above imperative constitutional and legal principles in mind, we would now like to turn to the facts of this case, starting with the first limb of section 83 and in this we shall be analyzing the violations of the principles in the *Constitution* and the electoral law that the petitioners are complaining of.

i. Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the *Constitution* and the written law relating to elections

214. In paragraphs 12 and 13 of the petition, the petitioners allege that in the conduct of the presidential election, IEBC became a law and institution unto itself and so flagrantly flouted the *Constitution* and the written election law on elections that in the end it completely subverted the will of the electorate. In particular, the petitioners urge that the 1st respondent violated the constitutional principles set out in articles 81 and 86 by failing to ensure

that the conduct of the elections was simple, accurate, transparent, verifiable, secure and accountable.

215. In support of their case, the petitioners filed several affidavits setting out what, in their view, were egregious irregularities and illegalities, which, taken together, establish an impregnable case on both limbs of the section to wit: non-compliance with constitutional principles and the written law on election, as well as commission of irregularities which affected the results of the elections. We shall address other illegalities and irregularities later but for now we shall limit ourselves to the question of transmission of results and transmission of unverified results.

216. The petitioners' major complaint in this matter relates to the transmission of the election results. Ole Kina, Godfrey Osotsi and Olga Karani, who were NASA's agents at the National Tallying Centre at Bomas of Kenya, deposed that hardly 10 minutes after polling closed at 5.00 pm on August 8, 2017, the presidential results started streaming in and were beamed on TV screens at the Centre without any indication of where they were coming from. On enquiry, IEBC kept fumbling around, alleging that because of network challenges, images of Forms 34A were not coming in as fast as would be expected and that some might not come in at all. Ole Kina deposed that by the end of 10th August, IEBC had supplied them with only 23,000 Forms 34A and 50 Forms 34B. By the time the results were declared on August 11, 2017, results from over 10,000 polling stations had not been received. In the circumstances, he wondered how the final results declared could be relied upon to validate the election.

217. The petitioners' further case is that the results that were streaming in from August 8, 2017 to 1August 1, 2017 showed a consistent difference of 11% between the results of Uhuru Kenyatta and Raila Odinga. According to the petitioners, such a pattern indicated that the results were not being streamed in randomly from the different polling stations but that they were being held somewhere and adjusted using an error adjustment formula to bring in a pre-determined outcome of results.

218. In a nutshell, the petitioners' claim in this regard is that, on the consideration of the evidence contained in all the affidavits sworn in support of the petition and the submissions made by their counsel, IEBC's conduct of the presidential election was fundamentally flawed and/or incompatible with the electoral values and principles of the *Constitution* including transparency, accountability, accuracy, security, verifiability, and efficiency. They further argue that contrary to sections 39, 44 and 44A of the *Elections Act*, IEBC failed to transmit or to promptly and simultaneously electronically transmit presidential election results from polling stations to the Constituency Tallying Centres (CTC) and National Tallying Center (NTC). According to them, this failure was deliberate, systemic and systematic.

219. The petitioners add that IEBC's Secretary and CEO, Ezra Chiloba, is on record as admitting that as at August 17, 2017 (over 9 days after close of polling) the IEBC was yet to provide all Forms 34A and Forms 34B to the petitioners. And that bearing in mind the mischief sought to be cured by the prompt electronic transmission of results and the constitutional obligation of secure, accurate, verifiable, accountable and efficient elections, the unreasonable delay in the electronic transmission of the results, if at all, as required by section 39(1C) of the *Elections Act*, grossly affected the integrity, credibility and validity of the results purportedly declared by the IEBC, so the petitioners contended.

220. In response, the 1st and 2nd respondents submitted that upon completion of counting of votes, the presiding officers would, using the KIEMS, take an image of Form 34A, manually enter into the KIEMS the results of each candidate and then simultaneously transmit the image and the results directly to the NTC and the CTC.

221. The 1st and 2nd respondents ' case as contained in James Muhati's affidavit is also that, the transmission of results required 3G and 4G mobile network which was provided by three Mobile Network Operators (MNOs), Safaricom, Airtel and Telkom Orange. That following a mapping exercise carried out by the 1st respondent and analysis by the MNOs (he does not say when this was done), it was ascertained that about 11,155 polling stations within the country were not effectively covered by either 3G or 4G network. In that regard, it was their case that the presiding officers in such affected polling stations would then be required to move to points with network coverage or in the alternative, to Constituency Tallying Centres, in order to transmit the results.

222. The 1st and 2nd respondents further urged that even if the electronic transmission of results was not effective as pleaded, the Forms 34A were still physically delivered to the CTC in accordance with the law. They also maintained that the system was not compromised and the results were not in any way manipulated.

223. In conclusion, the respondents urged that the flaws in election transmission of results, if any, cannot be the basis of voiding a presidential election with such a large margin of difference of numbers between the two leading contestants. Counsel for the respondents, the 2nd interested party as well as the 1st amicus curiae, the Attorney-General, submitted that in an election petition, the paramount consideration is to ensure that the will of the majority of the voters carry the day. In their view, flaws in election results transmission cannot be the basis of voiding a presidential election with such a large margin in votes as the one in this case.

224. On our part, having considered the opposing positions, we are of the view that, the contentions by the 1st and 2nd respondents ignore two important factors. One, that elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a

mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes. As Likoti, JF opines [e]lections are not isolated events, but are part of a holistic process of democratic transition and good governance....[101] Incidentally, IEBC's own Election Manual (Source Book)[102] recognizes that an election is indeed a process.

225. There are many other authorities which speak to this proposition. In *Kanhiyalal Omar v RK Trivedi & others*[103] and *Union of India v Association for Democratic Reforms & another*[104], the Supreme Court of India, for example, stated that the word election' is used in a wide sense to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. These stages include voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results.[105] Lady Justice Georgina Wood, the former Chief Justice of Ghana, made the same point and added other stages when she stated:

> " The Electoral process is not confined to the casting of votes on an election day and the subsequent declaration of election results thereafter. There are series of other processes, such as the demarcation of the country into constituencies, registration of qualified voters, registration of political parties, the organization of the whole polling system to manage and conduct the elections ending up with the declaration of results and so on[106]
>
> And according to the European Human Rights Committee, the process also includes the right to challenge the election results in a court of law or other tribunal.[107]

101 Likoti, JF., "*Electoral Managment Bodies as Institutions of Good Giovernance: Focus on Lesotho Independent Electoral Commission*" Vol 13 (1) Review of South African Studies 123-142 (2009) at page 126 (Dahl, R) (1998) *On Democracy*. New Haven CT and London": Yale University Press.)

102 *Election Manual (Source Book)*, 1st Edition, 2017.

103 Supreme Court of India on September 24, 1985; 1986 AIR 111, 1985 SCR Supl. (3) 1.

104 Appeal (Civil) 7178 of 2001.

105 OSCE/ODIHR 2013; '*Guidelines for Reviewing a Legal Framework for Elections* Second Edition at page 70

106 Lady Justice Georgina Wood, "International Standards in Electoral Dispute Resolution" in the Book "*Guidelines for Understanding Adjudicating and Resolving Disputes in Elections,*" Guarde, Edited by Chard Vickery (2011) at page 8.

107 See European Union, "*Compendium of International Standards for Elections*" (4th Edition), Brussels, 2016 Pg 22- 23.

226. Here in Kenya, the issue of elections as a process was discussed in the case of *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others*[108] where the High Court observed that:

> "an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results....The concept of free and fair elections is expressed not only on the voting day but throughout the election process....Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.

227. This case was cited with approval by the Supreme Court in *In the matter of the Gender Representation in the National Assembly and Senate*.[109] Therefore the process of getting a voter to freely cast his vote, and more importantly to have that vote count on an equal basis with those of other voters is as important as the result of the election itself.

228. It is also fact of common notoriety that there were serious protests following the declaration of the 2007 presidential election results. The violence arising from those protests not only claimed over 1000 lives and led to the destruction of and looting of property worth hundreds of millions of shillings, but also drove the entire country to the precipice of destruction. It is also common knowledge that following that violence, the Government formed the Independent Review Commission (IREC), commonly known as the Kriegler Commission, to inquire into the conduct of the 2007 elections and the cause of that violence. One of the critical areas of that Commission's focus was the integrity of vote counting, tallying and announcement of presidential election results. Let the Kriegler Report speak for itself:

> The acceptability of an election depends very considerably on the extent to which the public feel the officially announced election results accurately reflect the votes cast for candidates and the parties. It depends, too, on factors such as the character of the electoral campaign and the quality of the voter register, but reliable counting and tallying is a *sine qua non* if an election is to be considered legitimate

[108] *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others*, Election Petition 12 of 2013; [2013] eKLR.

[109] *In the matter of the Gender Representation in the National Assembly and Senate*, Advisory Opinion 2 of 2012; [2012] eKLR.

> by its key assessors-the voters[110]....The system of tallying, recording, transcribing, transmitting and announcing results was so conceptually defective and executed (sic)...[111] Counting and tallying during the 27-30 December 2007 (and even hereafter) and the announcement of individual results were so confused- and so confusing- that many Kenyans lost whatever confidence they might have had in the results as announced. While integrity is necessary at all stages in the electoral process, nowhere is it more important than in counting and tallying [Emphasis added.]

229. Among the significant recommendations the Kriegler Commission made related to the use of technology in the electoral process. It recommended that:

> ... without delay [the Electoral Commission of Kenya] ECK starts ... [developing] an integrated and secure tallying and data transmission system, which would allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.[112]

230. Pursuant to those recommendations, the process of integrating technology into the conduct of elections was undertaken starting with the use of Biometric Voter Registration (BVR) equipment to register voters on a pilot basis in the run up to the 2010 referendum. In the 2013 elections technology was applied for registration of voters, voter identification and results transmission. However, that did not work very well in the 2013 general election and it was one of the key issues that was raised in the 2013 presidential petition before this court. Consequently, in 2016 the Joint Parliamentary Select Committee on matters relating to the bi- partisan Independent Electoral and Boundaries Commission(IEBC) was formed, discussed the use of technology in elections and made far-reaching recommendations which led, to amongst others, extensive amendments to the *Elections Act* to provide for use of technology and also technology dedicated regulations, the *Elections (Technology) Regulations 2017*.

231. These changes, in our view, were meant to re-align several pieces of election-related legislation, with the principles of the *Constitution* and the electoral jurisprudence that had been developed by the courts. The cumulative effect of these changes was the establishment

110 *Report of the Independence Review Commission on the General Elections Held in Kenya on December 27, 2007*, page 9 (Kriegler Report).

111 *Kriegler Report*, page 9.

112 *Kriegler Report*, page 138.

of what is now referred to as the Kenya Integrated Election Management System (KIEMS). Henceforth, technology would be deployed to the process of voter registration, voter identification and the transmission of results to the Constituency and National Tallying Centres.

232. Towards this end, Parliament enacted section 44 of the *Elections Act*; subsection (1) of which provides that:

> " there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results."

Subsection (3) thereof provides that:

> " the Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

233. Section 39(1C) of the *Elections Act* then squarely addresses the results transmission aspects of these changes in the law. It provides that:

> For purposes of a presidential election the Commission shall-
>
> a. electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the Constituency tallying centre and to the national tallying centre;
>
> b. tally and verify the results received at the national tallying centre; and
>
> c. publish the polling result forms on an online public portal maintained by the Commission.

234. Regarding the voter register, this court in the 2013 *Raila Odinga* decision had observed that there was no single voter register but an aggregation of several parts into one register.

235. To cure this anomaly, Parliament amended section 4 of the *Elections Act* to provide that:

> " There shall be a register to be known as the Register of Voters which shall comprise of–
>
> a. a poll register in respect of every polling station;
>
> b. a ward register in respect of every ward;
>
> c. a constituency register in respect of every constituency;

d. a county register in respect of every county; and

e. a register of voters residing in Kenya."

Section 10 (1) of the *Elections Act* provides that:

> " A person whose name and biometric data are entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station."

Parliament also, introduced a new section 6A to provide inter alia; that:

1. The Commission shall, not later than sixty days before the date of a general election, open the Register for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.

2. The Commission shall, upon expiry of the period for verification specified under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process.

3. The Commission shall, upon expiry of the period for verification specified under subsection(1) publish- ...the Register of Voters online and in such manner as may be prescribed by regulations.

236. All these legislative enactments have one objective; to ensure that in conformity with the *Constitution*, the elections are free, fair, transparent and credible.

257. It is important to note that the terms simple, accurate, verifiable, secure, accountable and transparent engrafted into these provisions, are the selfsame constitutional principles in articles 10, 38, 81 and 86. We must in that context now proceed, to determine whether, the 1st respondent, conducted the presidential election in accordance with the principles laid down in the *Constitution* and the law.

The Mystery of Forms 34A and the conundrum of electronic transmission

238. By far, the most critical and persistently claimed non-compliance with the law, was that the 1st respondent announced results on the basis of Forms 34B before receiving all Forms 34A. It was also alleged that the results announced in Forms 34B were different from those displayed on the 1st respondents' Public Web Portal. This was contrary to section 39 (1C) of the *Elections Act*. The petitioners also argued that the non-compliance was in violation of Articles 81(e) and 86 of the *Constitution*. The non-compliance also went contrary to the Court of Appeal's decision in *Maina Kiai*. The petitioners also claimed that many results were transmitted from the polling stations unaccompanied by the scanned image of Form

34A, contrary to section 39 (1C) of the *Elections Act* as read together with sections 44, and 44 (A) of the *Act*.

239. In response, the 1st respondent submitted that the difference in the results announced on the Forms and the Public Web Portal did not offend any law or regulation in view of the fact that the results in the forms were final, while the results on the Public Web Portal were mere statistics. Mr Nyamodi, counsel for the 1st respondent also submitted that in view of the Court of Appeal's decision in *Maina Kiai*, the system of transmission had to be reconfigured to allow for manual transmission. Counsel explained that the source document that the 1st respondent relied on to do so was no longer Form 34A but Form 34B.

240. Likewise, counsel submitted, a similar fate had befallen the Form 34C in terms of format and structure. Towards this end, counsel informed the court that the original Form 34C which had contained a Form 34A tally was reconfigured by the first respondent to exclude that tally so as to conform to the decision of the appellate court in *Maina Kiai*.

241. As for the controversy surrounding the electronic transmission of results, counsel submitted that such transmission, was a mere conveyance belt and nothing more. To this, Mr Ngatia, counsel for the 3rdrespondent would later add that, the electronic transmission with which the petitioner was obsessed was like a matatu and no more. What was important, counsel urged, was what was conveyed (meaning, the results) as opposed to the manner in which it was conveyed (meaning the electronic transmission).

242. The 1st respondent also submitted that the security feature of the Kenya Integrated Electoral Management System (KIEMS) was programmed to capture and transmit only one image. In some instances, Text Data was transmitted instead of the filled and scanned Forms 34A. At any rate, argued the 1st respondent, the omission of un-transmitted forms, was cured by uploading the said forms, onto the Public Portal. According to the IEBC, the transmission of the wrong images did not affect or invalidate the result contained in the statutory Forms 34A. Later, it was argued, access to the scanned forms was granted to the public through Website.

243. Still on transmission of results, the petitioners highlighted various discrepancies, for instance that there was transmission of results from slightly more than 11,000 polling stations other than gazetted polling stations contrary to Regulation 7. It was also alleged that the streaming of results commenced a few minutes after 5.00 pm. being the official closing time for all polling stations. In addition, the petitioners questioned the streaming of results in constant percentages of 54% and 44% in favour of the 3rdrespondent and the 1st petitioner, respectively.

244. The petitioners further claimed that there were numerous discrepancies between the results declared in Forms 34A and those in Forms 34B from various polling stations across the

Country, contrary to section 39 of the *Elections Act*, as read with regulation 82 thus compromising the integrity of the election.

245. In response, the 1st and 2nd respondents, countered the accuracy in some of the allegations by providing contrary figures through a number of deponents. However, the said respondents also admitted that indeed there were discrepancies in the results in Forms 34A and Forms 34B spread across the Country but attributed them to human errors and fatigue of election officials. They further contended that the discrepancies in question did not affect the result of the election.

246. The 1st and 2nd respondents added in further response, that the 11, 155 polling stations from which the impugned results were streamed were in areas which were not served by 3G and 4G network coverage.

247. The petitioners' case, and the responses thereto by the respondents, have conjured in our minds, a puzzle of labyrinthine proportions regarding Forms 34A. In the face of a very clear and unambiguous section 39(1C) of the *Elections Act*, what went wrong with this critical document" The case for the petitioners is that the 2nd respondent, in exercise of his responsibility as the returning officer of the presidential election, declared the results for the election of president before receiving all the Forms 34A from the 40,883 polling stations from across the country. Incomplete results, argued Mr Otiende Amollo for the petitioners, could not be a basis for a valid declaration. The respondents' answer to that assertion is that the results were declared on the basis of Forms 34B all of which had been received by the time the declaration was made.

248. In an affidavit sworn by Koitamet Ole Kina, in support of the petition, there is telling correspondence which we had referred to earlier but which we reproduce in the present context. On the 10th of August 2017, the deponent, acting on behalf of the petitioners, wrote to the 2nd respondent in the following words:

> "Your brief on the above subject at Bomas on August 10, 2017 at around 9:00 pm refers. You informed Kenyans and the world at large that IEBC had received over 40000, Forms 34 A and about 170 Forms 34B. We have requested IEBC for all these forms for purposes of verification. Members of your secretariat have informed us that they can only avail 29000 Forms 34A as at 11pm of August 10, 2017. We kindly request the Commission expedite (sic) release of the remaining Forms 34A &B to enable us complete the verification exercise."

249. Again on August 14, 2017, the deponent wrote:

> " This is a follow up on our letter dated August 10, 2017. Until now, IEBC has only furnished NASA with 29000 forms 34 A and 108 forms 34B. We urgently require the unsupplied ten thousand (10000) forms 34A and one hundred and eighty seven (187) forms 34 B to complete the list of documents the Commission was supposed to release to all the candidates in the just concluded general elections. Attached please find a list of the outstanding 187 constituencies for your immediate action.

250. On August 14, 2017, the Secretary and CEO of the 1st respondent wrote;

> " Reference is made to your letter dated August 14, 2017 requesting to be supplied with the remaining forms that were not supplied earlier. The Commission is in a position to provide all the required form 34Bs immediately. We are however not able to supply form 34As at the moment but the same shall be availed to you as soon as possible."

251. It is a fact that the correspondence quoted above did take place, and the contents of the said correspondence were never controverted. On this basis, a number of questions arise:

> " a. Why was the 1st respondent not able to immediately supply the petitioners' agents with all the Forms 34 B upon declaration of results if as it was submitted, the said results were based on the same, and all of which were said to have been available"
>
> b. Why was the 1st respondent not able to supply all the Forms 34 A (said to be around 11,000) to the petitioners as at August 14, 2017; (4) days after the declaration of results"
>
> c. Were all the scanned copies of Forms 34A electronically transmitted to the National Tallying Centre simultaneously with those transmitted to the Constituency Tallying Centre in accordance with section 39(1C) of the *Elections Act*" If so, why would it have been impossible for the 1st respondent to avail those copies to the petitioners" If not, why were they not transmitted in the manner required by the law"

252. We sought answers to these questions as we listened to the submissions of counsel on the emerging conundrum. The submissions of Mr Nyamodi, on behalf of the 1st respondent,

made disturbing if not startling revelations. According to counsel, the 1st respondent used Forms 34B as opposed to Forms 34A to declare the final results of the presidential election. He emphasized that at the time the final results of the presidential election were declared, all Forms 34B had been collated. It was counsel's submission that, the declaration of sections 39 (2) and (3) of the *Elections Act, 2011* by the Court of Appeal as being inconsistent with the *Constitution*, curtailed the 1st respondent's ability to change, amend or alter the results transmitted from the Constituency. According to him therefore, the decision of the Court of Appeal in the *Maina Kiai* case extinguished the concept of provisional results.

253. Consequently, the numbers manually entered into the KIEMS kit at the close of polling, and transmitted simultaneous to the CTC and the NTC, bore no status in law. They were mere statistics, although, as Mr Muhati stated in his affidavit, the presiding officer had to show the agents present the entries made for confirmation before transmission.

254. Mr Nyamodi further explained that the completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage. In respect of areas lacking 3G or 4G network coverage, the respondents established alternative mechanisms to ensure completion in transmission of the image of the Form 34A. The procedure adopted in the transmission and tallying of results of the presidential election was in conformity with the decision of the Court of Appeal in the Maina Kiai case.

255. On the basis of this process, Counsel submitted that the petitioners' allegation that the 1st respondent deliberately pre-determined and set itself on a path of subverting the law by being a law unto itself, was unfounded. In addition, Counsel submitted that the determination by the Court of Appeal on the finality of presidential election results declared by the constituency returning officer also changed the structure of Form 34C. Regulation 87(3)(b) for avoidance of doubt provides that: upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the Commission shall tally and complete Form 34C. However, the 1st respondent had to allegedly modify Form 34C to reflect the entry of Forms 34B, which was the Form declared by the Court of Appeal to be the source document to determine the winner of a Presidential election, instead of Forms 34A.

256. Mr Nyamodi concluded by reaffirming that the way the 1st respondent structured its transmission system, was largely based on the Court of Appeal's decision in the *Maina Kiai* case which did not interfere with or negate the will of the people resident in Form 34A.

257. What was Mr Nyamodi saying

> "We were left to ask. Was counsel admitting that the 2nd respondent indeed as claimed by the petitioners, had declared the presidential results without having

> received all Forms 34A" Was he in the same vein also admitting that not all Forms 34A had been electronically transmitted to the National Tallying Centre from the polling centres as required by law" Where did the language of statistics as opposed to results emerge from" Was counsel disclosing the fact that fundamental changes had been made to the KIEMS system at the sole discretion of the 1st respondent without reference to all the players in the presidential election contest"

258. Be that as it may, Mr Nyamodi persistently argued that the conduct by the 1st and 2nd respondents, to wit; of declaring results solely based on Forms 34B without reference to Forms 34A; of not scanning all Forms 34A and simultaneously transmitting them to the NTC; of reconfiguring Form 34C to exclude the Form 34A tally and only include the Forms 34B tally; of introducing the language of statistics as opposed to results; that all these actions, were necessitated, nay, required by the decision of the Court of Appeal in the *Maina Kiai* decision.

259. We were at pains to understand how the Court of Appeal decision in that case, could have provided a judicial justification for the conduct of the 1stand 2nd respondents. The Attorney General, appearing as amicus curiae, having been so admitted, and despite having been clearly restrained from submitting on the so called impact of the *Maina Kiai* decision, also appeared to suggest, in his closing remarks that somehow, the Appellate Court's decision in that case, had changed the landscape of the conduct of elections in the Country.

260. In the above context, we reiterate that the main questions that this Court has to grapple with at this stage are:

a. Whether the 2nd respondent declared the results of the presidential election before he had received all the results tabulated on Forms 34A from all the polling stations.

b. Whether all the Forms 34A had been electronically transmitted from the polling stations to the National Tallying Centre.

261. We have read the extensively reasoned and powerfully rendered decision by the Court of Appeal in *Maina Kiai*. We find nowhere in that decision where, the learned judges of appeal suggested, or even appeared to suggest that by affirming the High Court's decision which had declared section 39 (2) and (3) of the *Elections Act*, unconstitutional, the Court of Appeal, somehow for unstated reasons, lent judicial imprimatur to the 1st and 2nd respondent to either circumvent, or simply ignore the provisions of section 39(1C) of the *Elections Act*. On the contrary, the appellate court's decision was an unstinting reaffirmation, if not a restatement of the letter and spirit of the constitutional principles embodied in articles 81, 86, and 138 (3) (c), relating to the conduct of elections. And we have shown why that is so.

262. Section 39(1C) of the *Elections Act* for avoidance of doubt provides that:

> " For purposes of a presidential election, the Commission shall-
>
> a. Electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;
>
> b. Tally and verify the results received at the national tallying centre ; and
>
> c. Publish the polling result forms on an online public portal maintained by the Commission.

263. Clearly, with this provision in mind, the Court of Appeal in *Maina Kiai* decision, was categorical as it rendered itself thus:

> " We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers (read 1st respondent) can vary or even purport to verify those results..."

Further, the Court of Appeal stated thus:

> " The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of president electronically transmitted to it from the near 40,000 polling stations, is required to tally and verify the results..."

265. The appellate court had earlier made a pronouncement with which we are in total agreement, to the effect that:

> " It is clear ...that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion."

266. Given this very clear elucidation of the law regarding the imperative for electronic transmission of results from the polling station to the NTC, how could the Court of Appeals' decision in Maina Kiai have provided a justification for declaring the results of the election of the president without reference to Forms 34A" How was it a basis for the

reconfiguration of Form 34C so as to render Forms 34A irrelevant in the final computation of the results" But most critically, how did the Court of Appeal's decision relieve the 1st respondent from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the president from a polling station to the CTC and to the NTC in accordance with section 39(1C) of the *Elections Act*"

267. At the end of the day, neither the 1st nor the 2nd respondent had offered any plausible response to the question as to whether all Forms 34A had been electronically transmitted to the NTC as required by section 39 (1C) of the *Elections Act*. What remained uncontroverted however, was the admission by Ezra Chiloba, that as of August 14, 2017, three days after the declaration of results, the 1st respondent was not in a position to supply the petitioner with all Forms 34A. Counsel for the 1st and 2nd respondents, by insisting that the presidential results were declared on the basis of Forms 34B, all of which were available, also implicitly admitted that not all Forms 34A were available by the time the 2nd respondent declared the final results for the election of the president.

268. In addition to the above and relevant to this aspect of the petition, pursuant to an application by the petitioners, the court issued an order requiring the 1st respondent to supply the petitioners and the 3rdrespondent with all the scanned and transmitted Forms 34A and 34B from all the 40, 883 polling stations on a read only basis with the option to copy in soft version. Had the court's order been complied with, it would have unraveled the mysterious puzzle surrounding Forms 34A. Regrettably, according to the information made available to court, by its appointed experts, the 1st respondent only allowed read-only access to this information without the option to copy in soft version only two hours to the closure of court proceedings which never fully happened anyway. By this time however, the puzzle had been unraveled in the mind of the court and we shall shortly explain why.

268. In any event, it is claimed in the petition, and IEBC in its response conceded, that two days to the election date, IEBC announced that it was going to be unable to electronically transmit results from 11,000 polling centres because they were off the range of 3G and 4G network. Consequently, its officers would have to move to spots where they could get network to be able to transmit. Come the election date on August 8, 2017, IEBC claimed it was unable to transmit results from those stations. According to submissions by counsel for IEBC, such inhibition set in place the use of a complementary system of transmission of results envisaged under section 44A of the *Elections Act*, which is in essence the physical delivery of Forms 34A to the CTC and hence the delay in the declaration of results from those polling stations.

269. With tremendous respect, we cannot accept IEBC's said explanation. Failure to access or catch 3G and/or 4G network, in our humble view, is not a failure of technology. Surely IEBC's ICT officials must have known that there are some areas where network is weak or totally lacking and should have made provision for alternative transmission. It cannot have

dawned on IEBC's ICT officials, two days to the elections, that it could not access network in some areas.

270. In stating so, we note that under regulations 21, 22, and 23 of the *Elections (Technology) Regulations 2017*, IEBC was required to engage a consortium of telecommunication network service providers and publish the network coverage at least 45 days prior to the elections. In that regard, we take judicial notice of the fact that, in one of its press briefings preceding the elections, IEBC assured the country that it had carefully considered every conceivable eventuality regarding the issue of the electronic transmission of the presidential election results, and categorically stated that technology was not going to fail them. IEBC indeed affirmed that it had engaged three internet service providers to deal with any network challenges. We cannot therefore accept IEBC's explanation of alleged failure of technology in the transmission of the presidential election results. The so-called failure of transmission was in our view a clear violation of the law.

271. In any case, in his affidavit, Mr Muhati, IEBC's ICT director, as stated, averred that in polling stations off the range of 3G and 4G network coverage, Presiding Officers (POs) were instructed to move to points with network coverage or to the Constituency Tallying Centres in order to electronically transmit results. It is important to note that once the POs, who were off the network range, scanned the results into Forms 34A and typed the text messages of the same into the KIEMS and pressed the submit key, a process IEBC told the country was irreversible, all that remained was for the POs to move to vantage points where 3G or 4G network would be picked and the details could automatically be transmitted in seconds.

272. As is also clear from the information posted in IEBC's website, among the 11,0000 polling stations IEBC claimed were off the 3G and 4G range are in Bomet; Bungoma; Busia; Homa Bay; Kajiado; Kericho; Kiambu; Kisumu; Kisii; Kirinyaga; Nyeri; Siaya; and Vihiga Counties. It is common knowledge that most parts of those Counties have fairly good road network infrastructure. Even if we were to accept that all of them are off the 3G and/or 4G network range, it would take, at most, a few hours for the POs to travel to vantage points from where they would electronically transmit the results. That they failed to do that is in our view, an inexcusable contravention of section 39(1C) of the *Elections Act*.

273. We further note that at the time of declaration of results, IEBC publicly admitted that it had not received results from 11,883 polling stations and 17 constituency tallying centres; that in its letter of August 15, 2017, IEBC also admitted that it had not received authentic Forms 34A from 5,015 polling stations representing upto 3.5 million votes.

274. Dr Aukot, the 1st interested party, in the above context echoed the petitioners' case that the whole process of counting, tallying and transmission of results from polling stations to the CTC and finally to the NTC lacked fairness and transparency. That IEBC itself admitted

that it had network problems which hindered its prompt transmission of results but by the time of announcement of results, transmission had been completed.

275. What was IEBC's answer to the above contention" In his submissions before us, Mr Nyamodi, learned counsel for IEBC outlined to the court the mode of the transmission process of the results and submitted that after the manual filling in of the Form 34A, the POs then keyed in the results into the KIEMS kit, took the image of the Form 34A and then simultaneously transmitted the same to the Constituency and National Tallying Centres. Our understanding of this process is that the figures keyed into the KIEMS corresponded with those on the scanned images of Forms 34A. In the circumstances, we do not understand why those figures, which learned counsel referred to as mere statistics that did not go into the determination of the outcome of the results, differed.

276. In these circumstances, bearing in mind that IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election especially on the transmission of the presidential election results and it failed to discharge that burden.

277. Of further note is that IEBC strenuously opposed the petitioners' application for access to its servers, claiming that such access would compromise the security of the data in those servers. After considering the application, we overruled that objection and partly allowed the application. Though we did not therefore accept IEBC's said claim of compromising the security of its servers, considering the fact that having spent billions of taxpayers' money IEBC should have set a robust backup system, nevertheless to assuage those fears, we granted the petitioners a read only access which included copying where the petitioners so wished. The report from the court appointed IT experts, Professor Joseph Sevilla and Professor Elijah Omwenga, holders of PhDs on IT and lecturers in Strathmore and Kabianga Universities respectively, shows clear reluctance on the part of IEBC to fully comply with this court's order of August 28, 2017 to provide the information requested.

278. In summary the following are the items that were not availed to the petitioners; the 3rd respondent and the court.

a. Firewalls without disclosure of the software version. IBEC refused to provide information on internal firewall configuration contending that doing so would compromise and affect the vulnerability of their system. The court appointed ICT Experts disagreed with that contention and said it was difficult to ascertain whether or not there were any hacking activities;

b. IEBC was also required to provide Certified copies of the certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 election pursuant to Regulation 10 of the *Elections (Technology) Regulations*

2017. These were not provided. Instead IEBC issued uncertified documents and certificates by professionals which did not conform to that Regulation;

c. IEBC was also required to provide Specific GPRS location of each KIEMS kit used during the presidential election for the period between August 5, 2017 and August 11, 2017. This was not provided. IEBC instead provided the GPS locations for the polling stations which was never ordered to be granted;

d. Documents for allocated and non-allocated KIEMS kits procured was provided. However, the information on whether the kits were deployed or not was incomprehensive;

e. The court ordered access to Technical Partnership Agreements for IEBC Election Technology System including a list of technical partners, kind of access they had and list of APIs for exchange of data with partners. The documents were issued with the exception of the list of APIs. The court appointed ICT Experts said full information on APIs would have enabled determination of what kind of activities may have taken place;

f. The court had also ordered IEBC to provide the petitioners with the log in trail of users and equipment into the IEBC servers, the log in trails of users and equipment into the KIEMS database Management systems and the administrative access log into the IEBC public portal between August 5, 2017 to date (being the date of the court order which was on August 28, 2017). These were also not provided. Instead, IEBC provided pre-downloaded logs in a hard disk whose source it refused to disclose. The IT experts agreed with the petitioners' contention that the 1st respondent should have demonstrated that the logs emanated from IEBC servers by allowing all parties to have Read Only Access. Alternatively, the 1st respondent could have accessed the information in the presence of the petitioners' agents. Partial live access was also only purportedly provided on August 29, 2017 at about 3.50pm without ability to access the logs or even view them. The exercise was therefore a complete violation of the court order and the access was not useful to the parties or the court.

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.[113] In this case, IEBC's contumacious disobedience of this court's order of August 28, 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.

281. The petitioners also made claims that some Forms 34A supplied to them did not relate to any of the existing gazetted polling station/tallying centres; that while 15,558,038 people voted for the presidential candidates, 15,098,646 voted for gubernatorial candidates and 15,008,818 voted for Members of Parliament (MPs) raising questions as to the validity of the extra votes in the presidential election. No satisfactory answer was given to the latter issue and we must also hold the 1st respondent responsible for that unexplained yet important issue.

282. Having therefore shown that the transmission of results was done in a manner inconsistent with the expectations of section 39(1C) of the *Elections Act*, we must of necessity return to the principles in articles 81 and 86 of the *Constitution* which we have already reproduced. Of importance are the expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process. These terms should be understood to refer to:

a. an accurate and competent conduct of elections where ballots are properly counted and tabulated to yield correct totals and mathematically precise results;

b. an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media;

c. a secure election whose electoral processes and materials used in it are protected from manipulation, interference, loss and damage;

d. an accountable election, whose polling station, constituency and national tallies together with the ballot papers used in it are capable of being audited; and

113 *CMAWM v PAWM*, Civil Appeal 2 of 2014; [2014] eKLR (CA).

e. a transparent election whose polling, counting and tallying processes as well as the announcement of results are open to observation by and copies of election documents easily accessible to the polling agents, election observers, stakeholders and the public and, as required by law, a prompt publication of the polling results forms is made on the public portal.

283. Verifiability must have had strong significance in the 8th August election, because the presiding officers were required to verify the polling station's results in the presence of polling agents before sending them to the CTC and NTC using the KIEMS KIT. The Maina Kiai decision, made it clear that Form 34A being the primary document, becomes the basis for all subsequent verifications.

284. We have already addressed the import of the refusal to obey a court order and we further note that the whole exercise of limited access to the 1st respondent's IT system was meant to conform and verify both the efficiency of the technology and also verify the authenticity of the transmissions allegedly made to the CTC and NTC. Non-compliance and failure, refusal or denial by IEBC to do as ordered, must be held against it.

285. What of article 138 (3) (c) of the *Constitution*" It provides that:

> "in a presidential election- after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result."

287. The critical element here is the duty placed upon the Commission to verify the results before declaring them. To ensure that the results declared are the ones recorded at the polling station. Not to vary, change or alter the results.

288. The duty to verify in article 138 is squarely placed upon the Independent Electoral and Boundaries Commission (the 1st respondent herein). This duty runs all the way, from the polling station to the constituency level and finally, to the National Tallying Centre. There is no disjuncture in the performance of the duty to verify. It is exercised by the various agents or officers of the 1st respondent, that is to say, the presiding officer at a polling station, the returning officer at the constituency level, and the Chair at the National Tallying Centre.

289. The verification process at all these levels is elaborately provided for in the *Elections Act* and the regulations thereunder. The simultaneous electronic transmission of results from the polling station to the Constituency and National Tallying Centre, is not only intended to facilitate this verification process, but also acts as an insurance against, potential electoral fraud by eliminating human intervention/intermeddling in the results tallying chain. This,

the system does, by ensuring that there is no variance between, the declared results and the transmitted ones.

290. In the presidential election of August 8, 2017 however, the picture that emerges, is that things did not follow this elaborate, but clear constitutional and legislative road map. It has been established that at the time the 2nd respondent declared the final results for the election of the President on August 11, 2017, not all results as tabulated in Forms 34A, had been electronically and simultaneously transmitted from the polling stations, to the National Tallying Centres. The 2nd respondent cannot therefore be said to have verified the results before declaring them.

291. The said verification could only have been possible if, before declaring the results, the 2nd respondent had checked the aggregated tallies in Forms 34B against the scanned Forms 34A as transmitted in accordance with section 39 (1C) of the *Elections Act*. Given the fact that all Forms 34 B were generated from the aggregates of Forms 34A, there can be no logical explanation as to why, in tallying the Forms 34B into the Form 34C, this primary document (Form 34A), was completely disregarded.

292. Even if one were to argue, which at any at rate, is not the case here, that the verification was done against the original Forms 34A from all the polling stations, which had been manually ferried to the tallying centre, this would still beg the question as to where the scanned forms were, and why the manually transmitted ones, arrived faster than the electronic ones.

293. The failure by the 1st respondent to verify the results, in consultation with the 2nd respondent, before the latter declared them, therefore went against the expectation of article 138(3)(c) of the *Constitution*, just as the failure to electronically and simultaneously transmit the results from all the polling stations to the National Tallying Centre, violated the provisions of section 39 (1C) of the *Elections Act*. These violations of the *Constitution* and the law, call into serious doubt as to whether the said election can be said to have been a free expression of the will of the people as contemplated by article 38 of the *Constitution*.

294. It was further urged in court by a number of counsel for the 1st and 2nd respondent, that by disregarding Forms 34A, and exclusively relying on Forms 34B (many of whose authenticity would later be called into question), in the tallying process, the said respondents were simply complying with the Court of Appeal's decision in *Maina Kiai*. We have already held, that we find little or nothing in this decision, to suggest that, by deciding the way it did, the appellate court restrained or barred the 1st respondent from verifying the results before declaring them, or that it was relieving the former from the statutory duty of electronically transmitting the results. What the 2nd respondent was barred from doing by the Court of Appeal and the High Court, was to vary, alter, or change the results relayed to the National Tallying Centre from the polling stations and Constituency Tallying Centres, under the guise of verifying.

295. But be that as it may, how spectacularly re-assuring to the Kenyan people would it have been if the 2nd respondent, on that night of August 11 2017, had commenced the declaration of the results, with these words:

> Fellow Kenyans, the results I am about to declare, are exclusively based on Forms 34B which I have received from all the 290 constituency tallying centres country-wide. I have not verified these results against those tabulated on Forms 34A from all the 40,800 polling stations countrywide. This may sound strange, but I am simply doing this in compliance with the Court of Appeal's decision in *Maina Kiai*. This decision by the appellate court requires me to treat the results as tabulated by the various returning officers, as final and not to attempt, to verify them against the electronically transmitted Forms 34A. You will therefore, have to bear with me, as court orders must at all times, be obeyed. However, all hope is not lost, since I have availed all the Forms 34A on our Public Portal. Any candidate, election observer, or member of the public, is free to download these forms and compare the results thereon against the ones I am about to declare. If such an exercise should reveal serious discrepancies, then one can petition the Supreme Court to scrutinize them, and even annul them, since the Supreme Court has original and exclusive jurisdiction over such disputes...

295. He failed to do the above and apart from the duty to verify, the 1st respondent also has the responsibility to ensure that the system of voting, counting and tallying of results is verifiable. This is in conformity with article 86 of the *Constitution* which requires that:

> At every election, the Independent Electoral and Boundaries Commission shall ensure that-
>
> a. whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
>
> b. the votes cast are counted, tabulated, and the results announced promptly by the presiding officer at each polling station;
>
> c. the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
>
> d. appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of elections materials.

296. This provision places upon the 1st respondent the onerous responsibility of devising and deploying election systems that the voter can understand. The 1st respondent must further

be expected to provide access to crucial information that can enable, either a candidate, or a voter to cross check the results declared by it with a view to determining, the integrity and accuracy thereof. In other words, the numbers must just add up.

297. We note in the above regard, that even where Parliament found it necessary to make provision for a complementary system, it would not escape from the dictates of article 86 of the *Constitution*. Hence, section 44A of the *Elections Act* provides:

> Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for the identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of article 38 of the *Constitution*.

298. When called upon to explain why all the Forms 34A had not been scanned, transmitted and published on an online portal, in line with article 39 of the *Elections Act*, the 1st respondent, through counsel, alluded to some form of complementary mechanism. However, the description of such a mechanism did not appear to us to meet the yardsticks of verifiability inbuilt in the *Constitution* and section 44A of the *Elections Act*.

299. In their submissions, counsel for the respondents and the 2nd interested party urged us not to annul the election on the basis of minor inadvertent errors. We entirely agree. We have already categorically acknowledged the fact that no election is perfect. Even the law recognizes this reality. But we find it difficult to categorize these violations of the law as minor inadvertent errors. IEBC behaved as though the provisions of sections 39, 44 and 44A did not exist. IEBC behaved as though the provisions of article 88 (5) of the *Constitution* requiring it to ...exercise its powers and perform its functions in accordance with the *Constitution* and the national legislation did not exist. IEBC failed to observe the mandatory provisions of article 86 of the *Constitution* requiring it to conduct the elections in a simple, accurate, verifiable, secure, accountable and transparent manner. Where is transparency or verifiability when IEBC, contrary to articles 35 and 47 of the *Constitution*, worse still, in contumacious disobedience of this court‘s order, refuses to open its servers and logs for inspection"

300. Having therefore carefully considered all the affidavit evidence, and submissions of counsel for all the parties, we find and hold, that, the petitioners herein have discharged the legal burden of proving that the 2nd respondent, declared the final results for the election of the president, before the 1st respondent had received all the results from Forms 34A from all the 40,883 polling stations contrary to the *Constitution* and the applicable electoral law. We also find and hold that, the 2nd respondent, declared, the said results solely, on the basis of Forms 34B, some of which were of dubious authenticity. We further find that the 1st respondent in

disregard of the provisions of section 39 (1C), of the *Elections Act*, either failed, or neglected to electronically transmit, in the prescribed form, the tabulated results of an election of the president, from many polling stations to the National Tallying Centre.

301. At this juncture, we must restate that, no evidence has been placed before us to suggest that, the processes of voter registration, voter identification, manual voting, and vote counting were not conducted in accordance with the law. As a matter of fact, nobody disputes the fact that on August 8, 2017, Kenyans turned out in large numbers, endured long hours on queues and peacefully cast their votes. However, the system thereafter went opaquely awry and whether or not the 3rd respondent received a large number of votes becomes irrelevant because, read together, sections 39(1C) and 83 of the *Elections Act* say otherwise.

302. In passing only, we must also state that whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before us points to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports cannot therefore be used to authenticate the transmission and eventual declaration of results.

303. For the above reasons, we find that the 2017 presidential election was not conducted in accordance with the principles laid down in the *Constitution* and the written law on elections in that it was, inter alia, neither transparent nor verifiable. On that ground alone, and on the basis of the interpretation we have given to section 83 of the *Elections Act*, we have no choice but to nullify it.

ii. Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election and if in the affirmative, what was their impact, if any, on the integrity of the election"

304. While the impugned election was conducted in violation of relevant constitutional principles, the same was also alleged to have been fraught with illegalities and irregularities that rendered its result unverifiable and thus indeterminate. Illegalities refer to breach of the substance of specific law while irregularities denote violation of specific regulations and administrative arrangements put in place.

305. The petitioners in that context claim that the August 8, 2017 presidential election, was conducted in an environment characterized by many systematic and systemic illegalities and irregularities that fundamentally compromised the integrity of the election, contrary to the principles laid down in the *Constitution*. The alleged illegalities and irregularities, ranged from blatant non-compliance with the law, to infractions of procedure, some of which were requirements of the laws and regulations relating to the election, while others, had been put in place by the 1st respondent, for the management of the elections.

(a) Illegalities Allegations of Undue Influence, Bribery and voter intimidation

306. In addressing the above issue, at paragraph 37 of his supporting affidavit, Raila Odinga deposed that the 3rdrespondent, Uhuru Kenyatta, brazenly violated section 14 of the *Elections Act* (he must have meant section 14 of the *Election Offences Act*) by advertising and publishing in the print and electronic as well as on billboards, achievements of his government. Section 14 of the *Election Offences Act* provides that:

> No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.

307. This prohibition is clearly what article 81(e)(ii) refers to as improper influence. In our view, the rationale behind this prohibition, in the context of this case is that whatever achievements the current government may have made, resulting from expenditure of public funds, should not be taken advantage of by the government as a campaign tool.

308. Further, section 14(1) and (2) of the *Election Offences Act* provides:

1. Except as authorized under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.

2. No government shall publish any advertisements of achievements of respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.

309. In response to the allegations of improper influence‘ and misuse of public resources, the 3rdrespondent submitted that the petitioners had not adduced evidence showing the particulars of such sponsorship and that in any case, it is the mandate of the Presidential Delivery Unit to enhance the accountability of a government to its citizens by availing any information relating to ongoing projects.

310. We note in the above regard that the 1st petitioner has not attached any material evidence to support his proposition. That being the case, we are unable to make any determination on this issue for lack of material particulars. Furthermore, the 3rdrespondent submitted that the question whether he was allegedly sponsoring the advertisement of the government‘s achievement in the print and electronic media is pending at the High Court in the case of *Apollo Mboya v the Attorney-General and 3 others*[114] and *Jack Munialo & 12 others*

[114] *Apollo Mboya v the Attorney-General and 3 others*, Petition 162 of 2017.

v the Attorney-General & the Independent Electoral and Boundaries Commission[115]. The petitioners did not contest this averment and in this regard as we have previously held, we cannot adjudicate on an issue which is still the subject of judicial determination at the High Court. Our advisory opinion in the matter of *In Re The Matter of the Interim Independent Electoral Commission*[116], succinctly speaks to this point:

> The two cases seek the interpretation of the *Constitution*, with the object of determining the date of the next elections. Those petitions raise substantive issues that require a full hearing of the parties; and those matters are properly lodged, and the parties involved have filed their pleadings and made claims to be resolved by the High Court. To allow the application now before us, would constitute an interference with due process, and with the rights of parties to be heard before a court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. This is a situation in which this court must protect the jurisdiction entrusted to the High Court.

311. Further to the above finding, we also note the petitioners' further contention that the 1st respondent failed to act on the 3rdrespondent's alleged violation of the law by his misuse of public resources. In response, the 2nd respondent stated that he wrote a letter dated June 21, 2017, informing the Director of Public Prosecutions (DPP) about the alleged misconduct of the 3rdrespondent. The said letter is attached to the Affidavit sworn by Wafula Chebukati, and it reads as follows:

> "...In accordance with section 14 of the Election Offences Act, 2016, the Commission published a notice in the press advising candidates against the use of public resources in campaigns. The demised notice required all candidates who are current members of Parliament, county governors, deputy governors and members of the county assembly to declare the facilities attached to them, or any equipment normally in the custody of the candidate by virtue of such office.
>
> Following that publication, the Commission has received declaration from only twelve candidates...in that regard, any other person using the state resources other than those registered with the Commission are committing offences to which, upon sufficient evidence being gathered, should be prosecuted swiftly. This applies to Governors, Senators, Members of the National Assembly, Members

115 *Jack Munialo & 12 Others v the Attorney-General & the Independent Electoral and Boundaries Commission*, Petition 182 of 2017.

116 *In Re The Matter of the Interim Independent Electoral Commission*, Reference 2 of 2011; [2011] eKLR.

> of the County Assembly and Women Members of the National Assembly. [Emphasis added.]

312. We note further that upon considering the contents of the above letter, and contrary to submissions by the 1st and 2nd respondents, the above letter did not apply to the holder of the office of the presidency in which category the 3rdrespondent falls. Furthermore, we note that section 14(3) of the *Election Offences Act* which provides for the Commission's enforcement powers, does not apply to persons holding the office of the President. For clarity section 14(3) provides:

> For the purposes of this section, the Commission shall, in writing require any candidate, who is a Member of Parliament, a county governor, a deputy governor or a member of a county assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office.

313. Having that in mind and fortified by our observation that the interpretation of section 14 of the *Election Offences Act* is a live matter at the High Court, we are unable to address our minds into any allegation that touches on this section. That is the end of that matter.

314. We further note, in paragraph 34 of his said affidavit, Raila also claimed that while campaigning in Makueni County on August 2, 2017, President Uhuru Kenyatta threatened Chiefs in the area with dire consequences if he won for failure to campaign for him. That such an action also goes against article 81(e)(ii) of the *Constitution* which outlaws intimidation in the electioneering process. In proof of this assertion, the petitioners have attached transcripts of video evidence in the supplementary affidavit sworn by Ms Ogla Karani, detailing the allegedly offending words spoken by the 3rdrespondent. The said words reads as follows:

> " *...Naona walipewa kazi na wale wengine wajue pikipiki wanatumia allowances wanaopata wajue ni za Jubilee. Wenzenu walikuwa wanawafukuza. Tutaonana na nyinyi baada ya uchaguzi tunaelewana wazee tutakuwa na nyinyi, usione sisi hatujui nini inaendelea dunia hii, tunaelewa kabisa."*

315. In response, the 3rdrespondent relies on an affidavit sworn by Dr Karanja Kibicho, who avers that as the Principal Secretary, Ministry of Interior & Co-ordination of National Government, he received information to the effect that, some Chiefs in Makueni County, whose names are provided in the said affidavit, were unlawfully using their positions and government issued motor cycles to campaign for the petitioners. He thereafter reported the same to the 3rdrespondent who warned the Chiefs in that area not to take any political position nor use public resources to campaign for anyone. According to the said Dr Kibicho,

it is against that background that the 3rd respondent uttered the remarks now impugned by the petitioners.

316. In the above context, section 10 of the *Election Offences Act* provides:

> Undue Influence
>
> (1) A person who directly or indirectly in person undue influence or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of""
>
> a. Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;
>
> b. Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or
>
> c. Impeding or preventing a person from being nominated as a candidate or from being registered as a voter, Commits the offence of undue influence.
>
> (2) ...
>
> (3) A person who directly or indirectly by duress or intimidation""
>
> a. Impedes, prevents or threatens to impede or prevent a voter from voting; or
>
> b. In any manner influences the result of an election, commits an offence.
>
> (4) ...

317. What then is the meaning of the term undue influence in the context of an electoral malpractice and particularly as used under section 10 above" In India, the meaning of the term undue influence' is found in section 171(C) of the *Penal Code* which defines the offence of undue influence at an election as:

> " Undue influence at elections

171C.

(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

2. Without prejudice to the generality of the provisions of sub-section (1), whoever–

a. threatens any candidate or voter, or any other person in whom a candidate or voter is interested, with injury of any kind, or

b. induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

3. A declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

318. Though the wording of the Indian *Penal Code* quoted above is materially different from section 10 of the *Election Offences Act*, the meaning injected into the above legal provisions, shows its applicability in the Kenyan context. The Supreme Court of India in the consolidated cases of *Charan Lal Sahu & others v Giani Zail Singh and another; Nem Chandra Jain v Giani Zail Singh; Charan Singh and others v Giani Zall Singh*[117] thus explicitly stated that the test was whether there was an interference or an attempted interference with the free exercise of any electoral right. Similarly, section 10 above, whose marginal note is undue influence' forbids any impediment of a person's exercise of the electoral right. In India, the electoral right of an elector, is defined under section 171A(b) of

117 *Charan Lal Sahu & others v Giani Zail Singh and another; Nem Chandra Jain v Giani Zail Singh; Charan Singh and athers v Giani Zall Singh* 1984 AIR 309; 1984 SCR (2) 6.

the *Indian Penal Code*, as "the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election." This is comparable to article 38(3) of our Constitution which confers certain political rights on every citizen without any restrictions including the right to vote by secret ballot in an election.

319. The above case of India laid down a distinction between mere canvassing for votes and acts of undue influence. In doing so, the Supreme Court pronounced itself as follows in the above case:

> If the mere act of canvassing in favour of one candidate as against another were to amount to undue influence, the very process of a democratic election shall have been stifled because, the right to canvass support for a candidate is as much important as the right to vote for a candidate of one's choice. Therefore, in order that the offence of undue influence can be said to have been made out within the meaning of section 171C of the *Penal Code*, something more than the mere act of canvassing for a candidate must be shown to have been done by the offender. That something more may, for example, be in the nature of a threat of an injury to a candidate or a voter as stated in sub-section 2(a) of section 171C of the *Penal Code* or, it may consist of inducing a belief of divine displeasure in the mind of a candidate or a voter as stated in sub-section 2(b). The act alleged as constituting undue influence must be in the nature of a pressure or tyranny on the mind of the candidate or the voter. It is not possible to enumerate exhaustively the diverse categories of acts which fall within the definition of undue influence. It is enough for our purpose to say, that of one thing there can be no doubt: the mere act of canvassing for a candidate cannot amount to undue influence within the meaning of section 171C of the *Penal Code*.

320. The Supreme Court of India had also held in an earlier case of *Shiv Kirpal v Shri VV Giri*[118] that:

> The language used in the definition of "undue influence" implies that an offence of undue influence will be held to have been committed if the elector having made up his mind to cast a vote for a particular candidate does not do so because of the act of the offender, and this can only be if he is under the threat or fear of some adverse consequence. Whenever any threat of adverse consequences is given, it will tend to divert the elector from freely exercising his electoral right by voting for the candidate chosen by him for the purpose.... But, in cases where the only act done is for the purpose of convincing the voter that a particular candidate is

118 *Shiv Kirpal v Shri VV Giri* 1971 SCR (2) 197.

not the proper candidate to whom the vote should be given, that act cannot be held to be one which interferes with the free exercise of the electoral, right.

321. The test of undue influence is therefore, whether the 3rd respondent's conduct, if satisfactorily proved, created an impression in the mind of a voter that adverse consequences would follow as a result of their exercise of their political choices. In applying that test we cannot however ignore the deposition of Dr Kibicho who impugned the alleged non-impartiality on the part of two Chiefs who are public officers. Thus the 3rd respondent's statement above, must also be tested against the testimony of Dr Kibicho which evidence has not been controverted.

322. In the above context therefore, has a case been made against the 3rd respondent, for the commission of the offence of undue influence within the required standard of proof" Have the petitioners dispelled the 3rd respondent's position that he was merely giving a directive that it was against the law for a public officer to openly take political positions in support of one candidate against the other" In this context, words alone, without any other demonstrable evidence are not sufficient to enable this court make a conclusive finding on this issue. Further, we note that the evidence of Dr Kibicho, explaining the context within which the 3rd respondent uttered the said words, remains undisputed. Consequently, after carefully considering the evidence before us, we hold that the petitioners have not proved their case on this issue to the required standard.

323. The petitioners further alleged that the 3rd respondent and the Deputy President being contestants in the presidential elections are guilty of corruptly influencing voters in the lead up to the August 8, 2017 general election by paying reparations to victims of 2007 Post-election violence (PEV) in various parts of the country and used the platforms to canvass for votes for personal political gain in the said electoral areas contrary to the Election Offences Act. In proof of this assertion, the petitioners rely on the affidavit of Ms Olga Karani who attaches a transcription of the 3rd respondent's speech during his tour of Kisii and Nyamira Counties during the campaign period.

324. In response, the 3rd respondent relies on the affidavit sworn by Dr Kibicho aforesaid who stated that there is a National Consultative Coordination Committee (Committee) which is tasked with the obligation to manage the Internally Displaced Persons (IDP) affairs on behalf of the Government. That any such funds are approved by Parliament and released by the Committee into the beneficiaries' accounts and the 3rd respondent is not involved in the matter at all.

325. We have perused the attached video transcript, which is in the form of an interview conducted by one of the local news reporting station. We note that the transcript does not

contain a satisfactory basis or convincing evidence to the effect that the 3rd respondent acted in any inappropriate manner with regard to the release of funds to IDPs.

326. The 1st petitioner's further complaint on illegalities is that President Uhuru Kenyatta engaged Cabinet Secretaries who openly abused their position and used State resources in actively soliciting votes for him. Referring to article 152(4)(a) of the *Constitution*, the petitioners submitted that every Cabinet Secretary swears or affirms to have obedience to the *Constitution of Kenya* and ought therefore to be impartial in political contests as is required under the *Constitution*.

327. In a supplementary affidavit sworn by Olga Karani, the petitioners list various incidences in which, they claim that Cabinet Secretaries campaigned for the 3rd respondent. At paragraph 10 of the said affidavit, the deponent avers that, Mr Joe Mucheru, the Cabinet Secretary in charge of Information, Communication and Technology, at an interview conducted by a local television station, stated that he was at liberty to campaign for the 3rd respondent because no law barred him from doing so. Other Cabinet Secretaries also mentioned in Ms Karani's affidavit includes; Eugene Wamalwa, Mwangi Kiunjuri and Najib Balala.

328. The petitioners in their submission on these issues, brought to the attention of the court what they consider to be an inconsistency in the law and in this respect, they urged the court to declare section 23 of the *Leadership and Integrity Act* to be unconstitutional. In that regard, section 23 provides:

> 1. An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties""
>
> a. Act as an agent for, of further the interests of a political party or candidate in an election; or
>
> b. Manifest support for or opposition to any political party or candidate in an election.
>
> 2. An appointed State Officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.
>
> 3. Without prejudice to the generality of sub-section (2) a public officer shall not ""
>
> a. Engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
>
> b. Publicly indicate support for or opposition against any political party or candidate participating in an election [Emphasis added.]

329. The Petitioners submitted that since Cabinet Secretaries are State Officers, they ought to be impartial, but that section 23 above gives them leeway for impartiality. The 3rd respondent contests that submission and urges the court to disregard it since the issue of unconstitutionality was not pleaded in the petition but was only introduced as an argument in the petitioners' oral submissions. The 3rd respondent also urges that the Supreme Court in exercise of its exclusive original jurisdiction cannot adjudicate on the unconstitutionality of an Act of Parliament since that is a matter within the domain of the High Court in exercise of its jurisdiction under article 165 (3) (d) of the *Constitution*.

330. In addressing the above issue, we note that in rendering an advisory opinion *In Re The Matter of the Interim Independent Electoral Commission*[119], this Supreme Court noted [paragraph 43]:

> "Quite clearly, the High Court has been entrusted with the mandate to interpret the *Constitution*. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the *Constitution*, certainly in respect of matters resolved at first instance by the High Court. And while the Advisory-Opinion jurisdiction is exclusively entrusted to the Supreme Court, the *Constitution* does not provide that this Court while rendering an opinion, may not interpret the *Constitution*. Indeed, interpretation of the *Constitution* stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs: so, for instance, the State Law Office in advising Government Ministries, is entitled to interpret the *Constitution* as may be necessary; and the several independent Commissions under the *Constitution* are similarly entitled to interpret the *Constitution* as part of the performance of their respective mandates. The Supreme Court too, for the purpose of rendering an Advisory Opinion, may take its position as guided by its own interpretation of the *Constitution*. Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the *Constitution* by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages.

331. It is not in doubt therefore that the Supreme Court may in exercise of its jurisdiction such as this, interpret the *Constitution* and in doing so, where the need requires, declare an offending provision of the law to be unconstitutional. Such is a natural consequence of any legal reasoning if the court were to maintain its fidelity to the law. Indeed in *SK*

119 *In Re The Matter of the Interim Independent Electoral Commission*, Reference 2 of 2011; [2011] eKLR.

Macharia and Anor v KCB[120], the Court declared section 14 of the *Supreme Court Act* to be unconstitutional. However, the present scenario is peculiar in the sense that, the petitioners did not at the very first instance, through their pleadings, indicate their intentions to declare section 23 to be unconstitutional.

332. The rule of the thumb has always been that parties must be bound by their pleadings and especially in a case such as this where the petitioner is asking the court to address its mind to the possible unconstitutionality of a legal provision. For proper consideration therefore, and especially in order to do justice to both the parties and the greater public interest, we cannot afford to lock our eyes to the disadvantage placed upon the 3rd respondent especially who had no benefit to bring his thoughts into this cause.

333. In the circumstances, we are unable to find that section 23 is unconstitutional. Let the matter be addressed in the right proceedings in the right circumstances.

Irregularities

334. Apart from outright non-compliance with electoral law, the petitioners also claimed that the presidential election was marred by many irregularities the cumulative effect of which fundamentally and negatively impacted the integrity of the election.

Security Features: Now You see them, Now you see them not:

335. The most serious of the irregularities alleged by the petitioners was that many of the prescribed Forms 34A, 34B and 34C that were used in the election had no security features. Other such forms had different layouts and security features. Some forms were said to have had no serial numbers, bar codes, official stamps, water marks, anti-copying, among others. In response thereto, the 2nd respondent contended that the forms were protected by enhanced security features. Mr Mansur for the 1st respondent submitted that the reason the petitioners could not see the security features, was that the latter had been relying on the wrong bar-code readers which could not detect the embedded security features.

336. The other irregularity alleged by the petitioners was that many Forms 34A and 34B did not contain handover notes in the prescribed manner. This irregularity allegedly offended regulation 87(1) (b) of the *Election Regulations*. The petitioners also contended that many other forms bore no official stamp of the 1st respondent, while the stamps used on other forms were not official. The respondents however contended that hand over notes and official stamps were not a legal requirement.

120 *SK Macharia and Anor v KCB*, Sup ct Application 2 of 2011; [2012] eKLR.

337. The petitioners also alleged that many Forms 34A and 34B were signed by unknown persons, while many others were signed by the same presiding or returning officers. Some Forms 34A originated from un-gazzeted polling stations. Finally, the petitioners alleged that not all pages in some Forms 34B were signed.

338. In response thereto, the 1st respondent argued that regulation 83 only provides for signing of the forms and that there is no obligation flowing from this regulation that requires a returning officer to indicate his/her name while signing. Similarly, the 1st respondent argued, that the law does not require that all pages should be signed. Regarding the claim that many forms were signed by the same person in similar handwriting, contrary to regulation 5 (1A) (a), the respondent contended that the said claim had not been backed by evidence from a hand-writing expert. As for some Forms 34A having originated from un-gazetted polling stations, the respondent dismissed such a claim on grounds that there were no such polling stations.

339. The petitioners further claimed that there were numerous discrepancies between the results declared in Forms 34A and 34B from various polling stations across the Country, contrary to section 39 of the *Elections Act*, as read with regulation 82 of the Regulations thus compromising the integrity of the election. In response, the respondents, countered the accuracy in some of the allegations by providing contrary figures through a number of deponents. However, the 1st respondent also admitted that indeed there were discrepancies in the results in Forms 34A and 34B spread across the Country but attributed the discrepancies to human errors and fatigue of officials. The respondent contended that the discrepancies in question did not in any event affect the result of the election.

340. We reiterate in the above context that the petitioners applied for an order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C. This application was premised upon the petitioners' assertion that the elections were conducted so badly and marred with such grave irregularities that it did not matter who won or was declared the winner. As such, this court granted an order for scrutiny and access in the following relevant terms:

> (72) ....the petitioners, as well as the 3rd respondent shall be granted a read only access, which includes copying (if necessary) to–
>
> q. Certified photocopies of the original Forms 34As 34Bs and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production, leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

r. Forms 34A, 34B and 34C from all 40,800 polling stations.

s. Scanned and transmitted copies of all Forms 34A and 34B.

341. It be must be understood for avoidance of doubt, that the petitioners had laid a firm foundation for the grant of those orders because in the petition they had sought the following orders:

a. Immediately upon the filing of the petition, the 1st respondent do avail all the material including electronic documents, devices and equipment for the Presidential Election within 48 hours.

b. Immediately upon the filing of the petition, the 1st respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st respondent in respect of the Presidential Election within 48 hours.

c. A specific order for scrutiny of the rejected and spoilt votes.

d. ...

e. An order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C.

f. An order for scrutiny and audit of the system and technology used by the 1st respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/portal.

g. ...

h. ...

i. ...

n. ...

342. The scrutiny process was conducted under the supervision of the Registrar of this court and a report filed. The report was endorsed by the petitioners and all the respondents as being a fairly accurate reflection of what the partial scrutiny had unearthed.

343. According to the report, the process started with the Registrar counting to ascertain the number of Forms delivered by the 1st respondent. We note as per the Registrar's count, that the 1st respondent availed to her the following: 1 Form 34C, 291 Forms 34B, and 41,451 Forms 34As. The Registrar also made the following observations:

a. Certain forms 34As appeared to have been duplicated;

b. Certain forms 34As and 34Bs appeared to be carbon copies; (c) Certain forms 34As and 34Bs appeared to be photocopies;

(d) Some of the forms had no evidence of being stamped or signed.

344. The report nonetheless states that the petitioners chose to focus on distinguishing the genuine from the fake forms by checking whether the forms contained the following security features namely: the presence of a watermark using the UV reader; colour of the forms; serialization; Microtext; X10 magnification; Column for comments on the form; Format of the forms; and Anti-copy. The petitioners resorted to the use of a UV light reader (DoCash model) to ascertain the presence of or otherwise of the watermark on the forMs

345. Based on that process, the Registrar's report can be summarized as follows; On Form 34C, the petitioners noted that the Form 34C presented did not have a watermark and serial number and it looked like a photocopy. On the other hand, the 3rd respondent observed that the form was a copy of the original duly certified by an advocate of the High Court. Clearly, therefore the IEBC did not avail to parties and the Court the original Form 34C but a copy certified by an advocate.

346. With regard to Forms 34B, the petitioners were availed with a total of 291 ForMs These were to represent the 290 Constituencies as provided for under article 97(1) (a) of the *Constitution*. The extra one form represented the diaspora vote. It is noted that in scrutinizing those forms, the parties formulated a checklist which included confirming whether the forms had been signed and stamped by the returning officer and agents, and whether the hand over and take over' section had either been filled or not.

347. From the above exercise, the following were the findings; it was recorded that out of the 291 Forms 34B scrutinized 56 forms bore no watermark, 5 forms had not been signed by the returning officer, 31 forms had no serial numbers, 32 forms had not been signed by the respective party agents, the hand over section of 189 forms had not been filled and the take over section of 287 forms had not been filled.

348. Further, a random scrutiny of 4,299 Forms 34A across 5 Counties was undertaken to check and confirm; whether the forms bore the watermarks and the serial numbers; whether the forms had been signed and stamped by the presiding officers; whether there was involvement of the party agents.

349. Some of the issues emanating from the scrutiny of Forms 34A were that:

a. some forms were carbon copies;

b. others were the original Forms 34As but did not bear the IEBC stamp;

c. other forms were stamped & scanned while others were photocopies;

d. others had not been signed.

350. The report further indicates that out of the 4,299 Forms 34As, 481 were carbon copies, but signed, 157 were carbon copies and were not signed; 269 were original copies that were not signed; 26 of the Forms were stamped and scanned. 1 form was scanned and not stamped; 15 had not been signed by agents, 58 were photo copies of which 46 had not been signed; and 11 had no watermark security feature. All these issues correspond with the Registrar's observation stated above.

351. Submitting on the findings, SC Orengo for the petitioners contended that the report had proved beyond reasonable doubt, that the election process was shambolic. According to Counsel, the Form 34C which was used to announce the presidential results had no security features and hence the authenticity of the results as announced in Form 34C could not be guaranteed.

352. Counsel further contended that in totality, the number of votes affected in more than 90 Constituencies as a consequence of these irregularities could be as high as five million. Counsel submitted that the random sampling of the Forms 34A depicts numerous irregularities. He argued that some of the forms used were not standardized forms and were not prepared in accordance with the agreement between the 1st and 2nd respondents and the printer. Counsel thus urged the court to find that the forms did not comply with the statutory forms as required by law.

353. In response, the respondents were categorical that most of the forms met all the standard required features. They stated that the petitioners had failed to demonstrate that any of the figures in the forms were inconsistent with what was announced. Further, that the format of the forms was undisturbed.

354. Mr Muite, SC for the 1st respondent further contended that the only requirement under regulations 79 (2) (a) and 83 (a) is for the signing of the forms and that there was no requirement for security features. Asked by the court to explain why some forms bore security features if it was not a requirement of the law, Mr Muite responded that it was out of abundance of caution' on the part of the 1st respondent that it did so. Counsel could however not explain why some forms bore security features while others didn't if indeed they were printed by the same entity.

355. Counsel also argued that there were only 5 Forms 34B that had not been signed by the returning officers but that the 5 had serial numbers as well as watermarks. Counsel further

argued that the petitioner did not challenge the numbers of the votes and had not alleged that any of the figures contained in the forms was incorrect. Counsel thus submitted that the results as announced captured and represented the will of the Kenyan people and urged the court to dismiss this petition.

356. A number of conclusions/observations may be made from this exercise: Firstly, the Form 34C, that was availed for scrutiny was not original. Whereas the copy availed for scrutiny was certified as a copy original, no explanation was forthcoming to account for the whereabouts of the original Form.

357. Regulation 87(3) obligates the 2nd respondent to tally and complete Form 34C and to sign and date the forms and make available a copy to any candidate or chief agent present. This regulation presupposes that the Chairman retains the original. The court is mindful that the 2nd respondent was required to avail the original Form 34C for purposes of access and to this extent the 2nd respondent did not.

358. Secondly, turning to the Forms 34B, the court notes that whereas the registrar received 291 forms representing 290 Constituencies and the diaspora, it was explained that the results relating to prisons were collated alongside those of their respective Counties as the prisons fall within Constituencies where they are located. This was also noted by the Registrar of this court in her report.

359. The court notes further that from the report on Forms 34B, the Registrar outrightly made an observation that some of the forms were photocopies, carbon copies and not signed. And out of the 291 forms, 56 did not have the watermark feature while 31 did not bear the serial numbers. A further 5 were not signed at all and 2 were only stamped by the returning officers but not signed. In addition, a further 32 Forms were not signed by agents. The above incidences are singled out since they are incidences where the accountability and transparency of the forms are in question.

360. The Court also notes that in her affidavit, Immaculate Kassait, a Director of the 1st respondent deponed as follows:

> Security Features Of Statutory Forms
>
> 214. That I am aware that the Commission developed standards for its electoral goods prior to their procurement. The standards included specific security features for each ballot paper and statutory form in order to prevent duplication, misuse, piracy, fraud, counterfeiting and to improve controls. All the ballot papers and statutory forms used in the August 8, 2017 election contained these security features.

215. That some of the security features employed on the result declaration Forms 34A and 34B used in the August 8, 2017 election include:

a. Guilloche patterns against which all background colors on the various results declaration forms have been printed. These patterns are non – reproducible geometric patterns generated by a special security software used for currency designs and are generated as lines in vector format and cannot be scanned and reproduced.

b. Anti – copy patterns; when the results declaration forms are photocopied, hidden texts appear on the copy produced thus distinguishing the original from the reproduced copy. Thus, a photocopy would be distinguishable from an original form.

c. Watermarks; when the results declaration forms are viewed against normal light or at an angle, a pattern or text incorporated in the form can be seen.

d. Micro text; the results declaration forms have text characters printed in very small font size which appear like a line to the naked eye and are verifiable only under a magnified glass.

e. Tapered serialization; this means serial numbering. Each of the result declaration forms has a unique serial number to ensure monitoring and control of the distribution of forMs Furthermore, this serialization cannot be done by regular mechanical impact devices.

f. Invisible UV printing; each result declaration form bears invisible logos which may only be seen under a UV light. This feature renders the forms almost impossible to counterfeit.

g. Polling station data personalization; In addition to having the candidates‘ names, the forms 34A are personalized with the details of the polling station‘s name and code, ward name and code, constituency

name and code and the county name and code. This curbs the misuse of forms at different stations and minimizes manual entry of information by officials at the polling stations.

h. Self – carbonating element; Forms 34A bear this aspect thereby restricting manual entry of data on the form 34A to only once and consequently enhancing accuracy and verifiability of the results.

i. Barcodes; The Forms 34B and Form 34C are printed with barcodes which identify the tallying center by showing the county codes and constituency codes, therefore ensuring quick identification and verification of results.

216. That security features were also incorporated in the ballot papers used in the 8th August 2017 election all in an effort to ensure that the elections were free and fair. For example, each ballot paper included different colour coding of the background of each ballot paper for the six (6) elections. Each ballot paper when examined visually contained a different colour. Specifically the commission used different background colors for each election to wit:-

a. Presidential-Plain white.

b. Member of National Assembly-Green colour.

c. Senator ballot paper-Yellow colour.

d. Member of County Assembly-Brown colour.

e. County woman member of national assembly-Purple colour.

f. Governor-Sky Blue Colour.

217. That in addition to the colour coding, similarly as in the statutory declaration forms, each ballot paper incorporated a guilloche pattern, generic watermark, anti – copy feature, embossment, UV sensitive security, tapered serialization and tapered UV serialization to prevent duplication, misuse, piracy, fraud, counterfeiting and to improve controls.

218. That the security features incorporated on the results declaration forms and the ballot papers would enable the commission detect a counterfeit statutory form or ballot paper and discharge its constitutional mandate of conducting secure and verifiable elections.

219. That in addition to incorporating the security features, the Commission went a step further to instruct that all ballot papers need be stamped before they are issued to a registered voter to cast his/her vote. This was an extra measure initiated by the Commission with a view to ensure that the electoral process was secure. However, the absence of a stamp does not by itself speak to the authenticity of or invalidate the ballot paper.

220. That I confirm that all the Form 34A's received by the Commission at the National Tally Center had all the above mentioned security features.

361. The above categorical statement differs completely with the abundance of caution submission by Mr Muite SC and the not in the law' argument by the IEBC.

362. In the above context, we now turn to examine the applicable statutory provisions in this regard. As pointed out by the petitioners, there is a reasonable expectation that all the forms ought to be in a standard form and format; and though there is no specific provision requiring the forms to have watermarks and serial numbers as security features, there is no plausible explanation for this discrepancy more so when Immaculate Kassait deponed that all forms had those features.

363. There is another set of discrepancies relating to 32 Forms not being signed by agents, 103 forms where the hand over' section had not been filled and 287 where the take over' section had not been filled.

364. Regulation 87(1)(b) of *Elections (General) Regulations, 2012* as read with section 39(1A)(i) of the *Elections Act* deals with Forms 34B in the following terms:

87(1) The constituency returning officer shall, as soon as practicable-

(a) ...

(b) deliver to the National tallying centre all the Form 34B from the respective polling stations and the summary collation forMs

365. The schedule provides for a sample of the format of the Form 34B. As is evident from the schedule, the Hand Over' section is filled when the Forms 34A are submitted to the Constituency returning officer whereas the Taking Over' section is filled when the Chairperson receives the Forms 34A. Indeed Regulation 82(1) requires the presiding officer to physically ferry the actual results to the Constituency returning officer. Further, Regulation 87(1)(b) requires the Constituency returning officer to deliver to the National Tallying Centre all the Forms 34A from the respective polling stations and the summary collation forMs Regulation 87(3)(a) goes on to provide that, upon the receipt of Form 34A from the Constituency returning officer, the Chairperson of the Commission shall verify the results against Forms 34A and 34B received from the Constituency returning officer.

366. How then can the 1st and 2nd respondent deny the receipt of these prescribed forms" In any case, during the hearing of the scrutiny application, Counsel for the 1st respondent submitted that the Commission was in possession of all the original Forms 34A and 34B and went ahead to suggest that, it was willing to release the same forms for inspection. We note that, during the scrutiny exercise that was subsequently carried out, the Commission produced majority of those original forMs

367. It is clear that the purpose of including the requirement for indicating the number of forms received by various officers was to ensure accountability and transparency. It is therefore unfortunate that, out of the random sample of 4,299 Forms 34A examined, a total of 189 Forms had not been filled in the hand-over section, whereas 287 forms had not been filled in the take-over section. Such kind of scenario raises the question as to the kind of verification done, if at all, by the Chairperson of the Commission.

368. As for Forms 34A, the sampled 4,299 forms reveal that 481 of them were carbon copies, 269 were not stamped while 257 of the carbon copies were not stamped. 11 forms had no water mark while 46 of the photocopies were not signed. 58 forms were not stamped. Considering the sample size, it is apparent that the discrepancies were widespread. Did these discrepancies affect the integrity of the elections"

ii. The impact of the irregularities on the integrity of the election

369. Counsel for the respondents urged the court to dismiss the petition, as this would preserve the will of the people who turned out in large numbers to vote for their preferred candidates. Our attention in that regard was drawn to the provisions of article 38 of the *Constitution*, which is the embodiment of the political rights of the citizen. It was variously submitted that elections are about numbers and that they are about who gets the largest number of votes. Such irregularities as complained of by the petitioners, counsel submitted, could not in themselves overturn the sovereign will of the people. Further, if the quantitative discrepancies are so negligible (in this case, allegedly slightly over 20,000 votes), they should

not affect the election; for in the words of one of the Prof PLO Lumumba, counsel for the 2nd respondent, of small things, the law has no remedy.

370. On the other hand, counsel for the petitioners urged the court to look at the elections as a whole, as a process rather than an event. To look at, not just the numbers, but the entire conduct of the election. Mr Mwangi, counsel for the petitioners, went as far as to submit that elections are not a political process, but a legal one. That the court should concentrate on examining the legal process in the conduct of elections, as opposed to the political process.

371. It is our view however, that elections, are all these things. None of the factors highlighted by the parties can be viewed in isolation. For by doing so, we run the risk of cannibalizing a sovereign process. Elections are the surest way through which the people express their sovereignty. Our *Constitution* is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the *Constitution*, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.

372. It is in this spirit, that one must read article 38 of the *Constitution*, for it provides inter alia, that every citizen is free to make political choices, which include the right to free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors.... This mother principle must be read and applied together with articles 81 and 86 of the *Constitution*, for to read article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, is to nurture a mirage, an illusion of free will, hence a still-born democracy. Of such an enterprise, this court must be wary.

373. It is also against this background that we consider the impact of the irregularities that characterized the presidential election. At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

374. In view of the interpretation of section 83 of the *Elections Act* that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only

necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the *Constitution* or in that law. But even where a court has concluded that the election was not conducted in accordance with the principles laid down in the *Constitution* and the applicable electoral laws, it is good judicial practice for the court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.

375. In the impugned presidential election, one of the most glaring irregularities that came to the fore was the deployment by the 1st respondent, of prescribed forms that either lacked or had different security features. The 1st respondent had submitted by way of affidavit and in open court that out of abundant caution, it had embedded into the prescribed Forms, such impenetrable security features that it was nigh impossible for anyone to tamper with them. The court was also reminded that this was done, despite it being not a requirement by the law.

376. However, the scrutiny ordered and conducted by the court, brought to the fore, momentous disclosures. What is this court for example, to make of the fact that of the 290 Forms 34B that were used to declare the final results, 56 of them had no security features" Where had the security features, touted by the 1st respondent, disappeared to" Could these critical documents be still considered genuine" If not, then could they have been forgeries introduced into the vote tabulation process" If so, with what impact to the numbers" If they were forgeries, who introduced them into the system" If they were genuine, why were they different from the others" We were disturbed by the fact that after an investment of tax payers money running into billions of shillings for the printing of election materials, the court would be left to ask itself basic fundamental questions regarding the security of voter tabulation forms.

377. Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated" Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the numbers on that form"

378. Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election" It is true that where the quantitative difference in numbers is negligible,

the court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced" In such a critical process as the election of the President, isn't quality just as important as quantity" In the face of all these troubling questions, would this court, even in the absence of a finding of violations of the *Constitution* and the law, have confidence to lend legitimacy to this election" Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables" It is to the Kenyan voter, that man or woman who wakes up at 3 a.m on voting day, carrying with him or her the promise of the *Constitution*, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.

379. In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of August 8, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.

iv What Consequential Declarations, Orders and Reliefs Should this Court Grant, if Any"

380. In the petition, the petitioners sought the following Orders;

(a) Immediately upon the filing of the petition, the 1st respondent do avail all the material including electronic documents, devices and equipment for the presidential election within 48 hours;

b. Immediately upon the filing of the petition, the 1st respondent do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or on behalf of the 1st respondent in respect of the presidential election within 48 hours;

c. A specific order for scrutiny of the rejected and spoilt votes;

d. A declaration that the rejected and spoilt votes count toward the total votes cast and in the computation of the final tally of the Presidential Election;

e. An order for scrutiny and audit of all the returns of the presidential election including but not limited to Forms 34A, 34B and 34C;

f. An order for scrutiny and audit of the system and technology used by the 1st respondent in the presidential election including but not limited to the KIEMS Kits, the Server(s); website/portal;

g. A declaration that the non-compliance, irregularities and improprieties in the presidential election were substantial and significant that they affected the result thereof;

h. A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off the from the final tally and computation of the presidential election;

i. A declaration that the presidential election held on August 8, 2017 was not conducted in accordance with the *Constitution* and the applicable law rendering the declared result invalid, null and void;

j. A declaration that the 3rd respondent was not validly declared as the president elect and that the declaration is invalid, null and void;

k. An order directing the 1st respondent to organize and conduct a fresh presidential election in strict conformity with the *Constitution* and the *Elections Act*;

l. A declaration that each and all of the respondents jointly and severally committed election irregularities;

m. Costs of the petition; and

n. Any other orders that the honourable court may deem just and fit to grant;

381. Noting the prayers sought in this petition, this court has the mandate, to invalidate a presidential election under article 140(3) of the *Constitution* as read with section 83 of the *Elections Act*, *inter alia*, for reasons that there has been non-compliance with the principles in articles 10, 38, 81 and 86 of the *Constitution* as well as in the electoral laws. One of the clear reliefs in article 140(3) is that should a presidential election be invalidated, then a fresh election' shall be held within 60 days of this court's decision in that regard. Parties at the hearing of the petition did not address us on the issue, however, and so we do not deem it fit in this Judgment to delve into an interpretation of that term. We also note that the term fresh election' was addressed in the 2013 *Raila Odinga* case and is the subject of an application by the 1st interested party within this petition. The application has been fixed for hearing on September 21, 2017 and the court will deal with it on its merits. We now return to the specific prayers in the petition.

382. Without belabouring the point, prayers (a), (b) (c) (e) and (f) have been spent by fact of the ruling of this court delivered on August 28, 2017. And whereas a scrutiny of rejected and spoilt votes as was sought in prayer (c) was not specifically done, we have elsewhere above substantively addressed the legal regime on that issue and we do not need to repeat ourselves. However for clarity, and in addressing prayer (d), as we have already stated, it is our firm finding that the decision in the 2013 *Raila Odinga* case on rejected and spoilt votes remains good law and we see no reason to depart from it. Prayer (d) is therefore disallowed.

383. Prayer (g) has been addressed in the analysis and determination of Issues Nos (ii) and (iii) and it is our finding therefore that non-compliance with the constitutional and legal principles in *inter alia* Articles 10, 38, 81 and 86 of the *Constitution* and the *Elections Act* coupled with the irregularities and illegalities cited above, affected the process leading to the declaration of the 3rd respondent as President elect in a very substantial and significant manner that whatever the eventual results in terms of votes, the said declaration was null and void and the election was rendered invalid. Prayer (g) is therefore allowed.

384. Regarding prayer (h), the evidence before us cannot lead to a certain and firm decision regarding the specific number of votes affected by the irregularities and illegalities and it is our position that a concise reading of section 83 of the *Elections Act* would show that the results of the election need not be an issue where the principles of the *Constitution* and electoral law have been violated in the manner that we have shown above. Prayer (h) to the extent that it refers to votes to be struck off cannot therefore be allowed.

385. Regarding prayer (i), we have shown beyond peradventure that the presidential election held on August 8, 2017 was not conducted in accordance with the *Constitution* and the applicable law rendering the declared result invalid, null and void. In the circumstances, prayer (i) is allowed as prayed. Prayers (j) and (k) are a consequence of the declaration in prayer (i) and are also allowed.

386. Regarding prayer (l), we have shown that IEBC did not conduct the August 8, 2017 presidential election in conformity with the *Constitution* and electoral law. Irregularities and illegalities were also committed in a manner inconsistent with the requirement that the electoral system ought to be inter alia simple, verifiable, efficient, accurate and accountable. Although the petitioners claimed that various electoral offences were committed by the officials of the 1st respondent (IEBC) no evidence was placed before us to prove this allegation. What we saw in evidence, was a systemic institutional problem and we were unable to find specific finger prints of individuals who may have played a role in commission of illegalities. We are therefore unable to impute any criminal intent or culpability on either the 1st and 2nd respondent, or any other commissioner or member of the 1st respondent. We

are similarly unable to find any evidence of misconduct on the part of the 3rd respondent. The prayer is therefore disallowed.

387. On costs, we are aware that costs generally follow the event, but the present petition has brought to the fore the need for IEBC to adhere strictly to its mandate and not to exhibit the casual attitude it did in the conduct of the impugned election and in defence of this petition. It is a heavily public funded constitutional organ and to burden Kenyans tax payers with litigation costs would be a grave matter which we deem unnecessary in this petition. Let each party therefore bear its own costs.

J. Conclusion

389. In this judgment, we have settled the law as regards section 83 of the *Elections Act*, and its applicability to a presidential election. We have shown that contrary to popular view, the results of an election in terms of numbers can be overturned if a petitioner can prove that the election was not conducted in compliance with the principles laid down in the *Constitution* and the applicable electoral law. Never has the word 'or' been given such a powerful meaning. Why did we do that?

390. We did so because as Judges we have taken an oath (as advocates first and as Judges later). In the two oaths, the fundamental words are fidelity to the *Constitution* without fear or favour. the constitutional principles that we have upheld in this judgment were embedded and became a critical part of our electoral law. The Legislature in its wisdom chose the words in section 83 of the *Elections Act* and in keeping to our oath, we cannot, to placate any side of the political divide, alter, amend, read into or in any way affect the meaning to be attributed to that section.

391. As for the IEBC, all we are saying is that, the constitutional mandate placed upon it is a heavy yet, noble one. In conducting the fresh election consequent upon our orders, and indeed in conducting any future election, IEBC must do so in conformity with the *Constitution*, and the law. For, what is the need of having a *Constitution*, if it is not respected?

392. Having taken note of Mr Nyamodi's submissions, which appeared to suggest that IEBC had put in place a complimentary system for the transmission of results; a system that was neither simple nor known to the petitioners, we hereby direct that in conducting the fresh election IEBC must put in place a complementary system that accords with the provisions of section 44(A) of the *Elections Act*. It goes without saying that such a system as held by the High Court, in the case of the *National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 others*,[121] only comes into play when technology fails.

[121] *National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 others*, Petition 328 of 2017; [2017] eKLR.

393. In the 2013 *Raila Odinga* case, this court stated that

> " it should not be for the court to determine who comes to occupy the Presidential office; save that this court, as the ultimate judicial forum, entrusted under the *Supreme Court Act, 2011* (Act No 7 of 2011) with the obligation to assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya [S 3(a)] must safeguard the electoral process and ensure that individuals accede to power in the presidential office, only in compliance with the law regarding elections.
>
> We reiterate those words in this petition and for as long as the *Constitution of Kenya* has the provisions granting this court the mandate to overturn a presidential election in appropriate circumstances, it will do so because the people of Kenya in the preamble to the *Constitution* adopted, enacted and gave unto themselves the *Constitution* for themselves and future generations.

394. It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the *Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the *Constitution*.

395. And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law

> " is the heritage of all mankind"

and

> " a salutary reminder that wherever law ends, tyranny begins."[122]

Cast the rule of law to the dogs, Lutisone Salevao once observed and government becomes a euphemistic government of men... He adds:

> " History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith."[123]

122 Soli J Sorabjee,'*Rule of Law; A Moral Imperative For South Asia and the World*,' Soli Sorabjee Lecture, Brandeis University Massachusetts, April 14, 2010 at page 2. Available at www.brandeis.edu/programs/southasianstudies/pdfs/rule_of_law_full_text.pdf.

123 Lutisone Salevao, '*Rule of Law, Legitimate Givernance and Development in the Pacific*'(ANU Press, 2005)page 2.

The moment we ignore our *Constitution* the Kenyans fought for decades, we lose it.

396. We further note that elections world over are competitive features.[124] Presidents in many parts of the world, and especially in Africa, wield a lot of power.[125] The influence that comes with the office makes its very attractive.'[126] That influence cascades down through all elective positions to the lowest. Candidates and political parties often do anything to be elected. Besides the candidates, the electorate themselves, hoping for an improved standard of living, get equally agitated.[127] All these factors make elections at every level extremely high-pressure events.'[128]

397. If they are mismanaged or candidates do not respect the rule of law; if the average citizen, political parties and even candidates themselves do not perceive them as free and fair, elections can, and have led to instability in some countries. Examples of such an eventuality abound. However, we do not need to look far for examples. As we have stated, the flawed presidential elections in Kenya in December 2007 led to post-election skirmishes that left over 1,000 people dead, about 50,000 others displaced and drove the country to the brink of precipice not to mention the economic crisis that was thereby wrought.

398. In the circumstances, and in answer to the respondents' harp on numbers, we can do no better than quote the words of Justice Thakar of the Indian Court of Appeal in the case of *Ponnala Lakshmaiah v Kommuri Pratap Reddy & others*,[129] in which he observed:

> " There is no denying the fact that the election of a successful candidate is not lightly to be interfered with by the courts. The courts generally lean in favour of the returned candidates and place the onus of proof on the person challenging the end result of an electoral contest. That approach is more in the nature of a rule of practice than a rule of law and should not be unduly stretched beyond a limit. We say so because while it is important to respect a popular verdict and the courts

124 *Independent Review Commission Report on the General Elections Held in Kneya on December 2007*, Chapater III (Kriegler Report) at 32.

125 Edwin Odhiambo Apuya, '*Can African States Conduct Free and Fair Elections?*' Vol 8 Issued (Spring, 2010) Northwestern Journal of International Human Rights, p 123.

126 Ibid

127 Edwin Odhiambo Apuya, '*Consequences of a Flawed Presidential Election*', Legal Studies Vol 29, Issue 1, (March 2009) pp 127-158.

128 Above Note 1.

129 Ponnala Lakshmaiah v Kommuri Pratap Reddy & others, Civil Appeal 4993 of 2012 arising out of SLP (C) No 20013 of 2010.

> ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process.
>
> An election which is vitiated by reason of corrupt practices, illegalities and irregularities.....cannot obviously be recognized and respected as the decision of the majority of the electorate. The courts are, therefore, duty bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach & without being oblivious of the ground realities. Experience has shown that the electoral process is, despite several safeguards taken by the Statutory Authorities concerned, often vitiated by use of means, factors and considerations that are specifically forbidden by the statute.

399. What of the argument that this court should not subvert the will of the people" This court is one of those to whom that sovereign power has been delegated under article 1(3)(c) of the same *Constitution*. All its powers including that of invalidating a presidential election is not, self-given nor forcefully taken, but is donated by the people of Kenya. To dishonestly exercise that delegated power and to close our eyes to constitutional violations would be a dereliction of duty and we refuse to accept the invitation to do so however popular the invitation may seem. Therefore, however burdensome, let the majesty of the *Constitution* reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant.

400. Have we in executing our mandate lowered the threshold for proof in presidential elections" Have we made it easy to overturn the popular will of the people" We do not think so. No election is perfect and technology is not perfect either. However, where there is a context in which the two Houses of Parliament jointly prepare a technological roadmap for conduct of elections and insert a clear and simple technological process in section 39(1C) of the *Elections Act*, with the sole aim of ensuring a verifiable transmission and declaration of results system, how can this court close its eyes to an obvious near total negation of that transparent system"

401. In keeping with our pronouncement regarding the burden and standard of proof in election petitions, we are therefore satisfied that the petitioners have discharged the legal burden of proof as to squarely shift it to the 1st and 2nd respondent. We are also of the firm view that having so shifted, the burden has not in turn been discharged by the 1st and 2nd respondent as to raise substantial doubt with regard to the petitioners‘ case.

402. For the above reasons, let this Judgment then be read in its proper context; the electoral system in Kenya today was designed to be simple and verifiable. Between August 8, 2017

and August 11, 2017, it cannot be said to have been so. The petition before us was however simple and to the point. It was obvious to us, that IEBC misunderstood it, hence its jumbled-up responses and submissions. Our judgment is also simple, and in our view clear and understandable. It ought to lead IEBC to a soul-searching and to go back to the drawing board. If not, this court, whenever called upon to adjudicate on a similar dispute will reach the same decision if the anomalies remain the same, irrespective of who the aspirants may be. Consistency and fidelity to the *Constitution* is a non-wavering commitment this court makes.

403. One other peripheral but important matter requires our attention; the timeframe for hearing and determining a presidential election petition in Kenya. The court is able to bear all manner of criticisms but one would be extremely unfair; alleged inability to deliver on time. Where is that time" Between the decision in the 2013 *Raila Odinga* case and the present petition, it was a matter of agreement across Kenya that 14 days is not enough for parties and the court to fully deliver on their respective mandates not because they cannot (in fact they all have) but because there may be the need to conduct exercises such as a recount of votes or scrutiny which require substantial amounts of time. Yet the Legislature ignored pleas to rethink the timeframe. It is time they did so. The reasons for doing so are obvious and need no extrapolation here.

404. In concluding, we must express our profound gratitude to all counsel who appeared before us, for their submissions that assisted us in reaching the present decision.

K. Final Orders

405. By a majority of four (with JB Ojwang and N Ndungu, SCJJ dissenting), we make the following final orders:

a. A declaration is hereby issued that the Presidential Election held on August 8, 2017 was not conducted in accordance with the *Constitution* and the applicable law rendering the declared result invalid, null and void;

b. A declaration is hereby issued that the irregularities and illegalities in the Presidential election of August 8, 2017 were substantial and significant that they affected the integrity of the election, the results not- withstanding.

c. A declaration is hereby issued that the 3rd respondent was not validly declared as the President elect and that the declaration is invalid, null and void;

d. An order is hereby issued directing the 1st respondent to organize and conduct a fresh Presidential Election in strict conformity with the *Constitution* and the applicable election laws within 60 days of the determination of September 1, 2017 under article 140(3) of the *Constitution*.

e. Regarding costs, each party shall bear its own costs.

The Dissenting Judgment of Justice JB Ojwang, SCJ

A. Background

1. So proximate to the moment of delivery of the Supreme Court's decision in this pivotal case, did I learn that I fell on the minority side. By the *Constitution*, the timeline for hearing and determination was below a fortnight, and so, full versions of the Judgment had to come later. My summarized dissent, thus, grasped only the compelling elements of the case. Today, I have the opportunity to set out my opinion in detail.

2. The question before the court was whether the Presidential election, conducted under one and the same electoral process with five other sets of election (for Senate; National Assembly; County Governors; Women's Representatives; and County Assemblies), had been so compromised by operational irregularity and illegality, as to compellingly attract Orders of annulment.

3. I learnt that the majority on the Bench had come to the unreserved resolution that the Presidential election was a nullity, and that the electorate must return to the polls. Such a position was thus summarized:

   (i) As to whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the *Constitution* and the law relating to elections, upon considering inter alia articles, 10, 38, 81 and 86 of the *Constitution*, as well as sections 39(1C), 44, 44A and 83 of the *Elections Act*, the decision of the court is that the 1st Respondent failed, neglected or refused to conduct the Presidential Election in a manner consistent with the dictates of the *Constitution* and *inter alia* the *Elections Act*, Chapter 7 of the Laws of Kenya.

   (ii) As to whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election, the court was satisfied that the 1st Respondent committed irregularities and illegalities inter alia, in the transmission of results, particulars and the substance of which will be given in the detailed and reasoned Judgment of the court. The court however found no evidence of misconduct on the part of the 3rd Respondent.

   (iii) As to whether the irregularities and illegalities affected the integrity of the election, the court was satisfied that they did and thereby impugning the integrity of the entire Presidential Election.

4. Having taken such standpoints, the majority proceeded to strike down the Presidential-election outcome, ordering as follows:

   (i) a declaration is hereby issued that the Presidential Election held on August 8, 2017 was not conducted in accordance with the *Constitution* and the applicable law rendering the declared result invalid, null and void;

   (ii) A declaration is hereby issued that the 3rd respondent was not validly declared as the President elect and that the declaration is invalid, null and void;

   (iii) An order is hereby issued directing the 1st respondent to organize and conduct a fresh Presidential Election in strict conformity with the *Constitution* and the applicable election laws within 60 days of this determination under article 140(3) of the *Constitution*.

5. Thus, vital issues turning upon the democratic principle, issues of the terms and essence of the *Constitution*, of the statute law, and of the judicial mandate in the interpretation and crystallization of functional dimensions of the legal process, had been so cursorily dispatched – maybe in answer to policy objects, or to political persuasions, or to other general, social calls. For me, as an experienced lawyer and Judge, but more particularly, as a dedicated legal scholar, such an approach to contentious matters did short shrift to the firm and principled, normative configuration of the law and the legal process – elements which alone, would temper the motions of the social and political order, and ensure that the mechanisms of governance remain attuned to the ideals of civilized process.

6. I will, in this Judgment, examine the foregoing dimensions of law with greater focus, after adverting to the pertinent issues and evidence in the whole case.

B. Main Cause and Prelude

a. Prelude

7. The petitioners were the Presidential and Deputy-Presidential candidates of the National Super Alliance [NASA] coalition of parties, and were running on the Orange Democratic Movement Party [ODM] and the Wiper Democratic Movement Party tickets, respectively.

8. The 1st respondent is the Independent Electoral and Boundaries Commission [IEBC], an independent agency established under article 88, as read with articles 248 and 249 of the *Constitution of Kenya*, and the *Independent Electoral and Boundaries Commission Act, 2011* (Act No 9 of 2011) [the IEBC Act]. The 1st respondent bears the mandate of conducting and/or supervising referenda and elections for any elective body or office established under

the *Constitution*, as well as any other elections provided for under the *Elections Act, 2011* (Act No 24 of 2011).

9. The 2nd respondent is the chairperson of the 1st respondent – and bears the mandate under article 138(10) of the *Constitution*, to declare the outcome of the Presidential election, and to deliver written notification of the same to the Chief Justice and to the incumbent President.

The 3rd respondent is the incumbent President, who was the candidate of the Jubilee Party, and who was declared the winner in the elections, on August 11, 2017.

10. The petitioners are aggrieved with the mode of conduct of the Presidential election of August 8, 2017. They contend that the said election was conducted, administered and managed improperly by the 1st respondent, and that such mismanagement was deliberate and systematic, and having the effect that there was failure of compliance with the governing principles prescribed under articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the *Constitution*; with the *Elections Act*; with the Regulations made thereunder; with the *Electoral Code of Conduct*; and with other relevant provisions of the law. The petitioners call for the invalidation of the 2nd respondent's declaration of the 3rdrespondent as the duly elected candidate.

11. The prelude to the main cause is marked by a set of preliminary applications. These, and the court's determinations, may be enumerated in summary form:

    i. an application by the petitioners dated August 25, 2017 – seeking an order for the 1st respondent to give the petitioners direct access to data and information; this elicited the order that the 1st respondent do grant the petitioners, as well as the 3rd respondent, a read-only access', with copying if necessary, for certain items of data; the court also ordered its Registrar to give supervised access to certified copies of original voting-record Forms 34A and 34B, to the petitioners and 3rd respondent; the Registrar being required to file a report on the exercise by August 29, 2017 at 5.00 pm.; parties to make submissions thereupon; the court also designated an information and communication technology (ICT) officer from its staff, as well as independent ICT experts – to oversee the required access to the dissemination technology applied during the election;

    ii. an application by the 3rd respondent, dated August 25, 2017 and seeking to strike out from court record such documents as were not served out timeously; this was refused by the court, on the premise that, in the interests of justice to all parties, its inherent jurisdiction favoured retaining the documents and annexures in question; and, to safeguard the applicant's right to fair hearing, the court directed that the documents and annexures in question be served upon the 3rd respondent;

iii. an application by the petitioners, dated August 26, 2017, seeking to strike out documents filed by the 1st, 2nd and 3rd respondents, which had not been served upon counsel for the petitioners: this was dismissed, on grounds that if granted, it would terminate the entire case for the 1st, 2nd and 3rd respondents at this preliminary stage – and this would derogate from the interests of justice;

iv an application by 1st respondent, dated August 26, 2017 and seeking orders to expunge from the record documents filed out of time, which had the effect of raising a fresh cause of action, apart from carrying additional evidence: this was disallowed, on the basis that the question related to an application already before the court;

v an application dated August 21, 2017 by Information Communication Technology Association of Kenya for joinder as amicus curiae: this was dismissed, on the basis that it fell short of the applicable standard for admission;

vi. an application dated 21st August, 2017 by Mr Ekuru Aukot, one of the Presidential election candidates, seeking joinder as interested party: this was allowed, on the basis that the applicant had a personal stake in the outcome of the petition;

vii. an application dated August 23, 2017 by Mr Michael Wainaina Mwaura, who had been a Presidential election candidate, seeking joinder in some capacity – respondent, amicus curiae, or interested party: this being allowed (for interested party), on the basis that he had a personal stake in the outcome of the petition;

viii. an application by Mr Aluoch Polo Aluochier, dated August 23, 2017, seeking joinder as interested party: this being disallowed, on the ground that the applicant failed to meet the requisite legal threshold;

ix. an application by Mr Benjamin Barasa Wafula dated August 24, 2017 seeking joinder as interested party: this being disallowed, for failure to meet threshold requirements;

x. an application by learned counsel, Mr Charles Kanjama, dated August 25, 2017 seeking joinder as amicus curiae: this being disallowed for failure to meet threshold standards;

xi. an application by the Law Society of Kenya dated August 25, 2017, seeking joinder as amicus curiae: this being allowed, on the basis that the legal threshold was satisfied;

xii. an application by the Attorney-General dated August 25, 2017 seeking joinder as amicus curiae: this was allowed.

b. Main Cause: Issues and Contentions

12. It was the petitioners' contention that, during the Presidential election, being part of the General Election of August 8, 2017, certain management improprieties came to pass, which affected the registration of voters, the votes cast, the vote count.

13. One of the allegations related to the category of votes described as rejected votes, said to have constituted 2.6% of the total votes cast. The issue being raised in this regard, came alongside a contention that an earlier decision of the Supreme Court, in *Raila Odinga v Independent Electoral and Boundaries Commission and others*, Sup Ct Petition No 5 of 2013, should be reversed: insofar the Court had in that case held that spoilt votes are not to be taken into account, in computing the 50% +1 vote-strength threshold for determining the winner in a Presidential election.

14. Such a claim is founded upon a desired legal yardstick, rather than on the prescribed, and operative law. The petitioners contended that the Supreme Court in the earlier case, had improperly arrived at its legal threshold, because it had been influenced by a dissenting opinion in a comparative case-citation noted by this Supreme Court – which by Kenya's *Constitution* (article 163(7)), is the ultimate judicial authority, and [a]ll courts, other than the Supreme Court, are bound by its decisions. The petitioners were invoking the case from Seychelles, *Popular Democratic Movement v Electoral Commission*, Constitutional Case No16 of 2011; they were urging that the majority stand in that case should determine this Supreme Court's position as regards spoilt votes in the electoral process: and that in that context, there was an impropriety in the Presidential-election vote-count, following the election of August 8, 2017.

15. The petitioners contended that the conduct of the Presidential election of August 8, 2017 had contravened the principle of free and fair election under article 81(e) of the *Constitution* as read with section 39 of the *Elections Act*, and the applicable regulations.

16. The burden of the petitioners' case lies on the process of relaying and transmitting voting records from polling stations to constituency tallying centres and the National Tallying Centre: they questioned this process as falling short of standards on simplicity, accuracy, verifiability, security, accountability, transparency, promptitude. They contended that such shortcomings had compromised the principle of free and fair elections in terms of article 81(e) (iv) and (v) of the *Constitution*. The petitioners attributed impropriety to the electoral process on a plurality of grounds, such as that:

    i. the data and information recorded in Forms 34A at the individual polling stations had not been accurately and transparently entered into the electronic KIEMS kits, at the individual polling stations;

ii. there had been non-compliance with the requirement that KIEMS kits be accompanied by an electronic image of the prescribed forms, as these were transmitted to the National Tallying Centre; and this was in contravention of Regulation 87(3) of the *Elections (General) Regulations*;

iii. the 1st respondent had pre-determined the results of the Presidential election, and was therefore not impartial, neutral and accountable as required by article 81(e) (v) of the *Constitution*;

iv the declared results were not verified in more than 10,000 polling stations, and the data entered in the electronic kits was not consistent with the information in the Forms 34A;

v the information in Forms 34A was not consistent with that in Forms 34B, and the figures were not accurate and verifiable;

vi. the computation and tabulation of the results in a significant number of Forms 34B was not accurate, verifiable and internally consistent;

vii. the results, recorded in the 1st respondent's Forms 34B were materially different from those relayed, and relayed again, as at the time of filing on its website;

viii. the 1st respondent had espoused a false narrative and national psyche, as the stage for stealing the election on behalf of the 3rd respondent – by allowing the electronic media and the news channels to relay and continue relaying its results-data, which lacked a legal or factual basis; and

ix. at the time of declaration of election result, the 1st respondent was not in possession of Forms 34B, and did not publicly display the same for verification.

17. The petitioners contended that the Presidential election was not impartial, neutral, efficient, accurate and accountable as required under article 81(e)(v) of the *Constitution*, as read with Sections 39, 44 and 44A of the *Elections Act* and Regulations made thereunder, and section 25 of the *IEBC Act*; and that there were instances in which vote-count had been distorted, manipulated, or inflated in favour of the 3rdrespondent. The petitioners asserted that it was impossible to determine who had won the Presidential election, or whether the threshold for winning the election was met.

18. The petitioners contended that there had been a deliberate failure in operational transparency, and that the respondent had disregarded the decision of the Court of Appeal in *Independent Electoral and Boundaries Commission v Maina Kiai*, Civ Appeal No 105 of 2017, by failing to electronically collate, tally and transmit accurate results, and by declaring results by county, rather than by polling stations.

19. The petitioners contended that the 1st respondent had allowed the transmission and display of unverified provisional results, contrary to law; that the 1st respondent had also posted contradictory results in Forms 34A and 34B; and that there were internal contradictions in Forms 34A. They contended that the 1st respondent had declared final results on August 11, 2017 even before receiving results from all polling stations, and had allowed more than 14,000 defective forms from polling stations – with the outcome of distorting more than 7 million votes. The petitioners contended that the 1st respondent had colluded with the 3rd respondent to eject their legitimate agents from various polling stations in Central and Rift Valley regions. On the basis of such allegations, the petitioners contended that the 1st respondent had abdicated its responsibility for ensuring a transparent and an impartial voting process, apart from corrupting the process of transmission of results.

20. The petitioners contended that the 1st respondent had failed to adhere to the *Constitution*, rule of law, court orders and decisions – and that such a condition rendered the processes of the Presidential election, the transmission of results, and the final outcome, a nullity, as it lacked integrity, fairness and transparency.

21. The petitioners contended that there had been a violation of article 86 of the *Constitution*, and that the votes cast in a significant number of polling stations were not counted, tabulated, and accurately collated as required under article 86(b) and (c) of the *Constitution*, as read with the *Elections Act*. They contended that the results recorded in Forms 34A differed from the results shown in the 1st respondent's Forms 34B and displayed in the 1st respondent's website; and they asserted that the 1st respondent's Forms 34B were inaccurate, bearing statistical manipulation to favour the 3rdrespondent.

22. The petitioners contended that the 1st respondent had acted contrary to the terms of articles 38, 81 and 86 of the *Constitution* as read with sections 39(1c) and 44 of the *Elections Act* and the regulations thereunder, as well as section 25 of the IEBC Act.

23. The petitioners contended that, contrary to regulation 7(1)(c) of the *Elections (General) Regulations*, the 1st respondent had fraudulently established secret and ungazetted polling stations, wherefrom vote-count results were added to the final tally, thereby undermining the integrity of the Presidential election.

24. The petitioners contended that a significant number of Forms 34B had been executed by persons not gazetted as Returning Officers, and not accredited as such by the 1st respondent – and that such election results as were carried in such forms were invalid. They contended that all returns submitted without IEBC's official stamp, or which did not bear the signatures and particulars of Returning Officers and agents, were invalid.

25. The petitioners averred that the returns used in a material number of polling stations were not in the prescribed Forms 34A and 34B, contrary to Regulations 79(2) (a) and 87(1)(a), and that the Forms 34B bore fatal irregularities affecting 14,078 polling stations out of the established 25,000. They contended that a number of the forms and returns were not signed; that some did not show the name of the Returning Officer; that some did not bear the IEBC stamp; that some Forms 34A and 34B did not bear the signatures of candidates' agents, nor the reason for lack of signature; that some were signed by the same presiding officer serving at different polling stations.

26. The petitioners contended that the 1st respondent had violated their rights under article 35(2) of the *Constitution*, by putting up inaccurate information which misled the general public. They also asserted that the Presidential election was compromised by intimidation and improper influence, or corruption, contrary to article 81(e)(ii) of the *Constitution* as read with the *Elections Act*, and regulations 3 and 6 of the *Electoral Code of Conduct*.

27. On the basis of the foregoing contentions, the petitioners formulated certain specific issues for the court's determination:

i. whether the Presidential election was conducted in accordance with the *Constitution*;

ii. whether the Presidential election was conducted in accordance with the written law;

iii. whether the 1st respondent's non-compliance with the *Constitution* and/or the law, affected the result of the Presidential election;

iv whether the 1st respondent's non-compliance with the *Constitution* and/or the law affected the validity of the result of the Presidential election;

v whether the non-compliance, irregularities and improprieties affected the validity of the results of the Presidential election;

vi. whether the non-compliance, irregularities and improprieties affected the result of the Presidential election;

vii. whether the exclusion of 2.6% of the total votes cast, as spoilt votes, substantially affects and/or invalidates the count and tally of the Presidential- election votes;

viii. whether the total number of verified, rejected votes should be considered in ascertaining the attainment by any candidate, of the constitutional threshold;

ix. whether the 3rd respondent was validly declared as President-elect;

x. whether the said 3rd respondent committed election irregularities;

xi. what are the appropriate orders to be issued by the court.

c. What is the Evidence?

28. The various contentions and averments, as a matter of vital judicial methodology, are to be lighted up by objective evidentiary account. I will now consider the scope of validation for the petitioners' cause, coming forth by way of their main body of factual testimony.

29. The 1st petitioner, Mr Raila Amolo Odinga, tendered evidence by his affidavit of August 18, 2017 which also represented the stand of the 2nd petitioner. He deponed that he had been a Presidential election candidate, duly nominated by the NASA coalition.

30. The 1st petitioner deposed that the 1st respondent, acting through presiding officers, undertook the vote-count which culminated in the declaration of the 3rdrespondent as President on August 11, 2017, with 8,203,290 votes, as against the deponent with 6,762,224 votes. The deponent was aggrieved with the declaration, as he believed the Presidential election to have entailed breaches of the *Constitution* and the applicable laws – such breaches arising before polling day, as well as during the processes of tallying and transmission of results.

31. The deponent stated his belief, that the Presidential election failed to meet the constitutionally-prescribed terms that require free, fair, transparent, accountable, credible and/or verifiable elections. He deposed that the IEBC had deliberately and/or negligently compromised the security of the integrated electoral management system (KIEMS), and thereby exposed it to unlawful interference by third parties. He deponed that the collation, tallying, verification and transmission of the Presidential-election results had been compromised by procedural flaws and illegalities, upon such a scale as substantially qualified the credibility of the declared result. He averred that the poll results as declared, were substantially at variance with the actual results tallied and declared at the gazetted polling stations. He deponed that the 3rd respondent, in concert with Cabinet Secretaries and others serving under the charge of the 3rd respondent, had abused their positions, by bringing their influence and pressure to bear upon the potential voters.

32. The deponent averred that, while the 1st respondent had acted by virtue of section 44 of the *Elections Act*, and developed the *Elections (Technology) Regulations, 2017*, under which the KIEMS system had been set up for the management of elections, the failings in the conduct of the Presidential elections had now undermined the security of the electoral system, exposing it to third-party interference. He deponed that the said electronic system had been misapplied, with the effect that the Presidential election was substantially conducted by manual processes. As an instance in that regard, the deponent averred that the 1st respondent acted contrary to law by failing to transmit electronically the vote-count results from

the polling stations and the constituencies – with the consequence that the transmission process was now exposed to unlawful manipulation. He averred, in that context, that the consequential delay in transmitting election results with the prescribed forms, gravely affected the credibility and validity of the results.

33. The deponent averred that a review of the election results, in relation to the available Forms 34A and 34B, had shown substantial qualitative anomalies, such as put into question the credibility of the Presidential election.

34. The deponent averred that the 3rd respondent was guilty of undue influence, bribery, inducement and intimidation in relation to the free exercise of elective preference by the voters. In this regard the deponent averred that the 3rd respondent had, on 2nd August at Makueni, issued threats to those chiefs who did not mount political campaigns in his favour; that Cabinet Secretaries had actively campaigned for the 3rd respondent; that the 3rd respondent had taken decisions involving public resource-deployment, in such a manner as to benefit his political campaign.

35. Another deponent, Ms Oichoe, averred that she was a cyber security expert, and had observed and followed the conduct of the August 8, 2017 General Election – in particular, the process of vote-count results transmission. The process, as she averred, entailed six primary scenarios in respect of which IEBC's operational systems and data base has to be tested. The first of these is confidentiality: this requires that information should only be accessed by authorized persons; the confidentiality of sensitive information is to be secured. Secondly, integrity: information used should be accurate, complete, protected from unauthorized modification – by authorized or unauthorized persons. Under this scenario, it was the deponent's averment that non-authenticated results had entered the IEBC's public portal – and so, this should raise questions as to the integrity of the data. The third element, availability, required that data systems be available when required by persons authorized to use them – and access thereto is to be in compliance with the terms of articles 35 and 47 of the *Constitution*, and section 44(b) of the *Elections Act* as read with section 4 of the *Access to Information Act*, and regulation 15(4) of the *Elections (Technology) Regulations, 2017*. She deponed that during the August 8, 2017 General Election, the voters' register had not been made available on request, until the last moment when an order of court had been made in aid of such access. The deponent averred that the next feature of the data-base system was non-repudiation: an audit trial is to be maintained on activities occurring. This ensures that should someone have access to the information or data-base, a footprint is left; and a log should be maintained to facilitate tracing-back to source. It was her averment that it was emerging from the petition, that entry had been made into the data-base, and a strange return made in place of the statutory Form 34. She deposed that a strange book had been posted on the IEBC website, and that such a situation calls for explanation. She averred that since

the statutory form for transmitting results is Form 34, the book posted in the website was strange in law. The fifth website scenario, in the deponent's averment, is authenticity: the information itself, as well as its source, is to be shown to be genuine – this being attributable to section 44B of the *Elections Act*. The deponent averred that, on the date of declaration of election results, only 29,000 Forms 34A were available, and the declaration was made on the basis of forms of questionable authenticity. Her last, essential data-base feature was privacy: section 55A as read with section 44B of the *Elections Act* contemplates privacy and security of data; and so, the deponent averred, if it is proved that IEBC failed to secure its data and its public portal, then it would be necessary to have an audit of all its systems.

36. Another deponent, Mr Koitamet Ole Kina, averred that he was a duly accredited agent of the NASA coalition, in the General Election of August 8, 2017. He deposed that he had arrived at the IEBC co-ordination base, the Bomas of Kenya, on the election date at 16.30 hrs, for the purpose of activating his access card. Following some delay in activating the card, the deponent joined the company of fellow agents, and they witnessed the streaming-in of election results, which commenced at 17.15 hrs. Thereafter, he averred, his team came to learn that it was not possible to verify the result-announcements, as they came unaccompanied with hard copies of Forms 34A, or the soft copies from the server. The NASA team, being concerned, approached IEBC Commissioners (Professor Guliye and Ms Roselyn Akombe) and the CEO, Mr Ezra Chiloba, calling for Forms 34B as a basis of verification. As this initiative proved ineffectual, the deponent averred, the NASA agents demanded a meeting with the Commission, and obtained yet another fruitless promise of access to Forms 34A: these being received, with Forms 34B, only in limited numbers, on August 11, 2017.

37. The deponent recorded his opinion, regarding the unreliability of the supply of Forms 34A and 34B by the IEBC, that this was evidence of a determination on the part of the Commission to declare results that could not be verified as required by law. The deponent drew on the content of another affidavit, by Dr Oduwo, and averred that dilatory responses to the demands for the said forms, showed the 1st respondent's announcements to have been misinformed, and/or based on information such as failed the test of verification, accuracy, transparency and credibility.

38. Mr Moses Wamuru, the NASA Presidential candidate's chief agent and co-coordinator for Embu County, deponed that he and his agent-colleagues had not only been harassed, but kept out of the polling station by IEBC officials and officers of the Provincial Administration, for most of the election day. He deponed that he had been forced by the Constituency Returning Officer, to sign the election declaration form, as a condition for being availed a copy of the election results.

39. Another deponent, Mr Godfrey Osotsi, for Amani National Congress (of the NASA coalition of parties), averred that he was an ICT expert who had been an observer of the August election vote-tallying. This deponent deposed not upon settled fact, but urged this Court to order a system-audit: to trace transmissions so as to reveal the code used by IEBC for the more-than 40,000 polling stations; for the purpose of identifying the IEBC officers who used such codes to transmit election results; to establish the time and place where such transmissions were originated; and to identify the person who applied the special identifier to effect results transmission.

40. The deponent also gave his opinion on matters of law: that under the *Elections Act*, election material' includes systems such as are contemplated under section 17(1), and include the Kenya Integrated Electoral Management System (KIEMS) – which incorporates voter registration, voter identification, and the results-transmission system.

41. The deponent proceeds on that same line of averment: a declaration of results has to come in the wake of a transmission in the right manner, as prescribed, before reaching the National Tallying Centre. He rested his affirmations upon other deponents' statements in support of the petition: as at the time of declaration of Presidential election results, only 29,000 Forms 34A had been received, and their authenticity still stood to be ascertained; and, election results could only be declared when the Commission was already in possession of all the Forms 34A and 34B.

42. The deponent averred that IEBC either lacked full control of its system, or had ceded such control to some other authority.

43. Another affidavit was sworn by Mr George Kegoro, the executive director of the Kenya Human Rights Commission, a civil society agency committed to fostering and safeguarding human rights, democratic values, human dignity and social justice. He deponed that his organization serves as secretariat for an initiative known as Kura Yangu Sauti Yangu (KYSY), which is wholly devoted to the cause of fair elections during Kenya's 2017 election cycle. He averred that KYSY had deployed some 500 agents in all the 290 constituencies, to observe and monitor the electoral process: and KYSY had found contradictions and anomalies in the election data emanating from IEBC, especially in relation to the Presidential votes as reflected on the IEBC website.

44. An agent of the NASA coalition, Ms Olga Karani, deponed that, concerns had been expressed by members of the public, about anomalies and irregularities in the vote tallying process – such anxieties also coming from the election candidates, as well as NASA agents. She averred that the prescribed election forms were manually availed to the National Tallying Centre, though sometimes they were also displayed on the IEBC website. It was her belief that it was impossible to verify the authenticity of such forMs She deponed that, by the time

of announcement of the election results, the Commission had neither collated, nor availed any of the Forms 34B, nor had it responded to outstanding issues regarding Forms 34A, or to the questions being raised about results posted on the website. She attributed lack of transparency to the actions taken by the 1st respondent.

45. Another deponent, upon whose averments several of the petitioners' witnesses relied, was Dr Nyangasi Oduwo. He deponed that on August 8, 2017 at 5.07 pm., some 10 minutes after the closure of the polling stations, the 1st respondent started streaming results for the Presidential election. He averred that such announcements of results had maintained a constant gap of 11% between the vote-count for the 1st petitioner and the 3rdrespondent – notwithstanding the random distribution of the constituency-locations. His averment expressed suspicion also on the basis that, as he perceived it, in numbers of polling stations within the central Kenya and Rift Valley regions, the petitioner's agents were chased away from the stations, and replaced by imposters, and thereafter presiding officers were caused to record fictitious results in favour of the 3rdrespondent.

46. Dr Oduwo averred that, upon being asked by the petitioner to examine 5000 Forms 34A, supplied by presiding officers to the 1st petitioner's agents across the country, and to compare these with Forms 34B supplied by the 1st respondent and Forms 34A posted on the 1st respondent's website, he found discrepancies.

47. Dr Oduwo made averments embodying opinion in clear terMs He asserted that the 3rdrespondent and the Deputy-President, who were candidates in the Presidential election, were guilty of corruptly influencing voters in the run-up to the General Election of August 8, 2017. He averred that the election was compromised by instances of undue influence, inducement, bribery and intimidation. The deponent, in a second affidavit, avers that certain anomalies had compromised the said election, instances being: forms marked with a rectangular, rather than an official, circular stamp; Returning Officers failing to sign Forms 34B, or recording their own names; lack of handing-over notes; discrepancies in numbers of valid votes; unstamped forms; corrected figures noted on forms; agents not signing statutory forms; discrepancies in vote-tally.

48. Discrepancy in vote-tally records was also the subject of averments by Mr Benson Wasonga, who deponed that the IEBC's summation of valid votes was 15,179,717 – with the 1st petitioner having 6,821,505; the 3rdrespondent having 8,222,862; and the total rejected votes being 477,195; as compared to the IEBC portal showing as total votes cast, 15,180,381, 1st petitioner's vote as 6,821,877, 3rdrespondent's vote as 8,223,163, and rejected votes as 403,495. These figures, it was deponed, varied from the specific figures (Form 34C), that were issued at the time of declaration of the 3rdrespondent as the leading candidate: total valid votes, as 15,114,622; 1st petitioner's votes, as 6,762,224; 3rdrespondent's votes, as 8,203,290;

total rejected votes, as 81,685. The deponent deposed that the actual variation in the rejected votes, as between the IEBC's summation of the results, and the display on the portal, was 73,700 votes; and he averred that this differential amounted to violation of the electoral law, to the prejudice of Presidential candidates other than the declared winner.

49. The petitioners called two more witnesses, one of these being Mr Mohamed Noor Barre, from Mandera County in the north of the country. He deponed that while he had been trained, and sworn to serve as presiding officer in the elections, the local IEBC office had informed him on August 7, 2017 that he had been replaced by a different person. His averment was that the electoral process at his station had been conducted by strangers' as presiding officers.

50. It is the same with Mr Ibrahim Mohamud Ibrahim, also from Mandera, who deponed that although he had been appointed, training and sworn-in as presiding officer, he had been called to the local IEBC office on August 7, 2017 and informed that his place had been taken up by a different person. He deponed that the elections which took place on the following day, had been conducted by strangers, acting as presiding officers.

C. The Other Side: Respondents' Answer

a. Introduction

51. Judicialism, the established framework for relieving the all so-frequent grievances, conflicts, frays and tensions in the social order, has evolved as a civilized tradition of durable rules and methods of accommodation. Such methods have their objectivity and rationale, lodged within the discipline of law, which, as will become evident in this Judgment, is the domain not of the most open-textured manifestations, nor the most elementary political suasions – but of jurisprudence, as methodical reasoning, of a normative and professional category.

52. The established judicial method, which rests on the singular dependability of the fact- base, and which vindicates the principles of fairness, objectivity and legitimacy – is to entertain the account from the other side; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result.

53. As I express this introductory perception, so as to shed more light on the instant matter, I admit my debt to legal scholarship; with Andrew Goodman in his learned work, *How Judges Decide Cases: Reading, Writing and Analysing Judgments*, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co Pvt Ltd, 2009), in which he observes (p 44):

> However rarefied and abstruse the legal argument before the [court], it must be anchored on the facts of the case: while the judges will feel free to expound upon the most general principles in order to provide guidance for the future, the actual

> decision...will turn on the facts, even if the detail of the argument is quite remote from them [emphases supplied].

54. Such is a fundamental principle, invariably observed in the practice and application of law in this country, as in other countries, the constitutional and judicial systems of which have benefited from the integrity of the common law tradition. And such an approach is certain to lead to a fair, dependable and plausible basis of judgment, as well as set a just and tenable reference-point for the future.

b. Issues and Contentions

55. It was the 1st and 2nd respondents' assertion that the 3rd respondent, in the Presidential election of August 8, 2017 had garnered the largest number of votes, and had satisfied the constitutional threshold prescribed in article 138(4) of the *Constitution*, apart from complying with the terms of the applicable statute law. They denied the petitioners' claims of non- compliance with the terms of articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the *Constitution* as well as other applicable laws, asserting that all such claims of non- compliance were couched in bare generalities, and were devoid of any factual basis.

56. The 1st and 2nd respondents stated that the conduct of the Presidential election had been attended with an elaborate management system, guided by all relevant electoral laws, and safeguarded by definite safety measures for assuring transparency, accountability and verifiability, in terms of articles 81 and 86 of the *Constitution*.

57. The 1st and 2nd respondents stated that they had duly verified, and accurately tallied the election results for all candidates, before declaring the outcome, in accordance with article 138(10) of the *Constitution*, and duly taking into account the terms of the recent Court of Appeal decision in *IEBC v Maina Kiai and 4 others*, Civ App No 105 of 2017 [which relates to vote tallying]. They denied the petitioners' claims, that they had conducted the electoral process in a manner that prejudiced the sovereign will of the voters, and that they had only delivered preconceived and predetermined, computer-generated leaders.

58. The 1st and 2nd respondents denied the petitioners' allegation, that the number of rejected votes in the Presidential election had been as much as 2.6% of the total votes cast, stating that such votes, as declared in Form 34C, constituted only 0.54% of the votes cast.

59. The 1st and 2nd respondents contested the petitioners' claim that the right principle to guide this court, in respect of the treatment of rejected votes, should be that preferred by the Seychelles Supreme Court, in *Popular Democratic Movement v Electoral Commission*, Const Case No 16 of 2011, rather than this Court's established precedent in *Raila Odinga v Independent Electoral and Boundary Commission & others*, Pet No 5 of 2013. The

respondents' stand was that rejected votes had been rightly excluded from the count of votes cast, by this court.

60. The respondents stated that the process of relay and transmission of results, from the polling stations to the constituency tallying centre and the National Tallying Centre, had been simple, accurate, verifiable, secure, accountable, transparent and prompt.

61. The 1st and 2nd respondents stated that the Presidential election had been conducted in a manner that was free, fair, and in accordance with the *Constitution*; a manner that gave fulfilment to the sovereign will of the voters. The respondents urged that in these proceedings, two basic questions fell for determination, namely:

(i) whether the 3rd respondent was validly elected and declared as President- elect by the 2nd respondent;

(ii) what consequential declarations, orders and reliefs the court should grant.

They asked the court to find, with regard to the two questions, that –

i. the respondents had not contravened the provisions of the *Constitution*, the *Elections Act*, or any other statute;

ii. the presidential election was conducted in accordance with the *Constitution* and the *Elections Act*, and all other relevant statutes, and a valid declaration of the outcome duly made;

iii. the 3rd respondent was validly elected as the President of the Republic of Kenya;

iv the people of Kenya exercised their sovereign power of the vote, and their decisions should be respected;

v the petition lacks merit, and should be dismissed;

vi. the petitioners should bear the costs of the petition.

c. Evidentiary Statements

62. The 2nd respondent, in his affidavit sworn on August 24, 2017 deponed that he had been the Returning Officer for the Presidential election of August 8, 2017. He averred that neither he nor the 1st respondent had any private stake in the election outcome, and that they had been neutral referees – their sole mandate being to provide the electoral structure for the voters to exercise their sovereign will, by electing leaders of their choice.

63. The deponent averred that, a tally of all the votes had shown Uhuru Kenyatta to have garnered 8,203,290 votes, followed by Raila Odinga, the 1st petitioner herein, who garnered 6,762,224 votes. The declared results were expressed in Form 34C, which was

itself abstracted from forms 34B, forwarded to the National Tallying Centre from the constituency tallying centres, as well as the diaspora vote-tallies.

64. The deponent averred that, in view of the election-management infrastructure that was in place, the primary results-declaration forms (Forms 34A and 34B) were by no means compromised, in their accuracy and overall integrity. These forms had been transmitted through the KIEMS electronic system, in a scanned format, secured by non-replicable features. The security features, he averred, included anti-photocopy and self-carbonated elements, up to a span subsuming six copies.

65. He deposed that the presiding officers at the 40,883 polling stations were required to scan, and electronically transmit the original Forms 34A to both the constituency tallying centres and the National Tallying Centre. The constituency tallying centres for their part, were required to relay the Forms 34B to the National Tallying Centre, for the purpose of tallying: and so, for the Presidential election, the results could be verified by reconciling the figures in Forms 34A.

66. The deponent averred that, his dedicated task in the said electoral process was to provide policy leadership, and strategic direction, to ensure that the Commission's infrastructure for election-management, was accountable, efficient, systematic and methodical.

67. He deposed that, though afflicted by challenges occasioned by a multiplicity of suits against the Commission, it still ensured that the procurement of electoral materials, by the secretariat, was done in a transparent and timely manner; and that other electoral processes, including supportive technological systems, were deployed in a manner consistent with the constitutional and legal requirements of simplicity, accuracy, verifiability, security, transparency and accountability.

68. The deponent averred that, all due arrangements had been made by the Commission, in aid of the electoral process of August 8, 2017 – noting in particular the following aspects:

    i. voter education had been conducted throughout the country;

    ii. staff training, for the management of elections, had been duly carried out;

    iii. all the polling stations had been duly gazetted;

    iv the register of voters had been duly audited and uploaded in the Commission's website (https:www.iebc.or.ke/iebcreports), and hard copies printed and posted at conspicuous sites at each polling station;

    v mechanisms were put in place to facilitate the observation, monitoring and evaluation of the elections, in compliance with the terms of article 88(4) of the *Constitution*;

vi. the procurement and distribution of strategic and non-strategic election materials was duly completed;

vii. as required by article 10 of the *Constitution*, the Commission had held many consultative meetings with key stakeholders, including – quite significantly – political parties: to update them on the progress made on all fronts, in relation to the August 8, 2017 elections;

viii. the Commission had duly complied with the recent decision of the Court of Appeal in the *Maina Kiai* Case, on the conditions attending the tasks of: vote-counting; tallying; verification; and declaration of Presidential-election results at the constituency level, and at the National Tallying Centre.

69. The deponent averred, in the light of the foregoing safeguard-measures taken, that, it was not true as alleged by the petitioners and their witnesses, that the Commission presided over a shambolic Presidential election, or that the entire electoral process was a failure, or that the election entailed breaches of the *Constitution* and the applicable laws relating to vote-tallying, and to the transmission of results.

70. The deponent averred that the Presidential election had met all the requirements of free and fair elections, having been conducted by way of secret ballot; being free from violence, improper influence or corruption; having been administered in a dedicated process conducted exclusively by the Commission; having been transparently conducted; and having been administered in an impartial neutral, efficient, accurate and accountable manner.

71. The deponent, on the course of action which he took following the elections, signalled his authority as emanating from article 138(10) of the *Constitution*: he is mandated, within seven days following the election, to declare the result as set out in Form 34C, and to deliver written notice of the same to both the Chief Justice and the Incumbent President. He averred that, throughout the electoral cycle, he had discharged his mandate in perfect accord with the *Constitution*, the electoral laws, and the applicable regulations. He averred that in the discharge of his obligations at election time, he had not been influenced by anyone, and had maintained the required standards of professionalism.

72. The deponent deposed that he had conducted and supervised the election in accordance with the terms of article 81(e) of the *Constitution*, and that in this respect, several elements in his discharge of duty stand out, namely:

i. every registered voter who participated in the General Election, had cast his or her vote by way of secret ballot;

ii. polling stations were adequately secured by the police, to ensure that the electoral process was free from violence, intimidation, improper influence, or corruption;

iii. the election was independently conducted by the Commission;

iv candidates and observers, were allowed to have their appointed agents at the various polling stations – to observe the voting process and to assure transparency;

v the said agents observed the closure of the voting process, and were involved in the counting of votes at the various polling stations, to bear witness to manifestations of transparency, impartiality, neutrality, efficiency, accuracy and accountability in the voting and vote-count; and

vi. the agents of the Presidential-election candidates were given access to the various vote-recording forms, including Forms 34A and 34B – a further element in the 1st respondent's transparency and accountability.

73. The deponent averred, as regards the transmission set-up during the electoral process, that the Commission's staff managing the KIEMS gadgets, had been trained in good time, and the said gadgets had been configured with the register of voters. He averred that the KIEMS system was designed to allow for integration of the biometric voter registration, biometric voter identification, the electronic transmission of election results, and the political party, and candidate registration systems. He deposed that the said system had been successfully deployed on August 8, 2017, and that it had significantly improved efficiency, effectiveness and accuracy in the operation of the electoral process.

74. The deponent averred that he was present at the National Tallying Centre between 8th and August 11, 2017, participating in the tallying and validation of Forms 34B that were being electronically transmitted by the constituency returning officers (and in this regard, he attached as evidence copies of Forms 34B, marked WWC-3). Upon receipt of these forms, he deposed, he had collated the same, and confirmed the consistency of the results, availing Forms 34B to the Presidential election candidates through their agents, for verification and confirmation. The deponent, thereafter, used the said results to tally and complete Form 34C, in compliance with section 39(3)(b) of the *Elections Act*.

75. The deponent makes specific averments on the vote tallies, as he received them on August 11, 2017; on this occasion he received 290 Forms 34B from the constituencies, as well as the tally of diaspora votes: and the Presidential election results were confirmed by the agents, the particulars thereof standing as follows:

Name of Candidate	Valid Votes	Percentage of Votes Cast	No of Counties wherein Candidate had at least 25% of the Votes Cast
John Ekuru Longoggy Aukot	27,311	0.18%	0
Mohamed Abduba Dida	38,093	0.25%	0
Shakhalaga Khwa Jirongo	11,705	0.08%	0
Japheth Kavinga Kaluyu	16,482	0.11%	0
Uhuru Kenyatta	8,203,290	54.27%	35
Michael Wainaina	13,257	0.09%	0
Joseph William Nthiga Nyaga	42,259	0.28%	0
Raila Odinga	6,762,224	44.74%	29

On the basis of these results, the deponent avers, he acted in compliance with article 138(4) and (10) of the *Constitution*, and publicly declared the Presidential election outcome on August 11, 2017.

76. The deponent averred that the Commission had found that, in a few of the results-declaration forms, there were certain errors – but that these were inadvertent, minor errors which had no effect on the vote-tally and outcome of the Presidential election. In support of the finding on the said errors, the deponent tendered in evidence a document marked WWC-5, attended with the detailed affidavit of Ms Immaculate Kassait (1st respondent's Director of Voter Registration and Electoral Operations).

77. Mr Chebukati had specific averments to make in relation to certain depositions made on behalf of the petitioners. He deponed, in relation to the statement by Mr Godfrey Osotsi, that, throughout the electoral process, the Commission had engaged the petitioners as well as the 3rd respondent (in person, and through their representatives), the public, and interested stakeholders – for the purpose of adhering to best practices in electoral matters.

78. The deponent, in departure from the testimony of Mr Godfrey Osotsi, averred that the Commission was already in possession of all Forms 34B, at the time of declaration of the Presidential election results: and all the Forms 34B and 34C were availed to the candidates and their agents for verification, before the declaration of results; and all Presidential election candidates were allowed to visit the National Tallying Centre to verify the results, as from the commencement, up to the moment of declaration. He averred that he personally chaired many consultative meetings with the petitioners' agents, whenever any issues of concern had been raised, even though for unexplained cause, the petitioners' agents had decided to depart from the National Tallying Centre, just prior to the declaration of results.

79. In response to the 1st petitioner's claim of procedural flaws, illegalities and/or irregularities in the collation, tallying, verification and transmission of Presidential election results, the deponent averred that tallying as conducted by the Commission, was in compliance with articles 81(e) and 86 of the *Constitution* as read with section 39 of the *Elections Act*; and he deponed that at every forum of results-processing, the petitioners were allowed to have their agents, to confirm the tallying, the announcement and declaration of results. He averred as well, that the electronic system of transmission of results was secure, prompt, verifiable and efficient. He deponent that all the results-declaration forms had been subject to verification by the candidates' agents/representatives, and immediately thereafter, forwarded to the National Tallying Centre. The deponent further averred that the 1st petitioner had deposed that he had been given access to the Forms 34B through his agents: and thus the charge of lack of transparency and accountability in the tallying process, was short on veracity.

80. The deponent denied the 1st petitioner's assertion that IEBC had condoned voter intimidation, undue influence, bribery and/or flagrant electoral offences committed by the 3rd respondent. He similarly denied the assertion by one of the 1st petitioner's witnesses, Dr Nyangasi Oduwo, that the 3rd respondent had been declared to be the winner without a verification of all the requisite documents. He averred that all the Presidential election candidates and their agents, or representatives, had been invited to verify the results, before declaration. And he deponed that he did not announce the final results of the Presidential election until he had received and verified the Forms 34B from the constituency tallying centres.

81. The deponent averred that on August 10, 2017 the Commission received a letter of the same date from Mr Orengo, the petitioners' deputy chief agent, raising concerns about the Presidential election results; and the Commission internally considered the issues raised, before communicating its position by a letter of the same date (exh. WWC-6a and 6b). He averred that the declaration of Presidential election results on August 11, 2017 was done in full compliance with the terms of the *Constitution*, contrary to the averments of the 2nd petitioner.

82. The deponent averred that the petitioners' allegation that the Commission had failed to take steps against the 3rdrespondent for breach of the provisions of the Election Offences Act, section 14, was not true; for, on June 21, 2017 he had written to the Director of Public Prosecutions informing him of the alleged breach, and calling for his action. The Director of Public Prosecutions had responded by his letter of July 6, 2017 informing the deponent that he had directed the Director of Criminal Investigations to take action as appropriate (exh. WWC-7).

83. Another affidavit was sworn by the 1st respondent's Chief Executive Officer, Mr Ezra Chiloba (August 24, 2017), who averred that the Commission had conducted the Presidential election on August 8, 2017 in accordance with the terms of the *Constitution* (articles 81, 83 and 86), the *Elections Act*, and the applicable regulations.

84. Mr Chiloba testified that, despite the complex political and legal environment in the run-up to the General election of August 8, 2017, the 1st respondent had managed to put in place an effective infrastructure, with appropriate mechanisms, for the conduct of a free, fair and credible election. He averred that the election was conducted in a transparent, open and accountable manner, and that the process was peaceful and credible – just as was confirmed by both local and international observers. (In this regard, he annexed as evidence a copy of the various observer reports – exh. EC-12).

85. The deponent averred that the tallying and transmission of election results took place at the polling stations, where the vote-count was collated and declared at the constituency tallying centre, and at the National Tallying Centre. Results thus processed and accounted for, the deponent averred, were in every sense credible, and truly represented the will of the voters. He deposed that there had been no compromise to, nor interference with the system for the transmission of results – before, during, or after the declaration of the outcome of the Presidential election. He deponed that the collation, tallying and transmission of the results were in accordance with the terms of the *Constitution*, the *Elections Act*, and the appellate court's decision in the *Maina Kiai* case.

86. Referring to the documentary evidence on record, the deponent deposed that the election results as declared, were substantially consistent with, and were a true reflection of, the actual results tallied and declared at duly-gazetted polling stations.

87. Responding to the assertions in the 1st petitioner's affidavit, the deponent averred that the electoral law had been recently updated, with the enactment of the Election Laws (Amendment) Act, 2017, allowing a four-month period within which to procure and establish the Kenya Integrated Electoral Management System (KIEMS); and that there was no basis for the allegation that this new electronic system had been compromised through the practice of hacking, occasioning a distortion in the Presidential-election vote tallies. He denied the 1st petitioner's assertion that the 1st respondent had failed to put in place the requisite measures to assure the credibility of the KIEMS system, and averred that the said system had served well in the identification of voters, and for results transmission. He further deponed that the Commission's operations were not entirely dependent on KIEMS, as a complementary mechanism was provided for by law, in the event of any breakdown in the electronic mechanism.

88. The deponent denied the petitioner's assertion that the conduct of vote-tallying in the Presidential election had not been in accordance with the terms of article 86 of the *Constitution*. He deposed that the election results had been transmitted from polling stations and constituency tallying centres, as required by law. Denying the petitioners' statement that they were not supplied with Forms 34A and 34B, the deponent averred that the petitioners had indeed been supplied with all Forms 34A and 34B available on the public portal; and that by their own letter of August 14, 2017 the petitioners acknowledged being accorded access to all the requested forms. (The relevant correspondent in this regard is marked EC-15).

89. To the petitioners' assertions that the Forms 34A and 34B had certain anomalies, such as brought into question the credibility of the Presidential election, the deponent averred that the petitioners had not disputed the results as declared, but only alleged unsubstantiated qualitative anomalies.

90. The deponent averred that all presiding officers had been trained by the Commission to take the image of Forms 34A, for transmission through KIEMS, though there were a number of instances in which they chose to take images of other documents; and the consequence, in view of the fact that one of the security features was the capturing of only one image for the six sets of elections, was that, it was the test documents, rather than the Forms 34A, that ended up being transmitted. Upon noting this error, the 1st respondent uploaded the Form 34A for the affected polling stations, on the public portal. Such inadvertent transmission of wrong images, the deponent averred, did not affect the election results as contained in Forms 34A. (He annexed a typical example of such error, and its rectification, as exh. EC-18).

91. Responding to the petitioners' affidavit sworn by Ms Apprielle Oichoe, the deponent averred that the assertions made under the rubric, The Travesty that was the Electoral Process in Kenya 2017, did not give a true account. The report in question had not, in the first place, been dated or signed, nor was its author or source indicated. The deponent averred that, quite to the contrary, the 1st respondent's tallying and transmission system were functional and credible in all respects.

92. In response to the affidavit of Mr Benson Wasonga, the deponent averred that the election results from each polling station were contained in Forms 34A; and the results- declaration for the Presidential election was made on the basis of results contained in Forms 34B from 290 constituencies and the diaspora. He averred that the total number of rejected ballots as declared in Forms 34C, was 81,685, and not 477,195 as alleged. He averred that Mr Wasonga had misconstrued the statistics published on the public-display mode of KIEMS – which was not the result within the terms of the law. He deponed that the cause of the variance between the actual number of rejected ballots and the figure shown on the public website, was but on account of human error.

93. In response to the statements made on behalf of the petitioners by Mr George Kegoro, the deponent, firstly, adopted the detail, tenor and effect of the 1st respondent's depositions by Ms Immaculate Kassait. Secondly, the deponent averred that the statistics electronically displayed did not, as such, constitute the results of the Presidential election: the final result of the Presidential election is verifiable from an inspection of Forms 34A and 34B.

94. The deponent denied Mr Kegoro's statement that the IEBC's portal showed varying levels of votes cast for the six different elective offices featuring in the General elections of August 8, 2017. He averred that Mr Kegoro's statement was unrelated to the fundamentals of the petition, as it lacked a foundation in the pleadings and the primary depositions of the petitioners – hence verging upon an attempt to litigate a substantial Presidential petition by the guise of supporting affidavit.

95. Responding to the affidavit of Ms Olga Karani, for the petitioners, the deponent adopted the averments made by Ms Immaculate Kassait and Mr James Muhati, and deposed that all agents at the National Tallying Centre had been given access to the Forms 34A and 34B, and an opportunity to verify the results, before declaration.

96. The deponent averred that the Presidential election of August 8, 2017 was conducted in accordance with the *Constitution* and the electoral laws, and that the process was free, fair and credible. Among the elements of credibility in the said election, he enumerated the following:

i. a substantial increase was realized in the number of voters – from 14.4. million in 2013 to 19.6 million in 2017, being some 78% of the eligible voters;

ii. an audit of the register had been conducted, before the date of voting;

iii. the register had been opened for verification of biometric data, by members of the public (May 10, 2017 – June 9, 2017);

iv a time-table had been published for political-party primaries – Gazette Notice of March 17, 2017;

v resolving of disputes from the nomination process for candidates;

vi. registering of over 14,500 candidates to participate in the 2017 General Election;

vii. gazettement of 40,883 polling stations and 338 tallying centres across the country, including the prisons and the diaspora; and

viii. gazettement of returning officers;

ix. acquiring of an integrated electoral management system for voter registration, voter identification, candidates' registration, results transmission;

x. recruitment, training and deployment of over 360,000 election officials across the country;

xi. continuous voter education programmes undertaken across the country, using different strategies and platforms; and

xii. attracting over 15,000 individual observers; 105 international observer institutions; 254 local institutions; more than 7000 journalists from over 30 local and international media houses accredited to participate in the General Election.

97. The next deponent, James Muhati who holds the office of Director in charge of Information and Communication Technology at IEBC, made depositions bearing upon the statements by the 1st petitioner, and by Ms Apprielle Oichoe and Mr Godfrey Osotsi. He averred that the Commissions had taken up suggestions made in the *Kriegler Report* which was formulated in the wake of the violent General Election of 2007, and had deployed certain technological mechanisms to support the management of the electoral process – these being the Biometric Voter Registration (BVR); the Electronic Voter Identification Device (EVID); the Candidate Nomination System; and the Result Transmission System (RTS). When the ne electronic system was first utilized in 2013, the deponent averred, it was found to have certain imperfections; and it became necessary to amend section 44 of the *Elections Act*, mandating IEBC to establish an integrated electronic system: this would facilitate the

conduct of biometric voter registration; electronic voter identification; and electronic results transmission - that is, the Kenya Integrated Electoral Management System (KIEMS). This new system, the deponent averred, was successfully employed during the August 8, 2017 General Election: and it enabled IEBC to properly verify the biometric data during the May 10, 2017 – June 9, 2017 verification exercise, as required by law; it also enabled the proper verification of voters on polling day; and it enabled the due transmission of election results from polling station to constituency, and to the National Tallying Centre.

98. The deponent averred that he was aware of the terms of the *Constitution* and the statutory and regulatory framework, within which the electoral process had been conducted: and in this context, he cited articles 81 and 86 of the *Constitution* as read with section 4(m) of the IEBC Act, which require the voting set-up to be simple, accurate, verifiable, secure, accountable and transparent. He deposed that the KIEMS had been established with the approval of the Elections Technology Advisory Committee (ETAC), under the terms of section 44(8) of the *Elections Act*, and with the participation of relevant agencies and institutions, including political parties. (He annexed the supporting minutes – exh. JM – 1).

99. On the role of ICT in the General Election of August 8, 2017, the deponent averred that a technological process had been used in voter identification, and the transmission of results; and that the transmission component in KIEMS had enabled the Commission to relay the Presidential election results and statistics from the polling stations to the constituency tallying centres and to the National Tallying Centre. During the transmission of election results through KIEMS, the presiding officer would complete Form 34A as required by law, and then input on the KIEMS the results-statistics captured on Form 34A; the presiding officer would then take the image of Form 34A, and, before sending the data, he or she would first show the entries made to the agents of the candidates and of the political parties, for confirmation. (He annexed as evidence, copies of the directions issued to the presiding officers, the training manual, and a transmission flow-chart (JM-5A; JM-5B and JM 5C, respectively)).

100. It was the deponent's evidence that the petitioners' allegations that the relay and transmission was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt, and that there had been a contravention of the terms of article 81 (e)(iv) and (v) of the *Constitution*, did not represent the truth – especially as no evidence had been adduced to support the claims.

101. On the question of the security and verifiability of the electronic system, and in relation to the allegation that there had been some compromise to the KIEMS system by unauthorized third parties, the deponent averred that such claims have no relation to the true position, noting also that they are not supported by evidence. He averred that the Commission had engaged a competent support-team of experts, who subsequently partnered with

internationally recognized and accredited institutions to provide the best information-security system. (He annexed copies of certification and accreditation documents from the providers – exh. JM-8A; JM-8B; JM-8C; JM-8D).

102. The deponent gave testimony on the complementary system in the transmission of election results, for compliance with the terms of article 38 of the *Constitution*. He averred that Regulation 83 of the *Elections (General) Regulations, 2012* provided for the complementary system of transmission of election results, and that the complementary mechanism involves the physical delivery of Forms 34A by presiding officers to the Returning Officers, in the respective constituencies.

103. IEBC's Director of Voter Registration and Electoral Operations, Ms Immaculate Kassait, averred that, contrary to the negative impression given by some of the petitioners' witnesses on early transmissions of election results for some stations, such stations had only a few voters, sometimes numbering between one and 10 – and counting these would take only a short time; she gave examples in this regard: Boyani Primary School in Matuga Constituency; Arabrow in Wajir South Constituency; Ya Algana in North Horr Constituency; Lowangina Primary School in Tigania East Constituency.

104. The deponent denied the veracity of the claim by some of the petitioners' deponents, that there had been, in the transmission of election results, a constant 11% difference in vote-strength between the 1st petitioner and the 3rdrespondent. She displayed a table in her affidavit, based on a 30-minute interval analysis of transmitted election-results data; and this showed the vote difference to range in percentage between 9.095% to 25.573%.

105. The deponent denied the allegation in Dr Nyangasi's affidavit, that the 1st respondent had chased away from polling stations the agents of the 1st petitioner, in central Kenya and in the Rift Valley. She gave examples of polling stations in central Kenya in which, indeed, the petitioner's agents had duly executed Forms 34A.

106. The deponent admitted a case of an erroneous data entry in a station, where the petitioner had been credited with 2 votes instead of 561 votes, indicating that the circumstances in which such error occurred were explained in the 1st respondent's affidavit by Mr John Ole Taiswa; she deponed that a similar explanation of error was also set out in the affidavit of Ms Rebecca Abwaku.

107. The deponent took on specific instances in which the depositions made for the petitioner, and which attributed misrepresentation of vote-count, were based on untrue perceptions of fact: for instance, that a partial Form 34B was uploaded in respect of Karachuonyo Constituency; that in Kilome Constituency the original form 34B reflected 38,269 votes, while that uploaded in IEBC's portal showed 33,757 votes; that in Igembe South, the summation of total votes in Forms 34A for the 1st petitioner was 41,834, yet by Forms 34B

in the Commission's portal, his total votes were 43,209; that the Forms 34A in respect of St. John's Primary School Polling Station indicated the total number of valid votes cast as 468, against the entry on Form 34B which showed 467; that there was a variance between the Forms 34B keyed-in on the KIEMS kit and that projected at the National Tallying Centre for Morrison Primary School Polling Station; that there were any discrepancies in Forms 34B for Embakasi South Constituency, and Forms 34A for Jobenpha Community School; that there were any discrepancies in Forms 34B and 34A in respect of Kiru Primary School Polling Station.

108. The deponent, while disagreeing with most of the claims made by the petitioners, admitted the occurrence of certain errors, for instance: there were discrepancies in Form 34B in Bomet Central Constituency – to the extent that at Bomet Primary School, the form did not show any rejected votes, while there was one rejected vote; in the case of Kapkoross Primary School in Turbo Constituency, there was a computation error – though the total vote cast in respect of each candidate was correctly tallied; there was a computation error in the case of Dagoretti North Constituency, with the total valid votes being shown as 104,789, rather than 105,840; in the case of Naivasha Constituency, there were arithmetic errors in the completion of the forms for several polling stations; in the case of Kiangai Primary School in Ndia Constituency, Form 34A indicated the 3rd respondent's votes as 461, while Form 34B showed these as 467; there was a data-entry error in the case of Gem Constituency – with a variance between the total votes tallied, and the total valid votes.

109. The 3rd respondent made depositions to the effect that he had at all material times been the President of the Republic of Kenya, as well as the nominated Presidential-election candidate for the Jubilee Party, following the earlier General Election of 4th March, 2013; and he had been declared as President-Elect by the 1st respondent, upon the conclusion of the General Election of August 8, 2017.

110. Regarding the integrity of the 1st respondent in its conduct of the 2017 General Election, the 3rd respondent deponed that the IEBC was a reconstituted team, drawing its origin from the endeavours of the NASA coalition's predecessor, CORD, which in May 2016, had held nationwide rallies culminating in the removal from office of the former Commissioners, and the amendment of the *Elections Act*. The said protests led to a bipartisan Parliamentary process, which crystallized a new legal framework, attended with the resignation from office of the then Commissioners, and the appointment of the current Commissioners, who managed the elections of August 8, 2017.

111. The deponent averred that the Presidential Election of August 8, 2017 had been preceded by considerable litigation on electoral matters, in the superior Courts, promoted by the CORD or NASA coalition – notable instances being: *IEBC v Maina Kiai and others* [2017] eKLR;

NASA v IEBC and others, Civ Appeal No 258 of 2017; *Republic v IEBC ex parte Gladwell Otieno*, High Court Jud Rev No 447 of 2017.

112. It was the 3rd respondent's perception that the Commission had complied with the law, in the conduct of the General Election of August 8, 2017 – especially with directions issued by the Courts in the various election-related cases. This perception is founded upon a certain set of facts, as follows:

i. election materials, including biometric voter verification kits, and ballot papers, were timeously conveyed to all polling stations in the country at large;

ii. the biometric voter-verification kits were successfully applied in all polling stations – and where they malfunctioned, prompt action was taken to repair them, or to operationalize in their place the prescribed complementary identification mechanism;

iii. the voting process came up against no impediment, throughout the country; and voting closed on time, in the vast majority of polling stations; where voting began late, voters were allowed commensurate additional time to vote, before closure;

iv candidates and/or their agents, and political-party agents, were allowed in, at the polling stations, to monitor the process of voting, tallying, recording and transmission of results;

v presiding officers at each polling station not only submitted Form 34A in electronic form in the presence of the candidates and/or their agents, but submitted also the scanned copy of Form 34A to the constituency tallying centre – before the hard copies were taken to the constituency tallying centre; and wherever there was a failure to transmit simultaneously the results data and the scanned image of the Form 34A at a polling station, the same was not in violation of any law, there being no statutory obligation in that regard;

vi. other than minimal human errors, which are to be expected, the data entered in the KIEMS, particularly with regard to votes received by the individual Presidential-election candidates, was accurate;

vii. nonetheless, the results electronically transmitted through KIEMS were only provisional, and did not constitute the final figures which were announced by the 2nd respondent; it is notable in this regard that the 1st respondent had made it clear that in the event of any difference between the alpha-numeric results sent though KIEMS and the results reflected on the Forms 34A, the results on the Forms 34A would prevail;

viii. at each constituency tallying centre, the Forms 34A received from the polling stations were collated by the returning officer, and a declaration in the Form 34B, reflecting the same, was signed by the returning officer and the candidates or their agents, verifying that the Forms 34A received were a true reflection of the vote-count recorded by the presiding officers at the polling stations;

ix. the signed Forms 34B were thereafter scanned and transmitted to the National Tallying Centre electronically;

x. all transmitted Forms 34A were held accessible to all parties; and all Forms 34B were printed and availed to the Presidential-election agents at the National Tallying Centre;

xi. the Presidential election results were declared by the 2nd respondent on the basis of the results declared in forms 34A at the polling stations, and tallied in Forms 34B at the constituency tallying centres.

113. The 3rdrespondent deponed that the petitioners had failed to set out the particulars of the non-compliance with the *Constitution* and the law which they alleged, by the 1st respondent; hence their charge had rested merely upon conjecture and speculation.

114. As to the petitioners‘ contention that there were discrepancies between the Forms 34A and 34B bearing the election results, the 3rdrespondent averred that no instances of such variance had been shown; and in his perception, even assuming such allegations were true, the discrepancies would stand as no more than clerical errors, such as would affect the election result, in view of the large difference separating the 3rdrespondent and the 1st petitioner in vote-strength.

115. The deponent averred that it would not have been possible for the 1st respondent to manipulate or distort the votes cast and counted in favour of the 3rdrespondent, considering the rigorous statutory procedures observed by the 1st respondent; and moreover, the final results of the Presidential election had been duly verified by the political parties and the individual candidates, through their agents – the effect being that such election results were a true reflection of the will of the voters.

116. In the 3rdrespondent‘s perception, the 1st respondent, in the conduct of the General Election of August 8, 2017, had all along acted in a lawful and transparent manner, as it undertook the tasks of various stages of the election – including early preparations; voting process; vote counting at the polling stations; tallying at the constituency and the national tallying centres; and the transmission of results at all levels. The mode of conduct of the election, in the 3rdrespondent‘s perception, was efficient, accountable, accurate and credible.

117. The 3rd respondent averred that he had garnered, at the Presidential election of August 8, 2017, a substantial vote, represented in the figure of 1,401,286 above the number obtained by the 1st petitioner. Such a margin, in the deponent's view, emphatically demonstrated the sovereign will of the Kenyan people, which merits safeguard by the process of the law.

118. The 3rd respondent denied the petitioners' contention, that he had contravened the law and the declared principles for the conduct of free and fair election, through the medium of intimidation, coercion, or improper influence on voters. He averred that such allegations have been made without any evidentiary basis. He deponed that the Presidential election had been conducted peacefully, and in accordance with the law, as well as best international practice.

119. The 3rd respondent deponed that he had difficulty in responding to accusations emanating from the petitioners and their witnesses which were imprecise and lacked particulars. While he found Dr Nyangasi's depositions to be in the category of such generalized statements, he none-the-less went on to deny that he corruptly influenced voters in the run-up to the election of August 8, 2017; he denied that he had used threats to get the support of local chiefs in Makueni; he denied being aware of any Cabinet Secretaries who abused their offices and accorded him electoral support, and invoked several other affidavits in support of his averments – those by Dr Kibicho, Mr Wakahiu, Mr Chirchir, and Ms Guchu.

120. Mr Chirchir, who had been the chief Presidential agent during the 2017 elections, deponed that the said elections had been free, fair, accountable, credible and verifiable. He deponed that the majority-vote cast for the 3rd respondent was a natural reflection of the general national voting orientation, which gave the 3rd respondent's Jubilee Party the greatest number of votes for the five other categories of elective posts also filled through the same General Election of August 8, 2017.

121. Denying the averments in Mr Kegoro's affidavit for the petitioners, the deponent averred that the processes of voting, collating and tallying of votes, and declaration of results, had been conducted in compliance with the provisions of the *Constitution* and electoral laws, and that the Presidential election results announced by the 2nd respondent on August 11, 2017 were accurate, and in compliance with the prescribed standards.

122. The deponent averred that, at the time of declaration of the Presidential election outcome, the 1st respondent's online portal had not yet transmitted all the results; and these results were being retrieved from Forms 34A arriving from polling stations, which results had already been transmitted to the constituency level; and the inconsistency in the data displayed was on account of Forms 34A, 34B and 34C that had not yet been transmitted on the online portal. He deponed that, as at August 21, 2017 at 8.14 am, the transmission rate was 99.99%;

and this meant that the reported valid votes in the figure of 15,180,381 at the portal, did not include all valid votes from all the 40,883 polling stations of the country.

123. It was Mr Chirchir's averment that the violence witnessed several days following the declaration of results by the 2nd respondent, was occasioned by the demands by the petitioners that they be declared President-elect and Deputy President-elect on the basis that the petitioners were already in possession of what they believed to be the genuine results, secured from the 1st respondent's servers. Such a crisis, the deponent averred, had been deepened by a press conference in which the petitioners urged their supporters to reject such vote-count results as would later be announced, on the basis of a collation of results in Form 34C.

124. Mr Bryan Gichana Omwenga, a technology advisor employed by the Jubilee Party, averred in his affidavit that it was not true as deposed by Mr Ole Kina, that Forms 34A had been used to declare the Presidential election results; rather, he deponed, it is the Forms 34B that provide the basis for declaring such results.

125. Mr Omwenga deponed that the process of electronically transmitting Presidential election results had not, in all cases, functioned without a hitch: sometimes, the scanned image would fail to load, or would delay in loading, especially in those parts of the country that lacked the 3G or 4G network coverage. It was his testimony that such network challenges had been anticipated – and so, the 1st respondent had duly sounded necessary caution. However, the deponent averred, regardless of whether the electronic system duly functioned, the Forms 34A would still be physically delivered at the constituency tallying centre; and the Forms 34A would then be used to tally the constituency votes: and thereafter the results would be entered in Forms 34B. The Forms 34B would then be transmitted to the National Tallying Centre – where the Commission would sum-up in Form 34C, which would be the basis for declaring the results. Consequently, the deponent averred, it was not necessary to have Forms 34A in possession during the summation of Presidential election results. It followed, therefore, that the early voting results transmitted on television screens were only provisional, as the authoritative results would be based on the constituency tally in Forms 34B.

126. Dr Karanja Kibicho, in his affidavit sworn on August 24, 2017 carries depositions focussed upon the statements made on behalf of the petitioners by Dr Nyangasi Oduwo. He averred that, in his capacity as Principal Secretary in the Ministry of Interior and Co- ordination of Government, he had in July, 2017, received information that some chiefs in Makueni County were unlawfully using their positions, as well as government facilities, to participate in political campaigns – whereupon he duly informed the 3rdrespondent, who issued the necessary warning to halt such a practice.

127. Ms Marykaren Kigen-Sorobit, the Jubilee Party's deputy chief executive officer, made depositions in response to the statements of Mr Wamuru for the petitioners. She averred that Mr Wamuru had cited non-existent polling stations, and claimed that the NASA coalition agents had been excluded from certain polling stations. The deponent annexed evidence in the form of Form 34A, showing that one Ms Eunice Muthoni Ndwiga had been the NASA agent at the Karurumo Youth Polytechnic polling centre, and had duly signed the form, without any reservation.

128. The deponent averred that Mr Benson Wasonga for the petitioners, had stated that there were anomalies in the declaration of Presidential-election results, though without specifying the particulars of such anomalies. She deposed that the summation of the total valid votes in the portal is 15,180,381; and that by Form 34C, the 1st petitioner's votes were 6,762,244 while those for the 3rdrespondent were 8,203,290.

129. Ms Winifred Waceke Guchu swore an affidavit on August 24, 2017, in her capacity as the Executive Director of the Jubilee Party, and deputy chief Presidential agent for the 3rdrespondent. She averred that the difference of 1,441,066 votes that separated the vote tallies of the 3rdrespondent and the 1st petitioner, was a strong enough signal by the voters, who were expressing their free and sovereign will; and she perceived it as relevant to the orientation in political choice, that the Jubilee Party won the majority of elective positions for the office of County Governor; Senator; Member of the National Assembly; Women's Representative in the National Assembly; and Member of County Assembly, all from the same General Election.

130. The deponent averred that the petitioners had, on August 10, 2017 written a letter to the 1st respondent, claiming to have in their possession Presidential election results which differed from the results being shown on the IEBC portal at the time; and just before issuing this letter, the petitioners had made widely-publicised claims that the results transmission system had been corrupted through hacking.

131. The deponent averred that the *Constitution* imposes no duty on the 1st respondent to use electronic systems of results transmission exclusively: the only mandate of the 1st respondent being, to ensure that the electoral system is simple, accurate, verifiable, accountable and transparent. She averred that section 44A of the *Elections Act* entrusts to the 1st respondent a statutory discretion to apply a complementary mechanism, where technology fails, or cannot meet the constitutional threshold of a free and fair election.

132. The deponent averred that upon the conclusion of voting, the counting exercise had begun, in the presence of all agents present, observers, police officers, and all authorized persons. She deponed that according to ELOG, an observer group which deployed one of the largest observer-delegates, the petitioners had a good representation of agents. She believed that

even where such agents failed to sign the prescribed forms, such failure would not invalidate the vote-count results, in the light of the terms of regulations 62(3) and 79(6) of the *Elections (General) Regulations, 2012*. She deponed that once the counting process at the polling station was concluded, the results were simultaneously dispatched electronically to the constituency tallying centre and the National Tallying Centre, and these were the results which then streamed onto the public portal at the Bomas of Kenya.

133. The deponent averred that since the 1st respondent did not own telecommunication network facilities, it relied on licensed service providers. Such service providers were under obligation, under Regulation 20 of the *Elections (Technology) Regulations, 2017* to provide and deliver services as may be requested by the 1st respondent. The 1st respondent, in consultation with the service providers, was required under regulation 21 of the said regulations, to identify and communicate in a timely manner, to all stakeholders, about the network service available at different polling stations, and in areas where there was no telecommunication network. Thus, the deponent averred, Parliament introduced section 44A, to provide a complementary mechanism for the identification of voters and the transmission of results.

134. The deponent averred that after the Court of Appeal decision in the *Maina Kiai* case, it had been confirmed that regulation 83 would be the complementary system applicable in respect of the transmission of election results, in the event of failure of the technological mechanism. The complementary mechanisms would take the form of the physical delivery of Forms 34A from the polling stations to the returning officers at the constituency tallying centre, while constituency Returning Officers would deliver Forms 34B to the National Tallying Centre in Nairobi.

135. The deponent made averments regarding the claim of irregularity in the elections appearing in Dr Nyangasi Oduwo's affidavit. She averred that in the overwhelming majority of the cases cited by Dr Oduwo, the statement had not revealed the features typified as irregular. She deponed that neither the *Elections Act* nor the *Election (General) Regulations* requires that Forms 34A should bear the 1st respondent's stamp; and the failure of an agent to sign the forms at the counting hall did not invalidate the results.

136. In response to allegations of discrepancies in Forms 34A and 34B, the deponent averred that no significant variations existed. She produced a report (exh. WG 13) which showed that after reconciling the discrepancies in the forms attached to Dr Nyangasi Oduwo's affidavit, the effect was that the petitioner's vote-tally improved by 595, while that of the 3rdrespondent decreased by 1199 votes.

137. The deponent respondent to the deposition from the petitioners' side, that the final tally of Presidential-election votes had not included the results for Nyando Constituency, where the 1st petitioner had obtained 60,715 votes while the 3rdrespondent obtained 214 votes:

she deponed that such an oversight was not fatal, as, by Regulation 87 of the *Election (General) Regulations*, the 2nd respondent has authority to declare the Presidential election results where, in the opinion of the Commission, results not yet received would not make a difference in the final results.

138. Responding to the claim by the petitioners that there had been a suspicious disparity between the Presidential vote totals and the totals for other elective offices in the same constituencies, the deponent exhibited an analysis of results from 94 constituencies – showing that the votes cast in one or more of the five other sets of elections, were more than the votes cast at those levels, for the Presidential candidates.

139. The deponent denied the allegation made in affidavits sworn for the petitioners, that the voting results streamed by the Commission had shown a constant 11% margin between the vote-count for the 1st petitioner and for the 3rdrespondent: in line with other depositions for the respondents, she stated that such a gap in vote-count percentages had kept shifting constantly.

140. The deponent responded to the averment from the petitioners' side, that the 3d respondent's electoral strength had benefited from running governmental actions which showed him in positive light, and thus constituted censurable undue influence. She averred that there was no requirement in law that on-going government programmes be suspended during the election period; and that, as article 35 of the *Constitution* safeguards the right to information, the required openness made a case for current government projects and activities to be held accessible to all.

141. In further support of the respondents' stand, is the affidavit by Davis K. Chirchir, sworn on August 24, 2017. He avers that the collation of election results in Form 34C and the announcement thereof, was done after all Forms 34B, save as regards Nyando Constituency, had been electronically transmitted to the National Tallying Centre. He deponed, in line with the depositions of Ms Guchu, that the voting results for Nyando Constituency which had not been collated at the time of results declaration, had no effect on the outcome.

142. The deponent averred that, quite contrary to the reprobation of the vote-result transmission measures taken by the Commission, the actions taken had been based on the authority of the law. This transmission question had already featured in a High Court decision (*National Super Alliance v IEBC and others*, Petition No 328 of 2017) and a Court of Appeal decision (*National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission and 2 others*, Civ Appeal No 258 of 2017), where it was held that the 1st respondent had duly put in place a complementary mechanism in terms of section 44A of the *Elections Act, 2011* and that it had, with public participation, established regulations to operationalize the said statutory provision. In this context, the deponent averred that any

failure of the technological devices would not impair the electoral process, or become the basis for invalidity of the electoral process.

143. The deponent averred that the petitioners' claim that the security of the integrated electoral management system (KIEMS) had been compromised, was not substantiated with any transcripts of video clips, or any other material reference.

144. The deponent averred that the 1st respondent had kept in full control of its electronic transmission system at all times, and that no evidence showed it to have ceded its management or authority in that regard, to any third party. He deponed that it was not true as alleged, that the transmission of results from 11,000 polling stations had been compromised – especially as none of the petitioners had contested the contents of Forms 34A from the relevant polling stations. He further averred that it would not be true, as alleged by the petitioners, that a total of 11,000 polling stations would represent as much as 7,700,000 voters, given that the number of registered voters per polling station varied from one to a maximum of 700.

145. The deponent deposed that it was not a factual statement coming from the petitioners, that the IEBC had the election results streamed on the website, represent a constant percentage of 54% and 44% respectively, for the 3rdrespondent and the 1st petitioner: instead, the variation between the two had oscillated between 27.06% and 9.22% in favour of the 3rdrespondent.

146. The deponent's perception, on the electoral process as a whole, was that, the 3rdrespondent had been duly elected in a free, fair, credible and valid election conducted on August 8, 2017.

D. Does The Petitioners' Case Rest on Fact? Have They Discharged the Burden of Proof? Did the Respondents Discharge the Evidential Burden? Who is Favoured by the State of the Evidence?

147. The objective merits of this case must be drawn from the foundation of fact. I will subsequently revert to the vitality of fact, in the configuration of jurisprudence – the juristic and scholastic preoccupation with the essence of law, and its defining role in social, economic, political, religious or other crucial human engagements.

148. Fact is thus defined: Something that actually exists; an aspect of reality... (*Black's Law Dictionary*, 8th ed (Bryan A Garner, ed) (St Paul, MN: West Group, 2004), p628).

149. Fact, therefore, is as reliable as the concrete foundations of a skyscraper; and it is to be counted upon as a basis of objectivity and truth. The practice of law, and more particularly, the motions of the judicial process via the minds and hands of Judges – society's trustees for justice – are invariably lodged upon the pillars of fact, this being proffered through evidence.

150. The merits of the petitioners' case stand to be tested in the first place through evidence. What evidence did the petitioners adduce" And did they discharge their initial burden of proof, and complete it with an effective clearance of the constant legal burden resting upon them"

151. The evidence scenario speaks for itself, as may be summarized here:

i. the petitioners resort to broad assertions of alleged wrongs on the part of the 1st and 3rd respondents;

ii. such alleged failings are lined up against the *Constitution*'s prescription of certain values, principles and norms;

iii. the petitioners' statements are often plaintive, and inviting the Court to ascertain their true scope, in terms of legality and propriety in the measures taken by the respondents;

iv what the petitioners present as fact, relates primarily to the electronic transmission of election results, rather than the physical conduct of voting and enumeration of ballot;

v and what the petitioners present as fact, in relation to polling day, and to the count of votes, has been responded to in substantial detail in the consistent evidence emanating from the respondents;

vi. the deponents on the respondents' side have responded to the statements from the petitioners' side: they have given testimony describing their actions in the conduct of the General Election of August 8, 2017, as regards the tally and count of votes, and the recording, transmission and declaration of results. The respondents have in the process, explained the actions they took just before, in the course of, and in the aftermath of voting day – explaining such impediments as affected the electoral process, and invoking specific provisions of the *Constitution* and the law, by virtue of which they had acted.

152. Does one behold a clear evidence-scenario, such as ought to lead a duly- perceptive Court in some particular direction, of course, barring some weightier consideration of justice which compels a different course"

153. From the evidence, the petitioners do not seek an ascertainment of the true number of votes cast for the 1st petitioner and for the 3rdrespondent – even though these, as required by law, had been delivered to the Supreme Court, and are kept in the custody of the Registry. The petitioners have focussed the burden of their case on apprehensions as to the perfect security of the transmission system, whereby the election results had earlier been relayed, before the physical records were received, organized and kept by the 1st respondent. They

have claimed an improper tallying of votes from different polling stations, though this has been denied, on the basis of specific evidence, and exhibits showing the contrary. They have spoken of improper conduct during election, on the part of certain government officials, said to have unduly benefited the 3rd respondent's electoral platform – but these claims have been denied by witnesses for the respondents. The veracity of such averments have been brought to question by the detailed testimony of the respondents' witnesses, Dr Kibicho and Mr Wakahiu. The attributions to the 3rd respondent of improper influence, intimidation and corruption, therefore, are not just unsubstantiated, but also fail to meet the high standards of proof required for criminal charges.

154. The petitioners assert, in broad terms, that the 1st respondent, in the conduct of elections, did not abide by the terms of article 86 of the *Constitution*, which requires elections to be conducted in a manner that is simple, accurate, verifiable, secure, accountable and transparent [article 86(a)]. Yet the use of the manual ballot paper would clearly meet such conditions: the voter has no difficulty in marking it; its reality and visibility is not in doubt; it is verifiable, as a check so readily reveals the voter's exercise of his or her right of choice; it is secure; it is transparent; it is accountable.

155. The votes cast had been announced at the polling stations, where they were tabulated, and results announced. From that initial ascertainment of the voting situation, the results were collated at the constituency tallying centre, and announced at that level. The 1st respondent thereafter provided the Forms 34A from all polling stations; Forms 34B from constituency tallying centres; and Forms 34C at the National Tallying Centre – which was signed by all the Presidential election agents, save for the petitioners' agent. Thus, from the evidence in this Court's record, the claim of non-compliance with the terms of article 86 of the *Constitution*, does not stand up.

156. More substantial and more persuasive evidence, in my perception, has emanated from the respondents side. Several examples of such evidence may be set out here:

i. Mr Chebukati, who had been the Returning Officer for the Presidential Election, gave testimony that the verifiable, physical count of the votes cast showed that the 3rd respondent had garnered 8,203,290 votes, as against the 1st respondent who received 6,762,224 votes; and these results were duly recorded in Form 34C, which was itself abstracted from the Forms 34B forwarded to the National Tallying Centre from the constituency tallying centres, as well as the diaspora vote tallies.

ii. Mr Chebukati deponed that the primary results-declaration Forms (Forms 34A and 34B) had in no way been compromised, as regards their accuracy and overall integrity. He deposed that the Forms 34B had been duly forwarded from the

constituencies to the National Tallying Centre, for verification with Forms 34A and for tallying.

iii. Mr Chebukati deponed that the Commission had taken all the necessary steps to ensure that the General Election in all its components, complied with the constitutional requirements of simplicity, accuracy, verifiability, security, transparency and accountability.

iv Mr Chebukati's averments are specific, matter-of-fact, and in line with vital evidence emanating from other deponents on the respondents' side. For instance, Mr Chiloba, the 1st respondent's Chief Executive Officer, confirms that the tallying and transmission of results took place at the polling stations, after which the vote-count was collated and declared at the constituency tallying centre and the National Tallying Centre. Mr Chiloba gave a clear account of the transmission system used by the 1st respondent, as well as of the context and modalities of the recently-introduced Kenya Integrated Electoral Management System (KIEMS).

v Mr Muhati in his affidavit, gave still more details on the working of the electronic transmission system – an account that was entirely consistent with the averments of both Mr Chebukati and Mr Chiloba.

vi Specific and credible evidence, in relation to the factual situation attending the conduct of the General Election of August 8, 2017, is recorded by other deponents, such as Ms Immaculate Kassait, the 3rd respondent, Mr Wakahiu, Ms Guchu, Mr Chirchir, Dr Kibicho, Mr Omwenga, and Ms Kigen-Sorobit.

157. Judges entertaining the competing claims of parties, constantly have to form an opinion, and, from objective criteria and conviction, eliminate the credible from the incredible, the truth from the untruth. That has to be done in this instance. The factual accounts of the respondents are firm and gripping. They are credible, and represent the substantial truth. However, no account of equal strength is beckoning from the other side.

158. I cannot but conclude that, on facts conveyed through evidence, in support of the petitioners' case, they are on weak grounds, as compared to the respondents. In establishing the merits of their case, the petitioners had both the ultimate legal burden of proof, and the shifting evidential burdens falling upon them. They did not, in my appraisal, discharge even the early evidential burden – the effect being, in the end, that they made no valid case against the respondents.

159. The law of burden of proof, at the beginning and in the course of trial, has been the subject of scholarship. Dr HF Morris in his learned work, *Evidence in East Africa* (London: Sweet & Maxwell, 1968) [p 134], thus considered this issue:

> The distinction is commonly made by commentators on the law of evidence between the use of the term in the sense of the burden which lies throughout the trial of establishing a case – usually called the general burden of proof – and in the sense of the onus of producing evidence at any particular stage during the trial. There is a general burden of proof, which lies throughout the trial upon one of the parties and never shifts to the other, to establish the case....In a civil case this burden lies upon the party who would lose if no evidence at all were to be produced, that is to say, in order to win he must establish his case by a preponderance of evidence and, coupled with the onus of discharging this burden, is his right to begin.

160. Such a position is reflected in Kenya's *Evidence Act* (cap 80, Laws of Kenya), which thus provides [section 107]:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

E. The Petition: Any Other Basis of Claim?

161. How is the Court to be guided in relation to the petitioners' claims that

> "the Presidential election was so badly conducted, administered and managed... that it failed to comply with the governing principles established under articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163, and 249 of the *Constitution*...; the *Elections Act*... and the regulations made thereunder including the *Electoral Code of Conduct*....; and in relation to the assertion that [t]he massive, systemic, systematic and deliberate non-compliance with the *Constitution* and the Law goes to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Kenya, Undermines the foundation of the Kenyan system as a sovereign republic where people are sovereign under article 4 of the *Constitution*, and severely undermines the very rubric [sic] and framework of Kenya as a nation State?"

162. How is the court to be guided in respect of the petitioners claims that:

> "[t]he Presidential Election contravened the principles of a free and fair election under article 81(e) of the *Constitution* as read with section 39 of the *Elections Act*...; that [t]he entire process of relay and transmission of results from polling stations to the constituency and National Tallying Centre... and from the constituency tallying centres to the NTC...was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt...[and] substantially compromised and affected the requirement of free and fair elections under article 81(e)(iv) and (v) of the *Constitution*; that [t]he data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS at the individual polling stations; that [t]he Presidential Election was not administered by the 1st respondent in an impartial, neutral and accountable manner as required under article 81(e)(v) of the *Constitution*; that the 1st respondent abetted and allowed the electronic media and news channels to relay and continue relaying the purported results, which the 1st respondent was aware had no legal or factual basis, as well as other claims similarly couched"

163. Such claims invoke the question as to the 1st respondent's compliance with the law in every detail, though without necessarily adverting to the objective facts, as borne by the evidence. The Court has to consider whether such contentions should be a basis for annulling the outcome of the Presidential election of August 8, 2017. This takes us to the line of jurisprudence now established, in electoral matters.

F. Kenya's Jurisprudence in Election Matters

a. The terms of the *Constitution*

164. The *Constitution of Kenya, 2010*, which represents the people's much laboured initiatives to find a pacific, rational and humane regulatory structure for governance, bears certain principles, and it safeguards certain rights and values in unambiguous terms. It safeguards the rule of law, democracy and participation of the people [article 10(2)(a)]. It safeguards political rights, in detailed terms which include the provision [article 38(3)(b) and (c)] that every adult citizen has the right, without unreasonable restrictions, to vote by secret ballot in any election; and to be a candidate for public office...and, if elected, to hold office.

165. Such sacrosanct safeguards have to be so interpreted as to accord them true operational meaning. The same *Constitution* entrusts the interpretive mandate to the courts, to which,

for the faithful discharge of the task, the voters have entrusted their adjudicative sovereignty [the *Constitution*, article 1(3)(c)].

166. How are the courts to interpret such rights and safeguards" The answer is provided in the *Constitution* itself. Article 20(3) thus stipulates:

> In applying a provision of the Bill of Rights, a court shall –
>
> ...
>
> b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

And if it is the Supreme Court that is undertaking such interpretation, then, just like the other Courts, it is under obligation [article 20(4)(a)] to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.

167. The Supreme Court, just like the other courts, in the course of performing its safeguarded interpretive mandate, is under obligation, certainly in the straightforward case, to be guided by the principle that justice shall be administered without undue regard to procedural technicalities [article 159(2)(d)], and the principle that the purpose and principles of this *Constitution* shall be protected and promoted [article 159(2)(e)].

168. The *Constitution* enjoins all courts, in the exercise of their interpretive mandate, to adhere to certain well-defined paths, these being:

a. a manner that promotes [the *Constitution's*] purposes, values and principles [article 259(1)(a)];

b. a manner that advances the rule of law, the human rights and fundamental freedoms in the Bill of Rights [article 259(1)(b)];

c. a manner that contributes to good governance [article 259(1)(d)].

169. The foregoing prescriptions, in the context of the exercise of the people's electoral rights as took place on August 8, 2017, are the firm foundation upon which I have founded my dissent from the majority opinion, in this critical election petition. The majority decision, in my considered opinion, has not only done short shrift to the governing terms of the *Constitution*, but also failed to adhere to the clear path of the law which has evolved, including this court's precedents on electoral law.

b. The Electoral Law

170. Just as with the *Constitution* itself, so with the regulatory set of norms, including the statutes and regulations: they all fall to the interpretive mandate of the Courts. This fact, on the plane

of legal scholarship, ought to be apprehended as the inherent common law chain that runs through the motions of judicialism, in Kenya, as in so many other countries of the common law world. The long-established rationales of the judicial method remain with us today: and they ordain the espousal of the doctrine of precedent – a universal concept which, indeed, is expressly replicated in the *Constitution of Kenya, 2010*.

171. Thus, this *Constitution* stipulates:

> All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court [article 163(7)].

The *Constitution* prescribes competence in common law principles as prerequisite in the appointment of Judges, in the following terms [article 166(2)]:

> Each judge of a superior court shall be appointed from among persons who –
>
> (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction.

172. The common law interpretive method, is the constant milieu within which the application of Kenya's electoral law, beginning from the *Constitution* to the subsidiary legislation, is to be apprehended.

173. Once the Judge accomplishes the task of interpreting the electoral law as provided in the *Constitution*, the Judge comes down to a whole set of statutes and regulations – the latter category comprising –

i. the *Supreme Court Act, 2011* (Act No 7 of 2011);

ii. the *Appellate Jurisdiction Act* (cap 9, Laws of Kenya);

iii. the *Elections Act, 2011* (Act No 24 of 2011);

iv the *Election Campaign Financing Act, 2013* (Act No 42 of 2013);

v the *Election Offences Act, 2016* (Act No 37 of 2016);

vi. the *Independent Electoral and Boundaries Commission Act, 2011* (Act No 9 of 2011);

vii. the *Political Parties Act, 2011* (Act No 11 of 2011).

174. How has the court interpreted such laws? Where is the Supreme Court's earlier work recorded, in that regard? And since the applicable law is the pertinent one for each electoral dispute, what is the current state of the law? How does such law apply in relation to a petition before the Supreme Court, in relation to the General Election of August 8, 2017? Does such

law affect the Presidential election of that date, differently from the manner in which it affects the other five sets of elections of the same date?

c. The Rationale of the Case Law

175. Case law, the law as interpreted and applied by Judges, on the recorded merits of each matter, has for ever been the cornerstone of the common law. It is precisely the common law's focussed and authentic appraisal of the facts of each case, that made it ever so compelling, as a defining strand in the judicial contribution to progressive, modern governance in conditions of democracy.

176. Jurisprudential confirmation for the foregoing standpoint is found in the work of a distinguished Justice of the Supreme Court of the United States of America, Benjamin Nathan Cardozo (1870-1938) [*The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp 28-31]:

> [T]he problem which confronts the judge is...a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop....Cases do not unfold their principles for the asking. They yield their kernel slowly and painfully....
>
> The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the line of justice, morals, and social welfare, the mores of the day; and this I will call the method of sociology.

177. Such challenges of adjudication dictate that, the gains of the past, authoritative interpretation by a discerning and responsible court, be perceived as representing a precious juristic civilization; and these are for keeps, as a reference-point for the conscientious and effective resolution of later disputes.

178. Now the judicial approach in the sphere of electoral law is obviously inseparable from the *Constitution's* values and the principles of democracy. It thus behoves us to pay due deference to the fundamentals of the sets of cases that have, in the last several years, been determined by this Supreme Court, on the subject of elections – including Presidential elections. Such is, quite conclusively, the most dependable course of the law that this country's lawyers must engage, in the first place.

d. Case Law: Illustration

179. In *Raila Odinga and others v Ahmed Issack Hassan*, Sup Ct Petition No 5 of 2013, this court took into account the nature of the governance mandate under the *Constitution*, and, in response to a challenge to the integrity of the Presidential election, laid down a set of guiding parameters. The court thus remarked [para 298]:

> An alleged breach of an electoral law, which leads to a perceived loss by a candidate...takes different considerations. The office of President is the focal point of political leadership and, therefore, a critical constitutional office. This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.

180. Flowing from the crucial majoritarian factor in the filling of the primary office of the Executive branch, the court, in that case, defined its orientation as regards the resolution of an electoral dispute, such as the one which has come up before us [para 299]:

> As a basic principle, it should not be for the court to determine who comes to occupy the Presidential office; save that this court, as the ultimate judicial forum entrusted under the *Supreme Court Act*, 2011 (Act No 7 of 2011) with the obligation to assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya' [section 3(a), *Supreme Court Act 2011* (Act No 7 of 2011)], must safeguard the electoral process and ensure that individuals accede to power in the Presidential office, only in the compliance with the law regarding elections.

181. The foregoing principle, in this Supreme Court's perception, dictated that even though the court must uphold the clear popular, electoral choice, it will hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of [the Presidential] office, [in case] there is any major breach of the electoral law... [para 300].

182. The foregoing point, regarding the Supreme Court's obligation of vigilance, is expressed still more clearly [para 301]:

> The Judiciary in general, and this Supreme Court in particular, has a central role in the protection of the *Constitution*, and the realization of its fruits, so these may inure to all within our borders; and in the exercise of that role, we choose to keep our latitude of judicial authority unclogged: so the Supreme Court may be trusted to have a watchful eye over the play of the *Constitution* in the fullest sense. Even as we think it right that this court should not be a limiting factor to the enjoyment

> of free political choices by the people, we hold ourselves ready to address and to resolve any grievances which flow from any breach of the *Constitution*, and the laws in force under its umbrella [emphasis supplied].

183. Such guiding principles were clear enough, and, in my perception, were attended with special merit. These principles, today, represent the vital backdrop to Kenya's electoral law.

184. In the foregoing case, this court, suo motu, undertook a sample re-tallying of votes, coming to the conclusion that,

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

The court, while being mindful of the several imperfections noted during the sample re-tallying, mainly directed its mind to the emerging majoritarian intent, asking itself the following question, before upholding the electoral outcome [para 304]:

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

185. The precedent-setting decision was distinctly endorsed by subsequent electoral dispute cases: and it must now be regarded as the pillar of the scheme of electoral law in Kenya – founded upon a beneficent interpretation of the *Constitution*, and of the whole body of electoral law. This point, for good measure, is consistent with the comparative adjudicatory experience in election matters. As the retired Israeli Justice of the Supreme Court, Aharon Barak [*The Judge in a Democracy* (Princeton: Princeton University Press, 2006), p 200] observes:

> Comparative law can help judges determine the objective purpose of a constitution. Democratic countries have several fundamental principles in common. As such, legal institutions often fulfil similar functions across countries. From the purpose that one given democratic legal system attributes to a constitutional arrangement, one can learn about the purpose of that constitutional arrangement in another legal system. Indeed, comparative constitutional law is a good source of expanded horizons and cross-fertilization of ideas across legal systems.

186. On such a basis of principle, the law and practice in the United Kingdom of Great Britain may be cited, for its relevance in the instant case. An apt summary of that position was made by a distinguished scholar, Stanley A de Smith, who was Downing Professor of the Laws of England in the University of Cambridge [*Constitutional and Administrative Law*, 3rd ed (Harmondsworth: Penguin Books, 1977), p 252]:

> Petitions based on ...irregularities at...elections are now extremely rare; this is partly because very close contests are uncommon and even if the court finds that irregularities were present it may determine that the result ought to stand since they were unlikely to have affected the results [emphasis supplied].

187. Such a state of the law is reflected in yet another decision of this court, *Munya v Kithinji & 2 others*, Sup Ct Petition No 2B of 2014, in which it was thus held [paras 217, 218]:

> If it should be shown that an election was conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on the ground of irregularities.
>
> Where, however, it is shown that the irregularities were of such a magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.

188. On the same principle, the Supreme Court thus held, in *Kidero & 4 others v Waititu & 4 others*, Sup Ct Petition No 18 of 2014 [2014] KLR-SCK [para 341]:

> ...generally, an election can only be declared void if that election did not substantially comply with the written law... – in this regard, the *Constitution*, the *Elections Act*, and the Regulations made thereunder, and any other relevant law; and, where there is substantial compliance with the written law in an election, the irregularities must indeed have affected the result of the election for that election to be invalidated.

189. Yet another authoritative decision of this court is *Obado v Oyugi & 2 others*, Sup Ct Petition No 4 of 2014; [2014] KLR – SCK, in which it was thus held [para 139]:

> Although the Court of Appeal cited the decision of this court in the Raila Odinga Case, it did not apply the principle that a court should consider the effect of the irregularity in the contested results. This principle holds that irregularities in the conduct of an election should not lead to annulment, where the election

> substantially complied with the applicable law, and the results of the election are unaffected [emphasis supplied].

190. The Supreme Court ever so clearly defined the operative electoral law, on the basis of the *Raila Odinga* petition of 2013, in the subsequent petitions. The Court was scrupulously affirming the synchrony of two express edicts of the *Constitution of Kenya, 2010* – in article 1(3) and article 159(1): the first defining the sovereignty of the people, and the second delimiting the judicial authority. By article 1(3), the people's sovereign power is partly delegated to the judiciary and independent tribunals [article 1(3)(c)]; while article 159(1), which constitutes the judicial authority, thus provides:

> Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this *Constitution*.

191. The foregoing principle was constantly reflected in the Supreme Court's decisions rendered in 2013 and after – as is exemplified in *George Mike Wanjohi v Steven Kariuki & 2 others*, Sup Ct Petition No 2A of 2014, [2014], eKLR. In that case the court thus pronounced itself [para 131]:

> This court should in principle, not substitute a sitting [elected representative] with another, without allowing the people to execute their political rights, as enshrined under the *Constitution*. To do otherwise would be to undermine the values and principles of democratic governance that bind us, in the execution of our judicial authority. It would also lead to an upset in the composition of the elected [office-holders] who bear the people's sovereignty, and would stand out as a clear disregard of the founding provisions of the *Constitution* [emphasis supplied].

192. In hindsight, the foregoing passage in the *Mike Wanjohi* case touches on the very nub of judicial responsibility, as it relates to the sovereignty of the people, who established the totality of the current governance system, through the *Constitution of Kenya, 2010*.

193. It hence follows that the general guiding path for the disposal of electoral disputes such as the instance one, could not have been stated more conscientiously and more effectively than it was in that case, thus [para.110]:

> By the design of the general principles of the electoral system, and of voting, in articles 81 and 86 of the *Constitution*, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid until the contrary is shown....

194. A consideration of the merits of an electoral petition such as the instant one, therefore, takes one straight back to the evidence tendered; and here there is an inseparable link between constitutional principle, and the pillars of evidence. Since, as I have already determined, the petition herein fails on the pillars of evidence, it becomes clear that the majority decision lacks validity from the standpoint of governing principles.

195. Evidence is the bearer of tell-tale signs of electoral victory, or of electoral defeat. The physical form of the ballot is directly visible, and is readily subjected to the test [*Constitution of Kenya, 2010*, article 86] of simplicity, accuracy, verifiability, security, accountability and transparency. This physical evidence, quite clearly, is the natural starting point in ascertaining who has won an election: and hence the majority Judgment would have been expected to begin from a foundation of numerical assessment, before invoking any other parameters. For such other elements are essentially subjective, and are inherently destined to compromise the sovereign will of the voters which the *Constitution* expressly safeguards.

196. Only from such a foundation of the physical vote-count, does one secure a proper viewpoint for the other dimensions of the electoral process, including the credibility of the entire operation. Indeed, in view of the relative strength of the evidence emanating from the two sides, the only objective conclusion would have been that, within the measure of the possible, the conduct of the election by the 1st respondent was entirely credible.

197. The emerging principle, regarding the initiation of claims by way of election petitions, is that all proof should commence from the foundation of the physical ascertainment of voting records. All other claims then, must revolve around that pillar, and must establish that some gross impropriety had affected the electoral process, and should lead to its annulment. I am constrained to propose this scheme as a proper agenda for the reform of Kenya's electoral law. Such legal reform would need to institute all appropriate security back-ups around the physical records, and would ensure the establishment of safety- nets around the votes cast.

G. Issues of Broad, and Frequent Policy-making, Politics, and Exigency: Jurisprudential Questions

198. The instant case has evoked intense national debate, involving professionals, politicians, observers, and others – the consequence being a justification, in this Judgment, for a clarification of the implications of judicial intervention in situations that entail the legitimate exercise of the citizen's momentary inclinations, on matters of politics and daily exigency. Falling squarely within such a category are the people's legitimate preferences. What is the proper stand for the Supreme Court, in such matters" How does the Judge's requisite approach relate to the majority decision, in the instant petition" My consideration of such issues confirms my position in this dissenting Judgment.

199. By article 160(1) of the *Constitution* –

> the Judiciary...shall be subject only to this *Constitution* and the law and shall not be subject to the control or direction of any person or authority.

200. The *Constitution*, while safeguarding the Judiciary's adjudicatory space, entrusts certain governance-spaces to other agencies – primarily the Legislature and the Executive: and this is the basis for the constitutional principle, the separation of powers – a principle the validity of which, in the Kenyan constitutional order, has not ever been seriously contested.

201. The Judiciary is the trustee of the people's sovereign power [article 1(3)] with regard to the interpretation and application of all the terms of the *Constitution*, and of all other law. Clearly, a substantial initiative in the motions of the entire sphere of law, legality and jurisprudence, has been reserved to the courts.

202. As the outer limits of such reserved competence has not been specified in express terms, it follows that the frontier areas of such power, at least potentially, admit of conflicting interpretive approaches. But, as already noted earlier, the proper trustee of the boundary-delimiting ethics must be the Judiciary – an arm of the state which is endowed with the special facility of juristic values; objective criteria of conflict resolution; a placid mien, such as facilitates professionalism, justice and fairness; and the benefit of access to relevant comparative lessons.

203. The Judiciary, in the exercise of such an exclusive mandate, ought to enter upon its task by taking into account the uncontestable reserved remits of the other agencies of the state. The people, in exercise of their sovereign power, have expressly delegated some of that power to Parliament and the legislative assemblies in county governments [article 1(3)(a)]; and they have exclusively entrusted some of their sovereign powers to the national executive and the executive structures in the county governments.

204. There is no basis for abridging Parliament's power and mandate; for the *Constitution* [article 94(1)] prescribes that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

205. Similarly there is no basis for detracting from the general character of executive power, article 129(1) prescribing that Executive authority derives from the people of Kenya and shall be exercised in accordance with this *Constitution*.

206. Unlike the Judiciary, the work-orbit of which is lined up with laws, principles and jurisprudential yardsticks, both the Legislature and the Executive, in view of their electoral and policy foundations, may quite properly be described as political agencies. They relate to the largest number of Kenyan people, in a close and direct proximity; they influence and

are influenced by, the momentary concerns which, therefore, justify the conception and espousal of policy and politics conceived and executed within short time-frames.

207. This is in stark contrast with the relationship between the ordinary citizen, and the courts of law: and if the courts overlook this reality, it will constitute a groundswell for failure of judicial responses in line with the professional, juristic remit.

208. The prolonged history of judicialism, in all democratic countries, demonstrates that the proper role of the courts has been professional, judicial, and founded upon cardinal principles which draw lines of correctness and propriety in situations of dispute, so as to secure a certain optimum level of safeguards for the rights of the citizen. Beyond that level of safeguard and fulfilment, it falls to the political agencies to pursue constantly, such policy stands as will satisfy, and give fulfilment to the national populace.

209. On these principles of institutional disposition, it follows that it falls not to the court, to make undue haste in assuming the policy mantle; a stampede is destined not only to disrupt the delicate institutional balances, but to weaken the reliable jurisprudential bedrock, which assures the citizens of an ultimate governance safety-net.

210. In the context of the foregoing reasoning, it follows, in my view, that the majority on the instant petition, has made a precarious move, that is destined to prove detrimental to the dependable setting of relations among essential governance entities – to the detriment of the rights and legitimate expectations of the citizen.

211. The majority on the Bench thus pronounced itself:

(i) As to whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the *Constitution* and the law relating to elections, upon considering inter alia articles 10, 38, 81 and 86 of the *Constitution* as well as...Sections 39(1C), 44A and 83 of the *Elections Act*, the decision of the court is that the 1st Respondent failed, neglected or refused to conduct the Presidential Election in a manner consistent with the dictates of the *Constitution* and *inter alia* the *Elections Act*....

(ii) As to whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election, the court was satisfied that the 1st respondent committed irregularities and illegalities *inter alia*, in the transmission of results, particulars and the substance of which will be given in the detailed and reasoned Judgement of the court...

(iii) As to whether the irregularities and illegalities affected the integrity of the election, the court was satisfied that they did and thereby impugning the integrity of the entire Presidential election.

212. From such findings, the majority went on to make orders nullifying the election results, as follows:

(i) A declaration is hereby issued that the Presidential Election held on August 8, 2017 was not conducted in accordance with the *Constitution* and the applicable law rendering the declared result invalid, null and void;

(ii) A declaration is hereby issued that the 3rd respondent was not validly declared as the President elect and that the declaration is invalid, null and void;

(iii) An order is hereby issued directing the 1st respondent to organize and conduct a fresh Presidential Election in strict conformity with the *Constitution* and the applicable election laws within 60 days of this determination....

213. Such a determination is in clear departure, in the first place, from the state of the evidence. As already indicated herein, the petitioners' case rests on just one dimension of the electoral process – electronic transmission of results. Moreover, the bulk of the assertions made as regards transmission, is just that, contentions, with only limited testimonial ingredient: it is hardly evidence – what *Black's Law Dictionary*, 8th ed (Bryan A Garner) (St Paul, MN: West, 2004) (p 595) thus rightly depicts:

> Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact....
>
> On the other hand, evidence in the true sense, a set of probative facts, is what came forth from the respondents: and its tenor and effect was that, there were only limited instances of failure of results-transmission; only limited cases of irregularity in vote-addition and tabulation, not affecting the ultimate compilation and summation; the lawful complementary device was put in service, in cases of failure in the transmission process; all the physical voting records were available, and indeed, had been timeously availed to the Supreme Court Registry, and could have been re-counted, to confirm that the 3rdrespondent had been properly declared as the President-elect.

214. Thus, on basic elements of trial, the essence of burden of proof was undischarged; and it was, in effect, a reversal of the conventional process of judicial inquiry and determination – making a finding in favour of the petitioners.

215. Secondly, the majority would appear to have taken leave of the juristic obligation to interpret the terms of the articles of the *Constitution* invoked by the petitioners; the obligation to break these down, so as to ascertain the discrete demands of the law; the obligation to consider the

pertinence of the specific statements of evidence from the petitioners, such as would answer to the constitutional and legal principles invoked.

216. Thirdly, the majority departed, as it would seem, from the placid frame of the juridical setting, and assumed direct responsibility for the immediate calls of policy or politics – by altering the design of momentary, popular inclinations which are, by the terms of the *Constitution*, legitimate in all respects.

217. The damage such as may flow from such a deportment, is not yet plain to all, as is quite clear from common perceptions recorded in the media, ever since the delivery of the majority Judgment. Alexander Chagema [The Standard, September 7, 2017, p 15] wrote of *A Little Shock Therapy from the Supreme Court*. *Wycliffe Muga* [The Star, September 7, 2017, p 20] thus wrote:

> [When] I listened to the Supreme Court ruling on the presidential petition [...] I knew very well that I was watching history being made.

The Nairobi Confidential of 4-10 September, 2017 [p 2] thus remarked:

> The Supreme Court ruling that nullified the election of [the 3rd Respondent] on Friday has thrown Kenya into one of the most complex and expensive political situations.

And *Decky Omukoba in The Standard*, September 11, 2017 [p 14] thus wrote:

> What we have experienced as a nation is definitely a shift! The recent ruling by the Supreme Court to nullify a presidential election has never happened before in the history of this nation, or even this continent but it is undoubtedly a political and judicial shift that has risen from years of tectonic plates of power pushing on each other within a constricted democratic space.

218. The general perception associates the majority Judgment with an overtly political inclination. This, precisely, is the Judgment's obvious departure from the professional plane of jurisprudence, as the proper platform of the judicial arm of the state. The majority position would, of course, make history, emanating from a basic principle aptly depicted by the distinguished historian, Professor Bethwell A Ogot [*History as Destiny and History as Knowledge: Being Reflections on the Problems of Historicity and Historiography* (Kisumu: Anyange Press, 2005), p 8]:

> To tell the story of a past so as to portray an inevitable destiny is for humankind, a need as universal as tool-making. To that extent, we may say that a human being is, by nature, historicus.

So, by the magic jolt of September 1, 2017, general political history would have been made, even though, as I maintain, this represents a departure from the jurisprudence of democratic systems, which so much cherishes the separation of powers, and which so studiously commits the Judiciary to the professional task of line-drawing, to ensure the sustenance of regular safeguards of the *Constitution* and the law, for all.

219. In future inquiries, it may be established that the law, as advanced by its interpreters and scholars, has its anchorage on the adjectival plane, from which it addresses the primary motions of social, economic and political activity – agriculture, architecture and engineering, land development, seafaring, sport, transport and communications, and others. The law stands to be formulated, moulded, interpreted and applied, not for its own sake and in its own cause, but in relation to the said primary motions, which preoccupy citizens and communities.

220. Thus, in the instant case, the electoral process had taken place, and now, its motions had to be matched to the law as interpreted. By the interpretive scheme of the law, it does not stand the test of rationality or efficacy, to merely allege some unspecified impropriety in the electoral process. The relevant clause of the *Constitution* must be taken through an analytical process, and subjected to definite categorizations which crystallise the specific concepts and elements said to have been violated. By this criterion, most of the contentions of the petitioners in the instant case, on account of their broad generality, would not stand up. The interpretive task, as it thus relates to the adjectival essence of the law, is inherently professional – and is reflected in the concept of jurisprudence, which deals with thought about law [RWM Dias, *Jurisprudence*, 4th ed (London: Butterworths, 1976), p 17].

221. The Court, in the normal performance of its role, under the *Constitution*, is engaged in the specialized process of jurisprudence. It follows that the more immediate, urgent and primary motions of basic policy-making, inherently devolve to the political arms of the State, rather than the more specialized entity which is the Judiciary.

222. This Judgment, apart from the occasion it proffers for a reflection on the law relating to elections, is a basis for a rethink on law as a concept, and as a professional engagement, defined in a regulatory framework applicable to the citizens' primary undertakings. From such a platform, it emerges that the law's design in the hands of the judge, the lawyer and the scholar, rests in unity with the fundamentals of constitutional governance – an important element of which is the independence of the judiciary. On the basis of this principle, it is to be recognized that the judge's proper mandate lies several removes from the citizen's momentary policy and political desires and expectations – which generally devolve to the state's political agencies. By this perception, the judge's proper remit has its focus upon professional engagement, founded upon objective scenarios, or criteria.

223. Such a perception of law and legal process, in retrospect, will be found to be in conformity with the analytical schemes that mark the dedicated works of great jurists of the past. Definite exemplars, in this regard, are the following jurists:

i. Lord Mansfield (1705-1793) – see WS Holdsworth, *Lord Mansfield*, The Law Quarterly Review, Vol 53 (1937), pp 221-234; Edmund Heward, Lord Mansfield, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co Pvt Ltd., 2011);

ii. Professor Frederic William Maitland (1850-1906) – see OW Holmes, *In Memoriam: Frederic William Maitland*, The Law Quarterly Review, Vol 23 (1907), pp137-138; Robert L Schuyler (ed), *Frederic William Maitland Historian: Selections from His writings* (Berkeley: University of California Press, 1960);

iii. Lord Atkin of Aberdovey (1867 – 1944) – Atkin, *Law as an Educational Subject,* Journal of the Society of Public Teachers of Law (1932), pp 30-58; Geoffrey Lewis, *Lord Atkin*, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co Pvt Ltd, 2008);

iv Justice Oliver Wendell Holmes, Jr (1841 – 1935) – see Holmes, *The Common Law* (Boston: Little, Brown and Company, 1881);

v Justice Benjamin Nathan Cardozo (1870-1938) – see Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921);

vi. Professor Stanley Alexander de Smith (1922 – 1974) – see de Smith, *Constitutional and Administrative Law*, 3rd ed (Harmondsworth: Penguin Books, 1977);

vii. Lord Denning of Whitchurch (1899 – 1999) – see Denning, *What Next in the Law* (Oxford: Oxford University Press, 1982).

224. The special contribution of these judges and law scholars was to light up the orbit of jurisprudence, as a dedicated sphere of thought, learning and preoccupation, that secured the requisite motions of the different spheres of human activity, while affirming the perceptions of integrity and propriety.

225. Such is the jurisprudential context in which I have considered the petition herein. The majority decision, in effect, holds that the court may, quite directly, engage the course of national history – through a precipitate assumption of recurrent policy-making or political inclinations and mandates. In my considered opinion, judges, where the making of history devolves to them, should focus their attention in the first place, upon the intellectual and jurisprudential domain – rather than upon the workaday motions of general policy and politics which devolve to the citizens themselves, and to the political agencies of state.

226. On these premises, I hold that the majority decision fails to resonate with the *Constitution* and the law, and with all relevant guiding principles. I would dismiss the petition with costs.

Dissenting Opinion of Njoki S. Ndungu, SCJ.

A. Introduction

1. By a petition dated August 18, 2017, and supported by evidence in the form of twelve affidavits, the petitioners alleged that the Presidential election was so badly conducted by the 1st respondent that it failed to comply with the governing principles laid in the *Constitution of Kenya*, the *Elections Act, 2011* and the Regulations made thereunder including the *Electoral code of conduct*. In summary, the Petitioners case was that the non-compliance fatally compromised the conduct of the election and consequently, the declaration of the 3rdRespondent by the 2nd Respondent as the President-elect.

2. After conclusion of the hearing and in strict conformity with the constitutional 14-day directive, the court in a summary by the majority (Maraga CJ & P, Mwilu DCJ & DP, Wanjala & Lenaola, SCJJ) delivered its decision nullifying the entire Presidential Election in the following terms:

    i. As to whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the *Constitution* and the law relating to elections, upon considering *inter alia* articles 10, 38, 81 and 86 of the *Constitution* as well as, Sections 39(1C), 44, 44A and 83 of the *Elections Act*, the decision of the court is that the 1st Respondent failed, neglected or refused to conduct the Presidential Election in a manner consistent with the dictates of the *Constitution* and *inter alia* the *Elections Act*, Chapter 7 of the Laws of Kenya.

    ii. As to whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election, the court was satisfied that the 1st respondent committed irregularities and illegalities *inter alia*, in the transmission of results, particulars and the substance of which will be given in the detailed and reasoned Judgment of the court. The court however found no evidence of misconduct on the part of the 3rdRespondent.

    iii. As to whether the irregularities and illegalities affected the integrity of the election, the court was satisfied that they did and thereby impugning the integrity of the entire Presidential Election.

3. Having carefully evaluated the pleadings and the evidence, and having carefully dissected the submissions of the parties during the hearing, I was of a different conclusion summarized in the form reproduced below:

    1. The court has rendered its Judgement by a majority. I am however, of a different opinion. At the heart of democracy are, the people, whose will constitute the strand of governance that we have chosen as a country. On August 8, 2017, millions of Kenyans from all walks of life yielded to the call of democracy and queued for many hours to fulfill their duty to our Republic by delegating their sovereign power to their democratically elected representatives. This was an exercise that was hailed by many regional and international observers as largely, free, fair, credible and peaceful. That duty stands sacred and is only to be upset if there is any compelling reason to do so. That reason must affect the outcome of the election.

    2. The election was managed by the 1st respondent chaired by the 2nd respondent who were assisted by hundreds of others to execute the mandate of the Commission under article 88 of the *Constitution*. At the end of the process, the 2nd Respondent, in accordance with article 138 (10) of the *Constitution*, declared the result of the election. Having received more than half of all the votes cast in the election and at least twenty-five percent of the votes cast in each of more than half of the Counties, the 3rdrespondent was declared President-elect.

    3. The case revolved around three fundamental questions:

        i. whether the election was conducted in accordance with the *Constitution* and the law?

        ii. whether there were irregularities and illegalities committed during the conduct of the election and

        iii. if there were irregularities and illegalities, what was the integrity of the election?

    In answer to these three issues, my opinion is that the election was indeed conducted in accordance with the *Constitution* and the law. In fact, the 1st and 2ndRespondents to my satisfaction demonstrated that they had adhered to the directions given by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Civil Appeal No 105 of 2017 (the Maina Kiai case). The Court of Appeal in this case cautioned, and I agree, that the results declared at the polling station are final. In fact, the polling station is at the heart of any election. It is what happens there that is to be assessed and that is why its outcome is final.

4. In any election, the ordinary Kenyan voter will ask themselves the following questions?

   (1) Was there a problem with registration of voters?

   (2) Were voters properly identified at the polling station?

   (3) Were voters allowed to cast their ballots peacefully and within good time?

   (4) Were the votes cast-counted, declared and verified at the polling station to the satisfaction of all parties?

   If the answer to all these questions is in the affirmative, then the election has been conducted properly.

5. The Petitioners in my view did not present material evidence, to the standard required, to upset the results returned to the National Tallying Centre by the presiding officers in Forms 34A. Those results, counted and agreed upon by Agents at the polling station were not challenged. What was fiercely contested was the mode through which those results were transmitted from the polling station to the National Tallying Centre. The 1st and 2ndRespondents urged that transmission was conducted in line with the directions by the Court of Appeal in the *Maina Kiai* case. This process yielded the results that were Streamed onto the portal and which, were not sufficiently impugned during the trial.

   The decision of the voter at the primary locale of the election, which is the polling station, was unchallenged.

   How then can a process used to transmit those results for tallying upset the will of the electorate?

   It was not proved that the voters will during the conduct of elections, was so affected by any irregularities cited so as to place this Court or the country in doubt as to what the result of the election was. Challenges which are to be expected during the conduct of any election. However, those challenges which occurred, (and in my opinion, none of which occurred deliberately or in bad faith, and which fell particularly outside the remit of the voter and his/her will) – ought not to supplant the voters exercise of their right of suffrage.

6. In summary, I respectfully disagree with the decision of the majority, and in accordance with section 26(2) of the *Supreme Court Act, 2011*, will issue my full dissenting Judgment within 21 days.

4. I now proceed to give the full rendition of my judgment, bearing the expounded reasons upon which this dissent is founded.

5. I also adopt the comprehensive pillars analyzing the Petition, Supporting evidence, the Responses, and the Parties submissions, including the opinion of amici curiae, contained in the dissenting Judgement of my brother, Justice J.B Ojwang, SCJ.

B. Outline

6. This dissenting Judgement commences with an introduction about the nature of the Petition culminating in my summarised dissenting Judgement delivered on September 1, 2014, exactly 14 days after the Petition challenging the results of the Presidential Petition was initially filed at the Supreme Court Registry.

7. The starting point of my dissent is:

   (1) The proper context of the jurisdiction of this court sitting as an election court;

   (2) A thorough analysis of the remit of this jurisdiction leads to the conclusion that election causes are right-centric in nature.

8. In totality, I analyse the petitioners case under the following additional considerations:

   (3) Articles 81 and 86 of the *Constitution*

   (4) The process of Transmission;

   (5) Burden and Standard of proof;

   (6) Weighing the Evidence adduced in Affidavits;

   (7) Access to Information Orders by the Court;

   (8) The Evidence Submitted to the court pursuant to section 12 of the *Supreme Court Act, 2011*;

   (9) Section 83 of the *Supreme Court Act* and the question of Compliance;

   (10) Preserving Kenyas electoral jurisprudence;

   (11) Conclusion; and,

   (12) Determination.

C. The Supreme CourtS Original Jurisdiction: Setting The Parameters

i. The Supreme Court as an election Court

9. The Jurisdiction of the Supreme Court to hear and determine questions as to the validity of a presidential election is set out in article 163 (3) (a) of the *Constitution* in the following terms:

> 163 (3) The Supreme Court shall have-
>
> (a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under article 140;

In this regard, the Supreme Court constituted in the terms of article 163(3)(a) discharges its mandate as an election Court. Section 2 of the *Elections Act, 2011* defines an "election court as follows:

> An "election Court means the Supreme Court in exercise of the jurisdiction conferred upon it by article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by article 165(3)(a) of the *Constitution* or the Resident Magistrates Court designated by the Chief Justice in accordance with section 75 of this Act;

10. According to the *Blacks Law Dictionary*, 8th ed (2004), "exclusive jurisdiction means:

> " A courts power to adjudicate an action or class of actions to the exclusion of all other courts....

11. In the *Raila Odinga* case, this Court clarified the bounds of its exclusive original jurisdiction as follows, at paragraph 208:

> [208] A Petitioner against the declaration of a candidate as President-elect, under Articles 163(3)(a) and 140 of the *Constitution* as read together with the provisions of the *Supreme Court Act, 2011* (Act No 7 of 2011) and the Supreme Court (Presidential Elections) Rules, 2013 (now 2017), is required to present a specific, concise and focused claim which does not purport to extend the Supreme Courts jurisdiction beyond the bounds set out in the *Constitution*. It follows that the Court will only grant orders specific to the Presidential election. [Emphasis added]

12. The Supreme Court is therefore, the first (original), only (exclusive) and final resort for any party challenging the election of any person to the Office of the President. It determines presidential election petitions to the exclusion of all other Courts. This jurisdiction is also limited in time. the *Constitution* requires one to petition quickly and particularly. This

restriction, on extent and time, is not without basis. As decided in *Raila Odinga & others v Independent Electoral & Boundaries Commission*, Supreme Court Petition No 5 of 2013 (The *Raila 2013* case), the parties must present a clear, concise case supported by cogent evidence. This jurisdiction even though limited in time and scope, revolves around critical constitutional questions. The requirement for particularity is therefore important to ensure that the case presented before the Court is properly proved (in line with the set parameters of the burden and standard of proof).

ii. Election causes are right-centric and not form-centric

13. The peculiar nature of the Supreme Courts finality on interpretation of the *Constitution* and the law and the central theme in elections, ie, the right to vote in free and fair elections, presents an inescapable conclusion: the Supreme Court, as an election Court, is engaged by the parties in a right-centric cause driven by evidence and in the terms of its decision in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Civil Application No 5 of 2014 (the *Munya 1* case), in making its determination, the Court, must not disengage from the *Constitution*.

14. It is proper to emphasize that the Supreme Court in discharging its mandate as an election Court, remains the precedent-setting forum in the country and its decisions must be carefully analysed to ensure that a jurisprudential crisis or confusion does not ensue. Were that to happen, the Court would have failed the *Constitution* and the people. These considerations have been emphasized by this Court before. In the case of *Aramat v Lempaka & others*, Supreme Petition No 5 of 2014, (the Aramat case) at paragraphs 88, 101 and 102, the Court held (by a majority):

> (88) The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the *Constitution of Kenya, 2010* (article 163), a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts, has been established. The exclusive, dedicated role of the Supreme Court under the *Constitution* takes several forms: for example, it has "original jurisdiction to hear and determine disputes relating to the elections to the office of President [article 163(3)(a)];
>
> (101) We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the *Constitution* with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the *Constitution*. Besides, as the Supreme Court

carries the overall responsibility [The *Constitution of Kenya, 2010*, article 163(7)] for providing guidance on matters of law for the States judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other Courts.

(102) The Supreme Courts jurisdiction in relation to electoral disputes is, in our opinion, broader than that of the other superior Courts. We note in this regard that while the Court of Appeals jurisdiction is based on section 85A of the *Elections Act*, with its prescribed timelines, that of the Supreme Court is broader and is founded on the generic empowerment of article 163 of the *Constitution*, which confers an unlimited competence for the interpretation and application of the *Constitution*; and this, read alongside the *Supreme Court Act, 2011* (Act No 7 of 2011) illuminates the greater charge that is reposed in the Supreme Court, for determining questions of constitutional character. [Emphasis added]

15. The thrust of the foregoing paragraphs can be summed up as follows: the *Constitution* is Kenyas guiding Order. It has organized Kenyas governance character and infused accountable governance, public service and responsible citizenship. The Judiciary bears the enviable, but extremely difficult and rewarding duty of giving the *Constitution*, comprehensible interpretation that is stable, consistent, predictable, certain and true to the sovereignty of the people. Undergirding this sovereignty is the ability of every Kenyan to enjoy his/her full human-character guaranteed by an elaborate charter on rights. A determination of a dispute akin to the one before us cannot therefore be mechanically disposed of without paying due regard not just to the letter or spirit but also the conception of the *Constitution* itself. At the core of the *Constitution* is sovereign will, at the soul of sovereign will are the people, and central to the people are their rights.

16. What then is the complete description of an election cause within Kenyas constitutional system? An answer lies in the inaugural, elaborate jurisprudence laid by this Court and applied by lower Courts in a number of election cases.

In *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others*, Supreme Court Petition No 12 of 2014 (the *Wetangula* case), this Court held, at paragraphs 107 and 112:

[107] The description of election petitions as causes sui generis, is in every respect apposite. An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factor. Such petitions rest on private political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.

[112] The overriding objective of the *Elections Ac*t is to functionalize and promote the right to vote. This requires a broad and liberal interpretation of the Act, so as to provide citizens with every opportunity to vote, and to resolve any disputes emanating from the electioneering process. The primary duty of the election Court is to give effect to the will of the electorate; and consequently, the Court is to investigate the nature and extent of any election offence alleged in an election petition. Accordingly, the happenings that touch on the due conduct of the election process, come as proper items of agenda in the tasks of an election Court. [Emphasis supplied]

In *George Mike Wanjohi v Steven Kariuki & 2 others*, Supreme Court Petition No 2A of 2014, (the Mike Wanjohi case) it was held, at paragraph 112:

112. [A]part from the priority attaching to the political and constitutional scheme for the election of representatives of governance agencies, the weight of the peoples franchise - interest is far too substantial to permit one official, or a couple of them, including the Returning officer, unilaterally to undo the voters verdict, without having the matter resolved according to law, by the judicial organ of State. It is manifest to this court that an error regarding the electors final choice, if indeed there is one, raises vital issues of justice such as can only be resolved before the courts of law. [Emphasis supplied]

17. An election cause is a right-centric cause. At the heart of a Petition challenging the results of a presidential election is the right to vote in free and fair elections. This right is at the epicenter of Kenyas democratic character as a Republican state. Interpretation and application of the constitutional provisions touching on elections must therefore be read holistically with each provision reinforcing the other. This approach has been consistently applied by other Courts in the region and embedded in the theory of constitutional interpretation in our own jurisdiction. In *Olum v The Attorney-General of Uganda* [2002] EA 508, this principle was enunciated thus:

> "[T]he entire Constitution has to be read as an integrated whole and no particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.

In Re Kenya National Human Rights Commission, Supreme Court Advisory Opinion Reference No 1 of 2012, this Court held as follows:

> "It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution*

must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result. [Emphasis supplied]

iii. Evidence in an election Court

18. What then is the law on evidence to be presented in an Election Court? Evidence is an imperative of the right to fair hearing. article 50 (4) of the *Constitution* cautions that:

> 50 (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

19. Evidence is the epicenter of any trial. The nature of a presidential election petition does not displace the basis of the law of evidence outlined in The Law of *Evidence Act*, Cap 80 of the laws of Kenya. Section 80 of the *Elections Act, 2011* expresses that among the powers of an election Court in exercise of its jurisdiction is: summoning and swearing in witnesses in the same manner, or as nearly as circumstance admit, as in a trial by a Court in exercise of its civil jurisdiction. article 163 (3)(a) proceedings before this Court although regulated by the *Supreme Court Act, 2011* and the attendant *Presidential Election Petition Rules, 2017*, allow reliance on Affidavit evidence. In order for that evidence to bear cogent value, it must meet the demands of proof.

20. This Courts role in exercise of its exclusive original jurisdiction ought to be thorough fact-finding and interpretation of the *Constitution* and the law in the terms set out in the foregoing paragraphs. In cases of factual prerequisite such as this one, interpretation of the law devoid of complete and exhaustive factual examination is by itself, an insufficient basis upon which to make the final determination contemplated under article 140(2) of the *Constitution*. The evidence adduced must be clear to show that what was declared was not the result. Electoral processes have assumed a fair presumption of correctness. To rebut this presumption requires proof to a high degree that the resulting declaration is not trustworthy. This is drawn from the democratic legitimacy accorded to elections by the *Constitution*. The test of invalidating an election must be a clear one. A new election should be conducted only when voters have been completely prevented from accurately registering their intended preference in numbers sufficient to affect the outcome. A determination to hold a fresh election in terms of article 140(3) should only be made if the following questions are considered, analysed and determined conclusively:

i. Was the final outcome of the election the result of fraud, mistake or omission which precluded the certified vote total from correctly aggregating all voters independent, non-coerced and non- procured preferences?

ii. Is the outcome incapable of being trusted to reflect the will of the people?

iii. Can a reliable outcome be determined in a manner other than holding a fresh election?

21. An attempt to displace elections without proper recourse to the stated case and evidence amounts to an unfair dislocation of accrued rights under the *Constitution*- to the people and their elected representatives. The Court must protect the rights of the candidate(s) and by the same stroke, ensure that the rights of the electorate are not compromised. Only a clearly pleaded and proved case will warrant voiding of an election.

22. The right to vote in free and fair elections is violated when a Court, without comprehensive understanding and analysis of the evidence displaces the electorate by halting an election and deciding the outcome itself. An election, unless clearly proven to have been conducted in gross violation of the *Constitution* and the law, affecting the ultimate outcome, must never be taken away from the voters. The electorate, by dint of article 1 of the *Constitution* is entitled to be represented by men and women of their choice. In resolving electoral disputes, the Judiciary must set upon this duty as a judicial, not a political actor. In so doing, its guiding force must be proper exercise of judicial authority granted under article 159 of the *Constitution*. It must consider rights, not form.

23. On this basis, I now set upon the legal and factual analysis of my decision with close reference to the pillars set out in the Judgement of my brother, Justice J.B Ojwang, SCJ.

D. Right-Centric or Form-Centric? Interpreting and Applying article 38 of the *Constitution of Kenya, 2010*: Which Way for the Supreme Court Sitting as an Election Court?

24. It is not in doubt that the Majority base their decision on an interpretation of section 83 of the *Elections Act* and in doing so they have read-in the provisions of Articles 81 and 86 of the *Constitution*. They state that the electoral process has not met the requirements as listed in those Articles. In my opinion this is a narrow and restrictive interpretation of the law. I find that the Majority in doing so, limited itself to operational and aspirational constitutional principles but failed to firstly; address the substratum of the issue at hand- the grundnorm of *Constitution*- the sovereignty of the people and the centrality of the people in the entire architecture of the 2010 *Constitution*; but secondly used a restrictive test in assessing whether a claim that the right to vote had been violated in any way had been made.

25. Let me set out by reinforcing the essence of the voter, who bears the right of franchise. Justice Albie Sachs aptly captured this essence in the case of *August and Another v Electoral*

Commission and others [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) (August):

> "Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans (read, Kenyans) regardless of race, and for the accomplishment of an all embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. [Emphasis added]

26. The interpretation and application of the Bill of Rights must not be mechanical or limited by a Courts interpretation of legislation. To favor legislation over the *Constitution* would be an affront to the Supremacy of the *Constitution*, which reads:

> Article 2.
>
> 1. This *Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
>
> 2. No person may claim or exercise State authority except as authorised under this *Constitution*.
>
> 3. The validity or legality of this *Constitution* is not subject to challenge by or before any court or other State organ.
>
> 4. Any law, including customary law that is inconsistent with this *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this *Constitution* is invalid.
>
> 5. The general rules of international law shall form part of the law of Kenya.
>
> 6. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this *Constitution*.

The correct approach ought to be that espoused in the Canadian case of *R v Big M Drug Mart Ltd* 1 S.C.R. 295, 18 D.L.R. (4th) 321

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be...a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.

27. The exercise of the sovereign power of the people in relation to the political processes of the State is to be found first in article 1 which provides that all sovereign power belongs to the people of Kenya who exercise their power directly or through their elected representatives and also delegate it to the three arms of government at both national and county level. The second reference to this sovereign power of the people is to be found in the Bill of Rights under article 38(2) and (3) of the *Constitution* where it is stated that:

> 38 (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
>
> a. any elective public body or office established under this Constitution; or
>
> b. any office of any political party of which the citizen is a member.
>
> (3) Every adult citizen has the right, without unreasonable restrictions—
>
> a. to be registered as a voter;
>
> b. to vote by secret ballot in any election or referendum; and
>
> c. to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

28. There cannot be any doubt at all that in interpreting and applying any provision of this *Constitution*, the *Elections Act* and Regulations there-under, this Court must adopt an interpretation that promotes the grundnorm in article 1 and the right to vote in article 38.

29. Articles 81 and 86 of the *Constitution* reinforce the right to vote elaborated under article 38 of the *Constitution*. These constitutional provisions must therefore be applied to this core right and not vice versa. Articles 81 and 86 are to be facilitative of the fundamental rights under article 38, in addition to other provisions of the *Constitution*. In fact, there are many other Articles of the *Constitution*, Legislation and Regulations whose purpose is intended to give effect to, facilitate and support the right to vote as provided for under article 38. In

the application and implementation of those provisions – the centrality of article 38 as the primary purpose for their existence must never be lost.

30. This was the position elaborated in the case of *Evans Kidero & others v Ferdinand Waititu & others*, Supreme Court Petition No 20 of 2014, (The *Kidero* case) this Court held, at paragraphs 137 and 138:

> 137. Chapter Seven of the *Constitution* is entitled "Representation of the People and bears the sub-title"Electoral System and Process, with further sub-title "General Principles of the Electoral System. Articles 81, 82, 83, 84, 85, 86 and 87 all fall under this Chapter. It is plain to us that most of the provisions in these Articles are rendered in the form of principles• some general, and others not so general. And, thus expressed, it is unavoidable that most of these principles are not self-executing: which fact moves the judicial forum to centre-stage, as regards interpretation and application.
>
> 138. These principles cannot crystallize into deliverables of public goods, such as those in the nature of governance and elections, without further legislative action.
>
> Thus, article 82 (1) (d) provides as follows:
>
> " Parliament shall enact legislation to provide for•
>
> .....
>
> a. the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections
>
> 2. Legislation required by clause (1) (d) shall ensure that voting at every election is•
>
> a. simple;
>
> b. transparent and;
>
> c. takes into account the special needs of•
>
> i. persons with disabilities and;
>
> ii. other persons or groups with special needs. [Emphasis added]

31. A reading of the majority decision also appears to presume that the only test for ascertaining the credibility of the election process, or more correctly for assessing any violation of the rights under article 38, lie in Articles 81 and 86. This is not the case. Articles 82 and 83 also

go to the specifics of the electoral process that support the right under article 38. Article 82 and 83 address the registration of voters and 83 underlines the requirements of the voting exercise itself – as simple, accurate, and taking into account those with special needs. article 83(3) states clearly that

> "administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate and shall not deny, an eligible citizen the rights to vote or stand for election."

The upshot being that the test for assessing a violation claim under article 38 must be more comprehensive than the aspirational guidelines set under Articles 81 and 86. Cherry-picking constitutional provisions to determine a right-centric cause on the basis of formal considerations - the choice of form over rights - undermines a purposive approach to the interpretation and application of the *Constitution*.

32. The *Constitution* in article 259(1) also clearly sets out the framework of applicable principles while interpreting the *Constitution*.

This article provides that;

259 (1) This *Constitution* shall be interpreted in a manner that—

a. promotes its purposes, values and principles;

b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. permits the development of the law; and

d. contributes to good governance.

(3). Every provision of this *Constitution* shall be construed according to the doctrine of interpretation that the law is always speaking.... [Emphasis added]

32A. Further the *Constitution* provides under article 20(3):

20(3) In applying a provision of the Bill of Rights, a Court shall-

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

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

In my opinion, the Majority has not given effect to the peoples right to franchise and have not interpreted it broadly and in a manner that most favours its enforcement.

33. The case for the advancement of the Bill of Rights clearly must therefore be at the forefront of any judicial determination under the *Constitution of Kenya, 2010*.

34. There is a more complex issue that must be addressed-article 19 of the Bill of Rights, Chapter IV of the *Constitution* states as follows:

> Part 1—General provisions relating to the Bill of Rights
>
> Rights and fundamental freedoms
>
> 2. (1) The Bill of Rights is an integral part of Kenyas democratic state and is the framework for social, economic and cultural policies.
>
> 2. The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.
>
> 3. The rights and fundamental freedoms in the Bill of Rights—
>
> a. belong to each individual and are not granted by the State;
>
> b. do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and
>
> c. <u>are subject only to the limitations contemplated in this *Constitution*.</u> [Emphasis added]

35. If the rights under article 38 may not be limited other than by a specific provision of the *Constitution*, can an interpretation of Articles 81 and 86 purport to take the essence of those rights away from any Kenyan? Where a voter has made his choice known, having been registered in accordance with Articles 82 and 83, 138(3) (a), having voted in accordance with Articles 81, 83 and his vote counted at the polling station (Art 138(3) (c), and the result announced at the polling station in accordance with the *Constitution* and the law - and the outcome is known and uncontested – then can a general principle non-specific to any precise act – overturn that choice and undermine a fundamental right? Can an operational aspect of an election (read as forming part of Art 81) cancel a result/outcome (read Art 38) that is unchallenged? And further, where in fact the election is not challenged as to the aspect that the result/outcome (Art 38) has been violated? Can a claim that does not plead violation of a fundamental right, extinguish the enjoyment or exercise of that right? Can it be argued

that there are two competing provisions of the *Constitution*: one provision guaranteeing the right and the other, burdening the enjoyment of that right? And if this is the case how would one balance to ensure an outcome that does not upset the will of the people?

36. We can draw lessons from the observations of Prof Rex Martin on the exposition of John Rawls Theory of Justice, in his book *Rawls and Rights*, where he states:

> " The weight of a right is a determination, sometimes explicit and sometimes not, sometimes quite exact and sometimes rather imprecise, of how it stands with respect to other normative considerations and whether it would give way to them or they to it, in cases of conflict .

37. Similarly, a scholar, Nur Kayacan, Derya in her paper, *"How to resolve Conflicts Between Fundamental Constitutional Rights*, (Saar Blueprints) puts across an interesting point, with which I fully agree with, that :

> " The discretion that the judges enjoy when applying the balancing method is a part of their duty as the guardians of law. One general rule, which embraces all of the situations in which a conflict occurs and gives a common technique to resolve them all, cannot possibly be formulated. Even if a single solution was to be formulated, it would not serve justice in each situation, since every case has its own specific circumstances. Also the discretion of the judges is not without any limits; they have to follow the principle of proportionality.
>
> The answer to the question, how to resolve conflicts between fundamental constitutional rights, is, at the end quite simple. Balancing ...

38. Thus even if there may appear to be a perception that a competing rights situation exists – that is between article 38 and 81 and 86 - there must be a balancing and an application of proportionality to effect a judicial outcome that serves the dictates of the *Constitutio*n. One must recognize that not all claims will be equal before the law: some claims have been afforded a higher legal status and greater protection than others. While there are many situations in which rights, principles, and values may seem to conflict or compete, when evaluating situations of competing rights, human rights, especially those provided in a Bill of Rights and will usually hold a higher status than principles and values. This rationale is further underlined by the architecture of our *Constitution*, which actually ring-fences the Bill of Rights from amendment which may be made only through referendum by the people of Kenya unlike the principles in article 81 and 86, which may be amended by elected leaders in Parliament. This plebiscite protection in itself - places the Bill of Rights - higher in the pecking order of competing provisions in the *Constitution*. The principle therefore should complement the right not vice versa. The principles in article 81 and 86 therefore cannot

trump the fundamental rights as provided for under article 38; and certainly they cannot undermine the provisions of article 1 on the sovereignty of the people. Further they ought not compete with all international treaties that provide and protect the right to vote and to which Kenya is a signatory, and which are part and parcel of our constitutional order under article 2.

39. We can go further to draw from decisions of the Indian Supreme Court as relates to the conflict between the fundamental freedoms and the Directive principles in the India constitution. Harmony between aspiration, reinforcing or guiding provisions and rights is however critical. In India the *Constitution* provides for both fundamental rights and directive principles. The Indian Supreme Court has, in a number of judgments, called these principles the "conscience of the *Constitution* and also as the core of the *Constitution*. That Court has held that the courts can look at the Directive Principles for the purpose of interpretation of the fundamental rights and adopt that interpretation which makes the fundamental rights meaningful and efficacious. But more importantly the Indian Supreme Court has pronounced itself on the instances where a conflict between fundamental rights and directive principles should arise. In *State of Madras v Champakam Dorairajan* AIR 1951 SC 226, the Supreme Court held that the directive principles are not enforceable by court stating that the chapter on Fundamental rights in the *Constitution* is sacrosanct and the directive principles have to conform to and run subsidiary to the chapter on Fundamental Rights. Similarly in 1967, a bench of 11 judges of the Supreme Court in *Golak Nath v The State of Punjab* AIR 1643, 1967 SCR (2) 762 (1967), found that fundamental Rights cannot be abridged or diluted to implement the directive principles. This means that Fundamental Rights were given superiority over the Directive principles.

40. The conclusion may therefore be drawn that fundamental rights constitute the foundation of the any *Constitution* and any accompanying values and principles are to be complementary and not to detract from the *Constitution*. The rights in article 38 remain central to any election cause and it is claim of the violation of those rights that ought to take center-stage in such a cause and not the form that accompanies it in the periphery.

41. Having determined that election causes are right-centric in nature, and having discussed the centrality of every citizens right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the *Constitution*, I now evaluate the alleged violation of Articles 81 and 86 of the *Constitution of Kenya, 2010* and its effect upon the outcome of the presidential election.

E. The Alleged Violation of Articles 81 and 86 of the *Constitution of Kenya, 2010* and Its Effect Upon the Outcome of the Presidential Election.

i. The Case

42. The Petitioners averred that there were massive, systematic, systemic and deliberate non-compliance with the *Constitution* and the law which contravened the principles of a free and fair election under article 81(e) of the *Constitution* as read together with section 39, 44 and 44A of the *Elections Act, 2011* and the Regulations thereunder. The Petitioners asserted that the relay and transmission of results from Polling Stations to the Constituency and the National Tallying Centre was not simple, accurate, verifiable, secure, accountable, transparent and prompt contrary to the provisions of article 86 of the *Constitution*. The Petition elaborated that the non-compliance was:

> On Forms 34A and 34B:
>
> a. The data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS Kits.
>
> b. The data entered into the KIEMS Kits ought to have been accompanied by an electronic picture or image of the prescribed Form 34A.
>
> c. The Practice Manual verbally communicated and publicly demonstrated by the 1st Respondent to the parties, stakeholders and observers demonstrated that transmission of any data from the KIEMS kit was only possible if the data was simultaneously accompanied by the image of the Form 34A. That according to late ICT Manager of the 1st Respondent, Mr Chris Msando, the submit button was programmed to function only when the data was accompanied by the electronic image of Form 34A.
>
> d. The results from over 10,000 polling stations were not accompanied by an electronic image of Form 34A and that the results declared from these polling stations represented approximately 5 million voters.
>
> e. The data being publicly displayed by the 1st Respondent was not consistent with the information on Forms 34A.

f. The 1st Respondent received in excess of 14,000 defective returns from polling stations affecting over 7 million votes.

g. The information on Forms 34B did not correspond with that in the primary Forms 34A making them inaccurate, unverifiable and invalid.

h. Inconsistencies in Forms 34B accounted for at least 7 million votes.

i. At the time of declaring the result, the 1st Respondent did not have 187 Forms 34B.

j. The computation and tabulation of results in a significant number of Forms 34B was not accurate, verifiable and internally consistent.

k. The purported results in the 1st Respondents Forms 34B were materially different from what the 1st Respondent publicly relayed and continued to relay as at the time of filing in its website or portal

l. That the results in Forms 34B were inaccurate and had mathematical additions in favour of the 3rdRespondent.

m. That some returns in a material number of polling stations were not in the prescribed Forms 34A and 34B contrary to Regulations 79(2)(a) and 87(1)(a).

n. That Forms 34B bore fatal irregularities affecting 14,078 polling stations.

o. That a number of forms and returns were not signed, some forms did not indicate names of the Returning Officer, some did not bear the IEBC stamp, some Forms 34A and 34B did not bear the signatures of the candidates agents nor the reason for refusing to sign, some were signed by the same person presiding in different polling stations.

p. In more than half of the Constituencies, the Returning Officers failed to indicate the number of Form 34As handed over to them as required under the law and regulations. As such, it was impossible to authenticate and verify the results given as the integrity of the forms had been put into question and the forms were unknown to the law.

Alleged Fraud on the part of the 1st Respondent:

q. In numerous instances, the 1st Respondent selectively manipulated, engineered and deliberately distorted the votes cast and counted in favour of the Petitioners and inflated those in favour of the 3rdRespondent, thereby affecting the final results tallied.

r. That the Presidential Election was marred and significantly compromised by intimidation and improper influence or corruption contrary to Articles 81(e)(ii) of the *Constitution* as read together with the *Elections Act* and Regulations 3 and 6 of the *Electoral Code of Conduct*.

s. That the 3rdrespondent, with impunity, contravened the Rule of Law and the principles of conduct of a free and fair election through the use of intimidation, coercion of public officers and improper influence of voters

Vote counting

t. It was alleged that the votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under article 86(b) and 86(c) of the *Constitution* as read together with the *Elections Act, 2011*.

The transmission process:

u. The respondents process of relaying and transmission of results from polling stations to the Constituency Tallying Centres and National Tallying Centre (NTC) was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt. This substantially compromised and affected the requirement of free and fair elections under article 81(e) (iv) and (v) of the *Constitution*

v The IEBC deliberately and/or negligently compromised the security of the integrated electoral management system (KIEMS) and thereby exposed it to unlawful interference by third parties.

ii. The evidence

43. The Petitioners relied on evidence borne in twelve depositions all sworn on the August 18, 2017 by: (1) Raila A. Odinga, (2) Stephen Kalonzo Musyoka, (3) Dr Nyangasi Oduwo, (4) George Kegoro, (5) Benson Wasonga, (6) Godfrey Osotsi, (7) Ibrahim Mohamud, (8) Mohamed Noor Barre, (9) Moses Wamuru, (10) Olga Karani, (11) Aprielle Oichoe and (12) Koitamet Ole Kina and a certificate by Duncan Nunda certifying the authenticity of

video and transcriptions attached to Dr Nyangasi Oduwos Affidavit. These depositions collectively support the case of the Petitioner and were filed on time, in line with the dictates of the *Constitution* and the *Supreme Court (Presidential Election) Rules, 2017*. This Evidence, together with a complete record of the responses is contained in the dissenting opinion of the Hon Justice JB Ojwang, SCJ.

iii. Analysis

44. The pertinent issues for consideration in this regard, in light of the pleadings, the evidence and submissions ought to evaluate the provisions of Articles 81 and 86 of the *Constitution* in the broad scheme of electoral prerequisites mandated by the *Constitution* and in light of article 38 of the *Constitution*. article 81 outlines the General Principles of the electoral system. Kenyas electoral system is instituted on the basis of multi-party democracy founded on the National Values and Principles outlined under article 10 of the *Constitution*. These values include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, equality, social justice, inclusiveness, human rights, non-discrimination and protection of the marginalized, good governance, integrity, accountability, transparency and sustainable development. Most importantly, the *Constitution* provides a formula for the election of the President (more than half of all the votes cast and at least twenty- five percent of the votes cast in each of more than half of the Counties) [Art. 138(4)].

For the other five elective positions: Governor, Senator, Member of the National Assembly, Woman Representative to the National Assembly, and Member of the County Assembly, the applicable system is first-past-the post i.e. the person with the most number of votes in the election.

45. The approach that a Court, keen to develop all the parameter of social order ordained by the *Constitution* is the one taken by this court *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Re Gender), Supreme Court Application No 2 of 2012, at paragraphs. 26 and 54:

> (26) The forthcoming general elections are not only the most important since independence, but are complex and novel in many ways. The elections come in the context of the first progressive, public-welfare-oriented, historic *Constitution* which embodies the peoples hopes and aspirations. Not only are these elections one of the vital processes instituted under the *Constitution*, but they constitute the first act of establishing a whole set of permanent governance organs. Clearly, any ambivalence or uncertainty in the path of such crucial elections must, as a matter of public interest, be resolved in time:

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

46. The electoral system and process is therefore discernible from a holistic reading of the *Constitution*, particularly, Chapters Seven, [Representation of the People], Eight [The Legislature] and Nine [The Executive]. The General Principles under article 81, which in my view are qualitative, are infused in the entire fabric of these Chapters and their resulting Legislation are concretized by other provisions of the *Constitution* as follows.

a. Freedom of citizens to exercise their political rights is provided under article 38 of the *Constitution*,

b. Not more than two-thirds of the members of elective public bodies shall be of the same gender-article 10, 27(8), 38, 56 (a), 82, 90, 91, 100.

c. Fair representation of persons with disabilities- article 54, 56, 82

d. Universal Suffrage based on the aspiration for fair representation and equality of the vote-article 10 and 38

e. Free and fair elections, which are

   i. By secret ballot-article 38

   ii. Conducted by an independent body-article 10 and 88

iii. Free from violence, intimidation, improper influence or corruption-article 10,

iv Transparent-article 10

v Administered in an impartial, neutral, efficient, accurate and accountable manner-article 10, 82,83, 88

47. This collectivity and interlocking nature of constitutional provisions in the scheme of rights, values, principles and administrative directives are then infused into the *Elections Act* and Regulations there-under and in determining claims of commission or omission in electoral disputes, a Court must consider:

(a) The nature of the commission or omission, in general;

(b) The source of such omission or commission;

(c) Foreseeability and mitigation;i.e. could the commission or omission be foretold? Were there steps to avert it?;

(d) The effect of the commission or omission on a right, a duty or the consequence of a duty thereof (such as effect upon the result of an election);

(e) The effect of the commission or omission on the individual and the collective;

(f) Possible remedies and directions.

48. The rationale of these considerations may be drawn from the *Mike Wanjohi* case at paragraph 110:

> [110] By the design of the general principles of the electoral system, and of voting, in Articles 81 and 86 the *Constitution*, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid, until the contrary is shown, through a recognized legal mechanism founded in law or the *Constitution*. Any contests as to the credibility, fairness or integrity of elections, belongs to no other forum than the Courts. The charge of commission of administrative error, fraud, deliberate misconduct, or some element of corrupt practice in elections, are questions that go to the root of the validity of elections and which, if apparent subsequent to the declaration of results, are expressly excluded from the scope of the dispute-resolution powers of the IEBC under article 88(4)(e). [Emphasis added]

49. Article 86 on the other hand bears a strict quantitative language regulating voting at an election. This article requires the voting method employed to be simple, accurate, verifiable,

secure, accountable and transparent. The Petitioners claim is that the results from the polling stations, the Constituency Tallying Centres could not be verified by their agents at the National Tallying Centre. The process of verification is not a two-step process. Verification in a Presidential election is a continuous process traceable from the date of registration of voters to the determination of a Presidential election petition in an election court. In other words, the plurality of persons engaged in the conduct of an election, including the ultimate determination of that elections validity, are all agents of verification in ascertaining the credibility of an election. To examine the integrity of the election, the election Court is obliged to consider all the relevant steps of the verification process. We shall examine the role of each one.

The Agents of Verification

(i) The IEBC

50. The Commission is established under article 88 of the *Constitution* and mandated to conduct and supervise elections to any elective office established by the *Constitution*, including: the continuous registration of voters, the regular revision of the voters roll, and facilitation of the observation, monitoring and evaluation of the elections. Section 4 of the Independent Electoral and Boundaries Commission Act, No 9 of 2011 outlines the powers and functions of the Commission in the language of article 88, with the addition of deployment of appropriate technology and approaches in the performance of its functions [Sec 4(m)]. The Commission is bound by the principles of the electoral system as outlined under article 81 (Sec 25). The Commission is also mandated to subject the register of voters to an audit at least six months before a general election (Sec 8A of the *Elections Act*). It is also mandated to test, verify and deploy technology at least 60 days before a general election. [(Sec. 44(4)(b)]

(ii) The Public

51. Section 6 of the *Elections Act* mandates the Commission to avail the register of voters to be inspected by the public at all times for purposes of rectifying the particulars therein. Verification of ones registration details, including biometric data, is therefore a critical part of verification essential to the conduct of an election and enjoyment of the right to vote. The Commission is also mandated to open the Register for inspection by the public, ninety days from the date of the notice of a general election. This assures the public of the correctness of the registration details entered into the register and guarantees certain key components of the right to vote under article 38. This process was undertaken in the months of May and June, 2017.

(iii) Candidates or Agents

52. Section 30 of the *Elections Act* empowers a political party, or a nominated agent, and an independent candidate to nominate one agent per polling station. Regulations 69, 70, 73,74,76, 77,79, 80, 83, 85 demonstrate that candidates and/or their agents are an integral part of the electoral process.

(iv) Political Parties

53. They are permitted under the regulations to observe the process of registration of voters under the registration of voters regulations

(v) Constituency Returning Officers

54. Section 39 of the *Elections Act* mandates the Commission to appoint Constituency Returning Officers to be responsible for collating and announcing the results from the polling stations in the constituency for the election of the President and submitting the collated results for the election to the national tallying center.

(vi) Presiding Officers

55. These officers are appointed subject to Regulation 5 (1A) of the Elections (General) Regulations, 2012. They are in charge of the entire process at the polling stations to ensure voting is done in accordance with the law and to ensure that counting of the votes at closure of polling, is done properly.

(vii) Representatives of electronic and print media accredited by the Commission

56. This accreditation is specifically provided for under regulation 95 to allow media access and cover to the electoral process. All accredited observers and media are permitted into the Polling stations on the basis of Regulation 62 (1)(g) of the Elections (General Regulations) 2012. They are allowed to attend the counting of votes pursuant to Regulation 74(4)(f) and the tallying venue (Reg. 83) and Reg. (85)

(viii). Observers: Local and international representatives accredited by the Commission.

56A. These persons or organizations are accredited to observe the election under section 42 of the *Elections Act* and more importantly are required to submit their official reports to the Commission under regulation 94 (6). The reports so filed therefore have a formal and official status.

57. All the international observers who observed the General elections termed it as free and fair. There are fundamental questions to be considered: What was the import of their reports regarding the fairness of the election? What is a free and fair election? What did the election observers consider? International election Observers are bound by Declaration of Principles for International Election Observation. Declaration 4 defines International election observation as:

> The systematic, comprehensive and accurate gathering of information concerning the laws, processes and institutions related to the conduct of elections and other factors concerning the overall electoral environment; the impartial and professional analysis of such information; and the drawing of conclusions about the character of electoral processes based on the highest standards for accuracy of information and impartiality of analysis. International election observation should, when possible, offer recommendations for improving the integrity and effectiveness of electoral and related processes, while not interfering in and thus hindering such processes. International election observation missions are: organized efforts of intergovernmental and international nongovernmental organizations and associations to conduct international election observation.

58. Despite not having a universally acceptable definition of a free and fair election, there are certain common attributes to that description. They were aptly expressed by the constitutional Court of South Africa in the case of *Kham and Others v Electoral Commission and Another* (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC).

> (34) There is no internationally accepted definition of the term"free and fair elections. Whether any election can be so characterised must always be assessed in context. Ultimately it involves a value judgement. The following elements can be distilled as being of fundamental importance to the conduct of free and fair elections. First, every person who is entitled to vote should, if possible, be registered to do so. Second, no one who is not entitled to vote should be permitted to do so. Third, insofar as elections have a territorial component, as is the case with municipal elections where candidates are in the first instance elected to represent particular wards, the registration of voters must be undertaken in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote. Fourth, the *Constitution* protects not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office.

In *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) (New National Party) the Court held, at para 12.

(25) There is even a shift among international observers towards abandoning the "free and fair standard and to ask instead whether the election is a legitimate expression of the will of the people or properly reflects the wishes of the people. In response to a question from the Swedish Ministry of Foreign Affairs regarding this shift in the public discourse over elections, the ACE Electoral Knowledge Network said:

> [A] shift has indeed taken place in the discourse of terms used to characterize the conduct of elections, and that consequently there are fewer references to elections as "free and fair. This shift was seen as a trend which began in the 1990s, when elections that were described as "free and fair at the same time could be seen by analysts to lack integrity, and it was also predicted to become a more widespread trend in the future. Moreover, one [Practitioners Network] member expected that the trend would go further as countries engage with new elections related technologies.
>
> Behind the shift in discourse lies a rising awareness among analysts that election observation should be less of a thumbs up/thumbs down judgement on an election-day event, and increasingly an effort to monitor and evaluate the process of an election, against international obligations voluntarily undertaken by countries.

ix. The Election Court

59. Let me reiterate that Kenyas electoral system is instituted on the basis of multi-party democracy founded on the National Values and Principles outlined under article 10 of the *Constitution*. The General principles of the Electoral System therefore and the interlocking constitutional provisions, including article 81 are engaged in an exercise of sovereign guardianship. Therefore, the Supreme Court by dint of its Jurisdiction is the final verifying Agency, if called upon to do so, in a Presidential election petition. This duty is enabled by the Supreme Courts inherent powers, as an election court, to Order: (a) scrutiny (b) recount (c) re-tally (d) discovery of documents (e) inspection of ballots (f) Orders that facilitate the Court to establish the peoples sovereign will.

60. The Supreme Court as an Election court is empowered by article 138 (3)(c), 140 and 163 (3) (a) of the *Constitution* and also under Sections 2, 80, 82 and 85 of the *Elections Act, 2011*. This is critical to meet the constitutional imperatives set upon the Court and the Electoral body by the *Constitution*. An election Court must be sure that there is a solid, not imagined; a proved, not alleged; case for invalidating an election. The South African Constitutional Court, in Kham and Others v Electoral Commission and Another (CCT64/15) [2015] ZACC 37; 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC) remarked, and I am fully persuaded by their opinion:

(91) It is undesirable to articulate a general test expressed in language different from that of the *Constitution*, as that may be misleading. The Court must give full weight to the constitutional commitment to free and fair elections and the safeguard it provides of the right and ability of all who so wish to offer themselves for election to public office. It is essential to hold the IEC to the high standards that its constitutional duties impose upon it. It is insufficient for the Court to say that it has a doubt, or a feeling of disquiet, or is uncomfortable about the freedom and fairness of the election. It must be satisfied on all the evidence placed before it that there are real – not speculative or imaginary – grounds for concluding that they were not free and fair.

What are the stages in the Process of Verification?

61. Regulation 68 provides that ballot papers shall:

a. Contain the name and symbol of the candidate validly elected

b. Contain a photograph of the candidate where applicable

c. Be capable of being folded up

d. Have a serial number, or combination of letter and number, printed on the front and;

e. Have attached a counterfoil with the same number or combination printed thereon.

These features allow the candidates or agents present at the polling station to inspect the ballot papers provided for use at the polling station.

62. The voting procedure outlined under Regulation 69 contains core components of verification which are complemented by the requirements of inspection and verification of the voters register.

Regulation 69. Voting Procedure

1) Before issuing a ballot paper to a voter, an election official shall—

a. require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;

b. ascertain that the voter has not voted in that election;

c. call out the number and name of the voter as stated in the polling station register;

d. require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the printed copy register once the image has been retrieved;

e. in case the electronic voter identification device fails to identify a voter the presiding officer shall—

i. invite the agents and candidates in the station to witness that the voter cannot be identified using the device;

ii. complete verification Form 32A in the presence of agents and candidates;

iii. identify the voter using the printed Register of voters; and

iv once identified proceed to issue the voter with the ballot paper to vote; (f) deleted by L.N. 72/2017, r. 31(c); (g) deleted by L.N. 72/2017, r. 31(c).

2) A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers—

a. cast his or her votes in accordance with regulation 70 without undue delay;

b. submit to having one finger as prescribed by the Commission immersed, dipped or marked in ink of a distinctive colour which, so far as is possible, is sufficiently indelible to leave a mark for the period of the election;

c. where a voter has no finger, make a mark on the next most suitable part of the body; and

d. upon collecting his or her identification documents, immediately leave the polling station.

3) A person who knowingly fails to place a ballot paper issued to him or her (not being a spoilt ballot paper) into a ballot box before leaving the place where the box is situated commits an offence under the Act.

4) An election officer who deliberately refuses to stamp any ballot paper commits an offence.

5) The presiding officer may, where a voter so requests, explain the voting procedure to such voter. [Emphasis added]

63. At the close of polling, a presiding office is supposed to indicate in a polling diary, a written statement of-

a. the number of ballot papers issued to him or her under regulation 61;

b. the number of ballot papers, other than spoilt ballot papers, issued to voters;

c. the number of spoilt ballot papers; and

d. the number of ballot papers remaining unused.

Then in the presence of the candidate or agents, seal, in separate tamper proof envelopes-

a. the spoilt ballot papers, if any;

b. the marked copy register, where necessary;

c. the counterfoils of the used ballot papers; and

d. the statement specified in sub-regulations

64. These items are then sealed by the presiding officer with the seal of the Commission and that of the candidate or agent (if they wish to do so) and then delivered together with the ballot boxes, to the returning officer. These items allow the examination of election materials at any stage of the election, permissible by law, for purposes of verification.

65. The Supreme Court of India has previously laid a basis upon which an election Court may lift the veil of secrecy in a ballot where a case has been made out by the Petitioner to do so. In *Jitendra Bahadur Singh v Krishna Behari and others* [1969] INSC 176; AIR 1970 SC 276 an elector challenged the validity of the election of the appellant to Lok Sabha. By the order dated May 21, 1968, the High Court permitted the Election Petitioner to inspect the packets of Ballot Papers containing the accepted as well as the rejected votes of the candidates.

The said order passed by the High Court was impugned before the Supreme Court. The Supreme Court held, at paragraphs 7 and 8:

> 7. The importance of maintaining the secrecy of ballot papers and the circumstances under which that secrecy can be violated has been considered by this Court in several cases. In particular we may refer to the decisions of this Court in Ram Sewak Yadav v Hussain Kamil Kidwai, 1964-6 SCR 238 [1964] INSC 6; (AIR 1964 SC 1249) and Dr Jagjit Singh v Giani Kartar Singh, AIR 1966 SC 773. These and other decisions of this Court and of the High Courts have laid down certain basic requirements to be satisfied before an election tribunal can permit the inspection of ballot papers. They are:
>
> (1) that the petition for setting aside the election must contain an adequate statement of the material facts on which the petitioner relies in support of his case and
>
> (2) the tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary.
>
> 8. The trial court was of the opinion that if an election petitioner in his election petition gives some figures as to the rejection of valid votes and acceptance of invalid votes, the same must not be considered as an adequate statement of material facts. In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bald assertion that he got those figures from the counting agents of the congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information. It is not his case that they maintained any notes or that he examined their notes, if there were any. The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as to afford a basis for the allegations made in the petition. ..... This Court in insisting that the election petitioner should state in the petition the material facts was referring to a point of substance and not of mere form. Unfortunately, the trial court has mistaken the form for the substance. The material facts disclosed by the petitioner must afford an adequate basis for the allegations made. [Emphasis added]

66. The preservation of election material for a period of three years is also an enabler of the verification process. In cases where a Court is in grave doubt as to the outcome of the election, as the Majority in this case decided they were, the ballots exist to enable a final inspection/verification process by an election Court. The people speak through the ballot

and the ballots, once marked and cast, in turn, speak for themselves anonymous of the voter, preserving the principle of secrecy under article 38 (3)(b) of the *Constitution*. Indias long constitutional tradition has given the Supreme Court an opportunity to reign in on the importance of ballots in verifying the result of the election when in doubt. In *Narendra Madivalapa Kheni v Manikarao Patil and Others*, Supreme Court Civil Appeal No 1114 of 1976 :

> The ballots are alive and available and speak best. Why, then, hazard a verdict on flimsy foundation of oral evidence rendered by interested parties? The vanquished candidate's ipse dixit or the victor's vague expectations of voters' loyalty – the grounds relied on – are shifting sands to build a firm finding upon, knowing how notorious is the cute art of double-crossing and defection in electoral politics and how undependable the testimonial lips of partisans can be unless authenticated by surer corroboration. Chancy credulity must be tempered by critical appraisal, especially when the return by the electoral process is to be overturned by unsafe forensic guesses. And where the ground for recount has been fairly laid by testimony, and the ballot papers, which bear clinching proof on their bosoms, are at hand, they are the best evidence to be looked into. No party can run away from their indelible truth and we wonder why the learned Judge avoided the obvious and resorted to the risky. May be, he thought reopening and recount of ballots may undo the secrecy of the poll. We are sure that the correct course in the circumstances of this case is to send for and scrutinize the 16 ballots for the limited purpose of discovering for whom, how many of the invalid sixteen have been cast. Secrecy of ballot shall be maintained when scrutiny is conducted and only that part which reveals the vote (not the persons who voted) shall be open for inspection. [Emphasis added]

67. The elaborate process of counting votes outlined under Regulation 76 guarantees several things:

    (i) that vote counting is systematic, transparent (in the presence of candidates or agents),

    (ii) verifiable-the presiding officer maintains a record of the count in a tallying sheet in Form 33.

68. After completing the count, Regulation 79 mandates the presiding officer, the candidates or agents to sign the declaration in respect of the elections. Pursuant to Regulation 79 (2A), the presiding officer shall-

> The presiding officer shall—

a. immediately announce the results of the voting at the polling station before communicating the results to the returning officer;

b. request each of the candidates or agents present to append his or her signature;

c. provide each political party, candidate, or their agent with a copy of the declaration of the results; and

d. affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station. [Emphasis Added]

This allows candidates or agents to verify the tally of these results at the Constituency Tallying Centre and to raise any objection to any manipulation or change of results. This is in line with the principle in the *Joho* case that results at the polling station are final and any challenge to these results can only be before a Court of law. Signatures by the Candidates or agents are central to the declaration that where not provided, a record of the reasons for failure to sign shall be provided either by the candidate or agent [Reg. 79(3)], or by the presiding officer [Reg. 79 (4)]. Failure by a candidate or agent to sign the declaration, shall not, by itself, invalidate the results announced [Reg. 79(6)]. The presiding officer is also required to record the absence of any candidate or agent [Reg. 79(5)]. The absence of a candidate or agent at the signing of declaration shall also not of itself, invalidate the results announced [Reg 79 (7)].

69. An added layer of verification is provided under Regulation 80 where a candidate or agent after counting is completed may require the presiding officer to have the votes rechecked and recounted. The presiding officer may also, on their own initiative have the votes recounted. This regulation is couched as a limited right, to be enjoyed by the candidates or agents at most, twice.

70. The importance of these processes bear credence to a careful consideration of the history of electoral practice in Kenya as was highlighted by Mutunga CJ & P (as he then was) in his concurring opinion in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & Others, S.C. Petition No 2B of 2014; [2014] eKLR [Munya 2] at paragraph 235, 247, 248, 249 and 250:

(235) The emphasis on free and fair elections, through an electoral system that is simple, accurate, verifiable, secure, accountable and transparent, in Articles 81(e) and 86 of the *Constitution*, has a rich Kenyan historical, economic, social, political, and cultural context. Article 86(b), for example, provides that the votes cast are to be counted, tabulated, and results announced promptly by the presiding officer at each

polling station. This is because our electoral history is rife with malpractices that occur during the transportation of ballot boxes from polling stations to constituency counting-centres. It is therefore no coincidence that many of the petitions filed in the High Court, before the promulgation of the 2010 Constitution, gave lurid details of the stuffing of ballot boxes, or discarding of them en route to the constituency counting-centre. At the constituency counting- centre itself, votes disappeared when lights, either by design, negligence, or power- outage, went off. Our elections were therefore not free, fair and peaceful (see Charles Hornsby, Kenya: A History Since Independence (I.B. Tauris, 2013)). [Emphasis added]

(247) Constitutional provisions are by themselves not enough. The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote.

Once the *Constitution* gives citizens the right to vote, the freedom to choose, and conditions are created for the realization of that right, it is not the business of the Court to aid the indolent. If party agents are required to be present, sign statutory forms, and undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail ones party, but also to fail our democracy. The Courts must frown upon any such inaction, reluctance, or delay.

(248) The election is first and foremost the citizens election. Every Kenyan must protect his or her right to vote the right to participate in the political affairs of the nation. It is upon exercising all the rights which the *Constitution* bestows upon the citizen, that she or he can claim the sovereign power that she or he donates to her or his representative.

(249) It is, therefore, time for us to develop our election-petition litigation: we must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. A candidate, or her agent, cannot abscond duty from a polling station, and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybodys collective interest, and in everybodys collective and solemn duty, to safeguard it.

(250) Given the strict electoral timelines in our Constitution, it is clear elections, will result in cogent grounds upon which election results are challenged. We will start seeing candidates conceding defeat in elections because they have been free and fair. We

> will see electoral litigation that may be ended through consent of the parties because they agree that the grounds upon which the election results were based, are solid and not frivolous. It is not hard to imagine that one day it will be possible, because of the vigilance of the citizens and all electoral stakeholders, to have elections that will be free and fair, and Courts will no longer be involved in the settlement of electoral disputes. [Emphasis supplied]

71. The next stage of verification is the process of tallying outlined under Regulation 83. The Returning Officer at the Constituency is mandated to collate and publicly announce the results from each polling station in the presence of candidates, agents and observers if present.

72. Regulation 81 is important because it preserves the election material for reference by an election Court, where applicable and which in my opinion, is the final verification avenue.

> Regulation 81. Sealing of ballot papers by presiding officer
>
> 1) Upon completion of a count, including a recount, the presiding officer shall seal in each respective ballot box—
>
> a. valid votes;
>
> b. rejected ballots sealed in a tamperproof envelope;
>
> c. unused ballot papers sealed in a tamperproof envelope; (d) counterfoils of used ballot papers sealed in a tamperproof envelope;
>
> e. copy of election results declaration forms; and
>
> e. stray ballot papers in a tamperproof envelope.
>
> 2) The presiding officer shall deliver, to the returning officer—
>
> a. the sealed ballot boxes;
>
> b. the statements made under regulations 78 and 79;
>
> c. copy of the Register of Voters; and
>
> d. Polling station diary. [Emphasis supplied]

73. Verification therefore is an exercise that comprises the entire electoral process commencing from registration of voters, inspection of the voters Register, verification of registration, verification of an electors details where the electronic identification fails, audit of the Register, identification of voters, presence of candidates, agents, accredited observers and

media, the process of counting and the limited right of recount, signing the declaration forms and the entitlement of candidates or agents to a copy, displaying the declaration of results for access by the public, sealing of ballot boxes and handing-over of election materials, the tallying process and the right to challenge the declaration of results in an election Court. All these processes activate several inbuilt principles of the electoral system under article 81 of the *Constitution*. They also provide an opportunity for electoral quality assurance, aptly described in the cited excerpt from the concurring opinion of Mutunga CJ & P (as he then was) in the Kidero case. The hierarchy is that any shortfalls in the preceding process can be detected in a consequent process forming a basis for a pre-election or post-election dispute.

74. It is however to be observed that a proper test for verification of an electoral process must always prioritize the primary instrument for Declaration of the result or outcome of the voters choice. The voter is identified at the Polling station; he votes at the polling station, ballots are counted at the polling station. The agents, candidates, observers are allowed access into the polling stations to verify the inner sanctum of the voice of the electorate - the altar of the voters choice. What happens there is what determines the parameters of verification. Any doubt as to the credibility or integrity of the election must be tested against the various layers of verification, including the election material in the custody of the Returning Officer. A single want of form in this elaborate scheme of verification cannot be a basis for nullifying a Presidential Election.

F. Transmission

75. At the heart of transmission was the application of the directions by the Court of Appeal in the Maina Kiai case. Before delving into the primary (Manual) and the complementary (electronic) modes of result transmission, I will revisit this decision and its bearing on the conduct of future elections.

The Case

i. The Petitioners Submissions

76. At paragraph 67 of the Petitioners written submissions, it was urged that the determination of the court of Appeal in the Maina Kiai case was that a polling station was the final point of declaration of Presidential Election results. The Petitioners contended that the 1st Respondent however, went contrary to this determination by: declaring the final results of the Presidential Election at the County; failing to electronically collate, tally and transmit the results accurately; allowing transmission and display of unverified results not provided for in law; posting contradictory and ever changing results in Forms 34A and 34B in the portal; and declaring final results of the Presidential elections on 11th August, 2017 before receiving results from all the polling stations.

77. According to the Petitioners, the only lawful, credible and secure way to conduct, tally and transmit the 2017 Presidential Election results was as provided under section 39(1C) of the *Elections Act, 2011* i.e. electronic transmission in the prescribed Forms and in a prompt and efficient manner. It was the Petitioners submission that the Court of Appeal in the Maina Kiai case affirmed the use of information technology to guarantee the accuracy and integrity of election results and at pages 70-71 of their judgment, determined thus:

> "We are satisfied that the electronic transmission of the already tabulated results from the polling station is a critical way of safeguarding the accuracy of the outcome of the elections The electronic transmission of results was intended to cure the mischief that all returning officers from each of the 290 constituencies and 47 county returning officers troop 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 officer would in the process tamper with the announced result.

ii. The Responses

(a) The 1st and 2nd respondents

78. Counsel for the 1st and 2nd respondents made concurring arguments on this issue. The written submissions of the 1st Respondent, summarized the litigation logic of the Maina Kiai case as an appeal against the decision by the High Court in Constitutional Petition No 207 of 2016 seeking the following Orders:

a. A declaratory Order that Sections 39 (2) & (3) of the *Elections Act, 2011*, are contrary to the provisions of Articles 86 and 138(2) of the *Constitution* and therefore, null and void;

b. A declaratory Order that Regulations 83(2), 84(1) and 87(2) of the Elections (General) Regulations, 2012 are unconstitutional and contrary to Articles 86(b)(c) and 138(2) of the *Constitution* and therefore null and void;

c. A declaration that respective constituency returning officers are the persons responsible for the conduct and declaration of constituency presidential election results;

d. A declaration that constituency presidential elections results once declared and announced by respective constituency returning officers are final results for the purposes of that election;

e. A declaration that constituency returning officers possess a fundamental and an inalienable mandate to announce and declare the final results of a presidential election at constituency level and that such declaration is final and is not subject to alteration, confirmation or adulteration by any person or authority, other than an election Court, pursuant to Articles 86 and 138(2) of the *Constitution of Kenya*.

79. The issue for determination was whether results announced by the Constituency Returning Officer in respect the Presidential election were provisional and subject to confirmation by the 1st Respondent. The Court of Appeal upheld the determination of the High Court that to the extent that section 39(2) and (3) of the *Elections Act, 2011* and Regulation 87(2)(c) provide that the results declared by the constituency returning officer are provisional, and to the extent that Regulation 83(2) provides that the results of the returning officer are subject to confirmation by the 1st Respondent, these provisions are inconsistent with the *Constitution* and therefore null and void.

80. In his oral submissions, counsel for the 1st Respondent Mr Nyamodi, submitted that the pathway to the final results was demarcated by the *Constitution*, the *Elections Act, 2011* and Regulations thereunder and by judicial directions rendered by Superior Courts in Kenya. To this extent, two critical decisions guided the 1st Respondents electoral returning role; the Maina Kiai case and National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & others [2017] eKLR Civil Appeal No 258 of 2017 (The NASA case).

81. Counsels submission was that in reliance to the *Constitution*, the law and judicial guidance, the 1st Respondent used Forms 34B as opposed to Forms 34A as argued by the Petitioners, to declare the final results of the presidential election. He emphasized that at the time the final results of the presidential election were declared, all Forms 34B had been collated. It was counsels submission that, by declaring Sections 39 (2) and (3) of the *Elections Act, 2011* inconsistent with the *Constitution*, the 1st Respondents ability to change, amend or alter the results transmitted from the Constituency, was entirely curtailed. According to counsel, the decision of the Court of Appeal in the Maina Kiai case extinguished the concept of provisional results. Consequently, the numbers manually entered into the KIEMS kit at the close of polling and transmitted simultaneous to the Constituency Returning Centre and the National Tallying Centre, bore no status in law. They were mere statistics, although the Presiding officer had to show the Agents present the entries made for confirmation before transmission.

82. To buttress his argument, Mr Nyamodi traced the process of a vote as follows (with reference to paragraph 20 of the Response to the Petition):

a. Upon the close of polling, the votes cast were counted and the results recorded in Forms 34A.

b. An image of the Form 34A was captured by the Kenya Integrated Election Management System (KIEMS) kit and the statistics in the Form 34A were then entered into the KIEMS kits at all polling stations.

c. The presiding officer would then simultaneously relay the statistics and the image of the Form 34A to the relevant constituency returning officer and to the National Tallying Centre (NTC).

d. The completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage. In respect of areas lacking 3G or 4G network coverage, the Respondents established alternative mechanisms to ensure completion of transmission of the image of the Form 34A. (It was however clarified, during oral submissions, that in such instances, the statistics could be sent without the accompanying image.)

e. In accordance with section 39 (1C) of the *Elections Act*, the 1st Respondent published the images of Forms 34A and 34B in respect of the presidential election on its public portal.

f. In all polling stations, the presiding officers transmitted the statistics of the results through KIEMS accompanied by the electronic image of Forms 34A.

g. At the time of the declaration of the results of the presidential election, the 1st and 2nd respondents had in their possession all the forms required in law for purposes of a declaration of the results of the presidential election.

h. The procedure adopted in the transmission and tallying of results of the presidential election was in conformity with the decision of the Court of Appeal in the Maina Kiai case. [Emphasis added]

83. On the basis of this process, Counsel submitted that the Petitioners allegation that the 1st Respondent deliberately pre-determined and set itself on a path of subverting the law by being a law unto itself, was unfounded. However, although section 44A of the *Elections Act, 2011* empowers the 1st Respondent to set up complementary mechanism for identification of voters and transmission of election results to ensure that it complies with article 38 of the *Constitution*, the Court of Appeal directed that the tabulated results electronically transmitted from the polling stations in the prescribed forms was a critical way of safeguarding the accuracy of the outcome of the elections and could not be varied. The rationale for this determination was that there was no need for 290 Constituency returning

officers and 47 County returning officers to troop to the NTC with Forms 34B carrying the hard copies of the presidential results which they had announced in their respective tallying centres. It was counsels submission that despite this conclusion, the Court of Appeal did not declare section 44A of the *Elections Act, 2011* inconsistent with the *Constitution*.

84. In addition, counsel submitted that the determination by the Court of Appeal on the finality of presidential election results declared by the constituency returning officer also changed the structure of Form 34C. Regulation 87(3)(b) provides that:

> " upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the Commission shall tally and complete Form 34C. However, the 1st Respondent had to modify Form 34C to reflect the entry of Forms 34B, which was the Form declared by the Court of Appeal to be the source document to determine the winner of a Presidential election, in place of Forms 34A.

85. Mr Nyamodi concluded by reaffirming that the way the 1st Respondent structured its transmission system, was largely based on the Court of Appeals decision in the Maina Kiai case which did not interfere with or negate the will of the people resident in Form 34A.

(b) The 3rdRespondent

86. Mr Ngatia, counsel for the 3rdRespondent submitted that the Forms 34B produced by the constituency returning officers upon tallying the results from the polling stations as contained in Forms 34A were binding upon the 2nd Respondent at the National Tallying Centre. As such, the duty of the 2nd Respondent at the National Tallying Centre was to tally the results contained in Forms 34B to produce Form 34C which contained the final results of the Presidential elections; a duty that was properly executed.

87. Counsel further rebutted the Petitioners argument that the declaration of results was made at the County. He urged that the declaration of results was done by presiding officers at every polling station, and by the returning officers at the Constituency Tallying Centre and that the role of the 2nd Respondent was simply to tally the results obtained from the returning officers in Forms 34B accompanied by Forms 34A before declaring the final results of the election. Due to the County threshold required by article 138(4)(b) of the *Constitution*, it was logical for the 2nd Respondent do announce the results County by County.

88. The Petitioners contention was that the 1st and 2nd respondents failed to adhere to the guidelines set by the Court of Appeal in the Maina Kiai case during the conduct of the 2017 Presidential elections. The Respondents on the other hand demonstrated that the presidential election was conducted in accordance with those guidelines. However, counsel

for the 1st Respondent urged this Court to consider the place of the Maina Kiai decision rendered by the Court of Appeal, in the conduct of presidential elections in Kenya and to settle the law for future elections. According to the 1st Respondent, the role of the 2nd Respondent had been reduced by the Court of Appeal to tallying the results in Forms 34B to generate Form 34C.

89. Counsel for the 1st Respondent was of the view that this Court does not lose its status to interpret and apply the *Constitution* while sitting as a Court of original jurisdiction to hear disputes relating to a presidential election. Indeed, I agree with counsel for the 1st Respondent that while exercising original jurisdiction as conferred on this Court by article 163(3)(a) of the *Constitution*, this Court will resolve both issues of law and fact arising in the course of litigation, and settle any issues of constitutional controversy.

Analysis

90. While it may seem peculiar to delve into analysis of the jurisprudence laid by the Court of Appeal in the Maina Kiai case, in a case, other than one on appeal, it is my considered opinion that we can do so through a two-prong approach. Firstly, this is a court of original jurisdiction in presidential petitions under article 163, and therefore competent to adjudicate upon matters of both law and fact in such a matter, including the interpretation and application of the *Constitution*. Secondly, this Courts foreboding on circumstances such as present before us, manifests in the decisions of this Court in the cases of *Anami Silverse Lisamula v The Independent Electoral and Boundaries Commission and Two Others*, Sup. Ct. Petition No 9 of 2014, (the Lisamula case) Rawal, DCJ, (as she then was), concurring [at paragraph 135]:

> " Therefore, the peculiar nature of the *Constitution of Kenya, 2010* informs the peculiarity of the Judiciary in the new dispensation, and more so, that of the Supreme Court. the *Constitution* progressively broadens the arena of litigation in this country, and the Supreme Court must remain steadfast in its duty to address itself to issues that may properly come [up] before it. The jurisprudence to be developed by the Supreme Court of Kenya may bear differences from that of other jurisdictions in the world, because of the special terms of this countrys charter, which expresses the peoples will, and embodies their mutual agreement. <u>While most jurisdictions would command a Court to relieve itself of duty by making a prompt finding on jurisdiction, Kenyas Constitution directs the Supreme Court to take no rest, until all unsettled issues of its interpretation and application are resolved</u> [Emphasis supplied].

In the Aramat case, [at paragraphs 101 and 111]:

> [101] We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the *Constitution* with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the *Constitution*. Besides, as the Supreme Court carries the overall responsibility [The *Constitution of Kenya, 2010*, article 163(7)] for providing guidance on matters of law for the States judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other Courts.
>
> [111] From the principles thus stated, it is clear to us that this Court ought to maintain constant interest in the scheme and the quality of jurisprudence that it propounds over time, even where it is constrained to decline the jurisdiction to deal with any particular questions.
>
> Whatever option it takes, however, this Court ought always to undertake a methodical analysis of any issues it is seized of, and ought always to draw the whole dispute to a meaningful conclusion, bearing directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the Courts below. [Emphasis added]

In Re The Matter of the Interim Independent Electoral Commission, Sup. Ct. Civil Application No 2 of 2011; [2011] eKLR (Re IIEC) this Court has the jurisdiction to interpret any constitutional provisions in the course determining any matter. It held that:

> Indeed, interpretation of the *Constitution* stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs: so, for instance, the State Law Office in advising Government Ministries, is entitled to interpret the *Constitution* as may be necessary; and the several independent Commissions under the *Constitution* are similarly entitled to interpret the *Constitution* as part of the performance of their respective mandates. The Supreme Court too, may take its position as guided by its own interpretation of the *Constitution*. [Emphasis added]

91. At the centre of the instant case is the impact of the decision of the Court of Appeal in the Maina Kiai case to the constitutional status of section 39 (in its entirety) and section 44A of the *Elections Act, 2011*; the role of the Chairperson of the Independent Electoral and Boundaries Commission pursuant to article 138(10) (a) of the *Constitution*; and the overall mode of transmission of presidential election results from the polling station to the National Tallying Centre as elaborated in the *Constitution*, the *Elections Act, 2011* and Regulations thereunder. It is important to note that no intention of an Appeal from this decision was

lodged in the Supreme Court Registry within the statutory 14 days. Bearing in mind the Supreme Courts constant call to interpret the *Constitution*, these issues still engage this Courts jurisdiction under article 163(3)(a).

92. This case therefore presents two apposite issues for determination:

(i) whether in conducting the 2017 presidential election, the 1st and 2nd respondents adhered to the guidelines set by the Court of Appeal in the *Maina Kiai* case; and

(ii) what is the place of this jurisprudence in the conduct of future presidential elections in Kenya?

93. The starting point is to place the *Maina Kiai* case in context. This was an appeal against the Judgement of the High Court delivered on April 7, 2017 in which the High Court made the following declarations:

a. that to the extent that section 39(2) and (3) of the *Elections Act* provides that the presidential election results declared by the constituency returning officer are provisional (it) is contrary to Articles 86 and 138(2) of the *Constitution* and is therefore null and void;

b. that to the extent that regulation 87(2)(c) of the *Elections (General) Regulations 2012* provides that presidential election results declared by the constituency returning officer are provisional (it) is contrary to Articles 86 and 138(2) of the *Constitution* and is therefore null and void;

c. that to the extent that regulation 83(2) of the *Elections (General) Regulations 2012* provides that presidential election results declared by the constituency returning officers are subject to confirmation by the Commission (it) is contrary to Articles 86 and 138(2) of the *Constitution* and is therefore null and void;

d. that the presidential election results declared by the constituency returning officer are final in respect of the constituency, and can only be questioned by the election court;

e. that to the extent that the 1st respondent interprets section 39(2) and (3) of the *Elections Act* and regulations 83(2) and 87(2)(c) to mean that it can confirm, alter, vary and/or verify the presidential election results declared by the constituency returning officer in the particular constituency (it) is contrary to Articles 86 and 138(2) of the *Constitution* and is therefore null and void.

The Appellant (1st Respondent in this case) sought to have the Judgement of the High Court overturned. In arriving at its determination, the Court of Appeal considered the meaning of section 39(1C) of the *Elections Act, 2011* (as amended) and observed that:

> From our own reading of all the provisions under review, the authorities relied on, and bearing in mind the history that we have set out in detail in this judgment, we are convinced that the amendments to the Act were intended to cure the mischief identified by the then former Chairperson of the appellant, and other stakeholders. That mischief was, the spectacle of all the 290 returning officers from each constituency and 47 county returning officers trooping 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 officer would in the process tamper with the announced results. [Emphasis added]

94. The Court of Appeal also found that the electoral system reforms which were emphasized in the 2016 and 2017 Amendments to the *Elections Act, 2011* was the use of information technology to guarantee the accuracy and integrity of the election results. It noted that section 44(1) required the 1st Respondent in this matter to:

> 44.
>
> (1) ...establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.
>
> ...
>
> (3) ...ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.
>
> ...
>
> (5) ...in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section...
>
> ...
>
> 44
>
> A. Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple,

> accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of article 38 of the *Constitution*. [Emphasis added]

On the basis of these Sections, the Court of Appeal held:

> We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers can vary or even purport to verify those results, particularly when it is clear that, by article 86 (d), section 2 of the Act and regulation 93(1), all election materials, including ballot boxes, ballot papers, counterfoils, information technology equipment for voting, seals and other materials, are to be retained in safe custody by the returning officers for a period of three years after the results of the elections have been declared, unless required in proceedings in court.
>
> The information contained in Form 34, which has since been replaced following the promulgation of the Elections (General) (Amendment) Regulations, 2017, is primary information that is itself arrived at after an elaborate process at two levels of the electoral system to safeguard the integrity of the outcome before it is transmitted to the national tallying centre. Regulations 73 to 90 enumerate the process of counting of votes, declaration and transmission of results.
>
> Once the presiding officer closes the polling station at the end of voting, he is required, in the presence of the candidates or agents to open each ballot box and empty its contents onto the counting table or any other facility provided for the purpose; cause to be counted, the votes received by each candidate by announcing the name of the candidate in whose favour the vote was cast; display to the candidates or agents and observers the ballot paper sufficiently for them to ascertain the vote; and put the ballot paper at the place on the counting table, or other facility provided for this purpose, designated for the candidate in whose favor it was cast. The total number of votes cast in favour of each candidate is then recorded in a tallying sheet in Form 33. [Emphasis supplied]

The Court of Appeal, emphasizing on the centrality of the activities at the polling station on election day held:

> We bear in mind that presidential election, where two or more candidates are nominated, are held in each constituency and the foregoing process is undertaken at the constituency, the details of which are recorded at the end of the exercise in Form 34. It is inconceivable that those details, arrived at after such an elaborate

> process can be viewed as provisional, temporary or interim. The inescapable conclusion is that it is final and can only be disturbed by the election court.
>
> It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters will . The counting of the votes a s elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and an tithetical to inte g rity and accuracys hould fal l from the appellants mouth. [Emphasis supplied]

95. The Appellate Court expansively interrogated the process of voting as enunciated under article 86 of the *Constitution* and was of the view that it was an affront to constitutional values and principles to claim that the 2nd Respondent in this case, could alone, at the national tallying centre or wherever, purport to confirm, vary or verify the results arrived at through an open, transparent and participatory process. The Court was of the view that article 138(3)(c) reinforces the values under article 86 by requiring the 1st Respondent to tally, verify the count and declare the result in a presidential election, after counting the votes in the polling stations. The Court interpreted this article to mean that the 1st Respondent could only declare the result of the presidential vote at the constituency tallying centre after the process of tallying and verification was complete. According to the Appellate Court, the 2nd Respondent has a significant constitutional role under article 138(10) as the authority with the ultimate mandate of making the declaration that brings finality to the presidential election process. The Court observed that the 2nd Respondent is required to tally all the results exactly as received from the 290 Returning Officers country-wide without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying centre and verification or confirmation related to establishing that the candidate to be declared President-elect had met the threshold set under article 138(4).

96. The Court of Appeal was of the view that the introduction of section 39 (2) and (3) of the *Elections Act, 2011* sowed discord, mischief and confusion in this elaborate process, making its retention in the *Elections Act, 2011*, unnecessary and in fact, unlawful. It remarked that the Amendment to section 39 was intended to align it with Articles 81, 82, 86, 101, 136 and 138 of the *Constitution* to provide for procedure at the general elections and that by dint of section 39(1) of the Act, required the 1st Respondent (through its Returning Officers) to tally, and verify the count and declare the results at the polling stations immediately after close of polling. It observed that:

> Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in Sub article (3)(c) is not to be construed to mean the Chairperson but rather,

the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result. The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of President electronically transmitted to it from the near 40,000 polling stations, is required to tally and "verify the results received at the national tallying centre, without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre. At the very tail end of this process, in article 138(10) the chairperson then declares the result of the presidential election, and delivers a written notification of the result to the Chief Justice and to the incumbent President. That is how circumscribed and narrow the role of the chairperson of the appellant is.

97. The Court also focused on the Amendments to the *Elections (General) Regulations 2012* by the 1st Respondent through Gazette Supplement, Legal Notice No 72 of 21st April, 2017, replacing the Form titled "Declaration of Presidential Election Results at a Polling Station with two forms (Forms 34A and 34B) titled "Presidential Election Results at The Polling Station and "Collation of Presidential Election Results at the Constituency Tallying Centre, consecutively. It thus held:

> "It is our firm position that the purpose for which section 39(2) and (3) of the Act and regulations 83(2) and 87(2)(c) were promulgated or made have the effect of infringing constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability.
>
> ...
>
> The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.
>
> ... there is no doubt from the architecture of the laws we have considered that the people of Kenya did not intend to vest or concentrate such sweeping and boundless powers in one individual, the chairperson of the appellant.
>
> Ultimately we find no fault in the determination of the High Court that to the extent that section 39(2) and (3) of the Act and regulation 87(2)(c) provide that the results declared by the returning officer are provisional, and to the extent that regulation 83(2) provides that the results of the retuning officer are subject to confirmation by the appellant, these provisions are inconsistent with the *Constitution* and therefore null and void.

Did the 1st and 2nd respondents adhere to the guidelines set by the Court of Appeal in the Maina Kiai case?

98. In my view, the 1st and 2nd respondents satisfactorily demonstrated that the electoral process was conducted in accordance with the directions of the Court of Appeal in the *Maina Kiai* case. Processes that had been put in place before the determination by the Court of Appeal declaring section 39(2) and (3) of the *Elections Act, 2011* and Regulation 87 (2)(c) unconstitutional were adjusted to:

    a. eliminate "provisional results" and

    b. adjust Form 34C to reflect a collation of Forms 34B from the Constituency Returning Officers who had verified and tabulated the final results from the polling stations in Forms 34A.

99. The declaration by the 2nd Respondent of the results of the election per County was in keeping with the constitutional requirement that the candidate declared elected as President receives at least twenty-five per cent of the votes cast in each of more than half of the Counties (herein, the County threshold).

100. I am therefore satisfied with the adherence by the 1st and 2nd respondents , to the guidelines by the Court of Appeal in the Maina Kiai case. This decision, delivered on June 23, 2017, 35 days prior to the conduct of the Presidential election in August, 2017, was definitive of the status of the law at that time. As such, the 1st and 2nd respondents adherence to those guidelines was an answer to the duty in article 10 of the *Constitution*, binding all State Organs and State Officers to the national values and principles, in this case, the rule of law, whenever any of them (such as the 1st and 2nd respondents) applies or interprets the *Constitution*, enacts, applies or interprets any law; or makes or implements public policy decisions. The only challenge was that the system of data transmission system from the polling station to the National Tallying Centre had already been set up.

101. Having so determined, I must now prospectively interrogate, as invited by the Respondents to do, the place of the Maina Kiai case in the conduct of future presidential elections in Kenya.

102. This Court is not new to Kenyas complex electoral history as so aptly considered by the Court of Appeal in its analysis. In fact, one of the issues this Court had to deal with in its maiden election appeals litigation following the March, 2013 General Elections was the process of declaration of election results resulting in an outcome after which the parties to the election, or a voter, are at liberty to file an election petition at the High Court. An examination of *Hassan Ali Joho & another v Suleiman Said Shahbal and others*, (the Joho

case), alongside that of *Maina Kiai* is necessary because *Joho* was extensively relied on by the parties during the hearing and determination of the appeal forming an integral part of the guiding precedent followed by the Appellate Court.

103. The *Maina Kiai* case, though in many respects similar to the case of the *Joho* case, Supreme Court Petition No 10 of 2013; [2013] eKLR was a play of different legal and constitutional provisions. while the *Joho* Case interrogated the plurality of declaration processes for a gubernatorial election, a three-tier election with no requirement of a County or national threshold, the Maina Kiai case addressed itself to the declaration processes in a Presidential election; a two-tier election process [article 138 (3)(c)] with a mandatory national and County threshold [article 138 (4)(a) and (b)], and a defined mode of declaration [article 138 (10)(a)]. Noteworthy is that these two cases were in different Electoral Law Amendment periods. The foregoing aspects therefore signal an imperative to distinguish *Joho* from the *Maina Kiai* case.

104. The Court of Appeal succinctly framed the controversy before it in the *Maina Kiai* case as follows:

> In the end, the learned Judges granted the petition by declaring that;
>
> > " .....to the extent that section 39(2) and (3) of the *Elections Act* provides that the results declared by the returning officer are provisional, that is contrary to Articles 86 and 138(2) of the *Constitution*. To the extent that regulation 83(2) of the Elections (General) Regulations 2012 provides that the results of the returning officer are subject to confirmation by the Commission, that is contrary to Articles 86 and 138(2) of the *Constitution*. To the extent that regulation 87(2) (c) of the Elections (General) Regulations 2012 provides that the results that the returning officer shall electronically to the Commission are provisional, that is contrary to Articles 86 and 138(2) of the *Constitution*." (Emphasis supplied)
>
> The highlighted phrase "subject to confirmation" and the word "provisional" were the main cause of discomfort prompting the 1st, 2nd and 3rdRespondents to Petition the High Court for relief. It is the construction of those very words by the three learned Judges that has now aggrieved the appellant to come to this Court. [Emphasis added]

105. The question before the Court of Appeal was whether the purpose for which section 39(2) and (3) of the *Elections Act* and Regulations 83(2) and 87(2)(c) (both Regulations now amended) were promulgated, or the effect of their implementation infringed any provision of the *Constitution*. In summary, the controversy was:

(a) the finality of the declaration (if any) of presidential election results at the polling station, the constituency tallying center and the national tallying centre and

(b) the process of transmission of election results from the polling station to the National Tallying Centre and the role of the Chairperson of the Commission in that process.

106. I agree with the determination of the Court of Appeal that

> "the polling station is the true locus for the free exercise of the voters will and that once the counting of votes as elaborated in the *Elections Act, 2011* and Regulations thereunder, with its open, transparent and participatory character using the ballot as the primary material means, as it must, that the count there is clothed with finality not to be exposed to any risk of variation or subversion."

Consequently, the concept of 'provisional results does not exist in our Constitutional electoral practice. As such, we uphold the determination by the Court of Appeal that Sections 39(2) and (3) of the *Elections Act, 2011* are inconsistent with the *Constitution* and to that extent, null and void.

107. However, I depart from the decision by the Appellate Court to the extent that:

i) it endorses another layer of tallying and verification of the result of the presidential vote in the form of the Constituency tallying centre and

ii) incapacitates the Chairperson of the Commission, an integral part of the declaration process in a presidential election, from verifying the polling results.

In particular, the determination that:

> Our interpretation of this article (138 (3)(c) is that the appellant, which is represented at all the polling stations, constituency and county tallying centres can only declare the result of the presidential vote at the constituency tallying centre after the process we have alluded to is complete, that is, after tallying and verification.
>
> Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in sub article (3)(c) is not to be construed to mean the chairperson but rather, the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result. The appellant, as opposed to its chairperson, upon receipt of prescribed forms containing tabulated results for election of President electronically transmitted to it from the near

40,000 polling stations, is required to tally and "verify" the results received at the national tallying centre, without interfering with the figures and details of the outcome of the vote as received from the constituency tallying centre. At the very tail end of this process, in article 138(10) the chairperson then declares the result of the presidential election, and delivers a written notification of the result to the Chief Justice and to the incumbent President. That is how circumscribed and narrow the role of the chairperson of the appellant is.

108. It is conceded that the Chairperson of the Commission cannot supplant the entries of a presiding officer against any candidate with his own figures, however, an arithmetic verification of the correctness of the summation in Form 34A and an examination of the authenticity of the instruments of declaration is permitted, nay, required by the *Constitution*. According to the *Constitution*, the Chairperson of the Commission is also the Returning Officer in a Presidential Election and therefore, ought to receive and preserve electoral material relating to that election in order to aid the election Court in its mandate as the final verifying Agency as elaborated in the foregoing section of this dissenting Judgement.

109. To place the role of the Chairperson of the Commission in the scheme of a presidential election, I am guided by the following interrogations:

(i) what is a declaration in a presidential election?

(ii) who makes that declaration and;

(iii) when is that declaration made?

110. The formula of locating a declaration of the result of a presidential election lies within the *Constitution* and can be derived by a reading of article 138 and 140 of the *Constitution*, together.

Article 138

(1) .....

(2) .....

(3) In a presidential election-

c. After counting the votes in the polling stations, the independent Electoral and Boundaries Commission shall tally and verify the count and declare the result. [Emphasis added]

(4) A candidate shall be declared elected as president if the candidate receives-

a) more than half of all the votes cast in the election; and

b) at least twenty-five percent of the votes cast in each of more than half of the Counties.

.....

(10) Within seven days after the presidential election, the Chairperson of the Independent Electoral and Boundaries Commission shall-

(a) declare the result of the election

Article 140

(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

111. Adopting the decision of this Court in the *Joho* case, the word "declared in article 180 (4) of the *Constitution* (in this case, article 138), has been used to depict the finality culminating in the declaration of the winner of an election. Article 138 (3) (c) of the *Constitution* is the pace -setter of the declaration process. It calls on the Commission to tally and verify the count before declaring the result. This formula is in terms of article 86(a), simple, verifiable, transparent and accountable. Article 138(3)(c) eliminates need for the polling results in a presidential election to be tallied at the constituency tallying centre before being declared. Presidential election results are declared at the national tallying centre, by the Chairperson of the Commission. Before that declaration can be made; several things must be done:

i. the polling results must be tallied-Art. 138 (3)(c)

ii. the count must be verified-(Art. 138 (3)(c)

iii. the national threshold must be met-article 138(4)(a) and

iv the County threshold must be met-article 138(2)(c).

These prerequisites can only be done at the National Tallying Centre by the Chairperson of the Commission who is also the person who Returns the Results of the Presidential Election in accordance with the *Constitution*.

112. I am persuaded by the reasoning of the Irish Supreme Court in *Kiely v Kerry County Council (Rev 1)* [2015] IESC 97, where Mr Justice William M. McKechnie writing for the majority, elaborated the role of a returning officer as follows, at paragraph 45:

> Whilst it is undoubtedly the case that the role of the returning officer is indispensable to the election process, it is also evidently the case that he or she, in fulfilling that role, is a creature of statute and is bound by the terms of the

> express legislative provisions above referred to. Accordingly, in the performance of his (or her, as the case may be) duties and functions he must be guided by the principles so laid down in such legislation, within which is set out the framework where those whose names are validly on the register of electors can give effect to the franchise so vested in them. He must obviously not exceed the limits of the competence so conferred on him: he is therefore confined to what can legitimately be extracted from the provisions in issue, either by way of express conferment or necessary intendment. He cannot operate in excess of these limitations. He cannot, for example, justify any act or action, however desirable his intentions might be, based on any form of inherent power for the simple reason that his office is not amenable to attract competence in this way. When the occasion arises it therefore becomes a matter of statutory interpretation as to whether or not the act or omission complained of is within the competence of his office to perform. [Emphasis added]

113. The role of the Chairperson of the Commission as the Returning Officer of the result of the presidential election is confined within the four corners of articles 138 and 140 of the *Constitution*. The following determination by the Court of Appeal cannot therefore hold.

> Article 138 deals with events at the polling stations where votes are counted, tallied, verified and declared. We hold further that reference to the appellant in sub article (3)(c) is not to be construed to mean the Chairperson but rather, the returning officers who are mandated, after counting the votes in the polling stations, to tally and verify the count and declare the result.

114. This is the only logical result following a holistic and purposive interpretation of the *Constitution*. We have previously explicated on the essence of a holistic and purposive interpretation of the *Constitution* In *Re Kenya National Human Rights Commission*, Supreme Court Advisory Opinion Reference No 1 of 2012 as follows:

> " It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

In the *Speaker of the Senate & another v Attorney-General & 4 others*, Sup Ct. Advisory Opinion No 2 of 2013; [2013] eKLR, held, with respect to interpretation of the *Constitution*, as follows-at paragraph 226:

> The Court, in the circumstances, should adopt a holistic approach to interpretation, with a view to protecting and promoting the purpose, effect, intent and principles of the *Constitution*.

In his concurring Opinion in the same matter, Mutunga, CJ & P, (as he then was) observed at paragraph 185 that a Constitution does not subvert itself. Therefore, no provision should be deemed to strike down another, but rather the provisions must be interpreted in a manner that each supports the other. the *Constitution* must be interpreted holistically and no provision should be read in isolation.

In the *Joho* case, this Court held that:

> Indeed, ordinarily, in our view, a question regarding the interpretation or application of the *Constitution* may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the *Constitution* should be interpreted broadly and liberally, so as to capture the principles and values embodied in it. [Emphasis added]

115. It is therefore my considered view that article 138 of the *Constitution* must be interpreted liberally and in a manner that none of its sub-Articles strikes down the other.

Electronic and Manual Electoral Processes

116. Having determined the place of the *Maina Kiai* case in the 2017 Presidential Elections, and having, by this dissent appealed to the Supreme Courts consideration of that decision in Kenyas electoral practice, noting the unnecessary burden upon the value of simplicity of the electoral process through an added layer of the Constituency, I now turn to the role of electronic results transmission as a complement to the manual transmission of election results (the classical ballot election). Once again, the pillars of this section have been elaborated in the dissenting opinion of my brother, Justice J.B Ojwang, SCJ and I shall restate only in part, where necessary.

117. The value of transparency underscores a critical component of elections: their public-nature. A voter must be able to verify whether the *Elections Act* has been conducted and recorded accurately-hence the participatory nature of vote counting and tallying expressed in the *Constitution*, the *Elections Act* and Regulations thereunder. The public is represented, at the counting stage by accredited members of the media and international observers. The process of voting and declaration is also public.

118. History is a great revealer of intent. Events inspire laws and public processes and at the heart of these laws and processes are shortcomings to be remedied, crises to be averted, needs to be met, and a nation to be efficiently and effectively governed. The disputed 2007 Presidential elections marked a turning point in electoral management in Kenya. Describing the political atmosphere during this period, the Committee of Experts on Constitutional Reform noted in their Preliminary Report dated November 17, 2009 that:

> These elections were heavily contested... The final results were delayed and then announced amidst public tension and accusations that the delay was a sign that the Presidents party was attempting to rig the elections. Eventually, the results were announced on December 30, 2007 and the President hurriedly sworn in.

119. The *Report of the Joint Parliamentary Select Committee on matters of the Independent Electoral and Boundaries Commission* traces the historical use for deployment of Information Technology in elections. At paragraph 359, the report makes reference to the experience of voter registration and the ills thereof witnessed during the 2007 elections thus:

> 359. The Independent Review Commission on the General Elections found that the 2007 disputed General Elections were not credible due to names of deceased voters appearing in the electoral register, impersonation of absent voters and defective planning of voter registration system among other shortcomings in the electoral process. The Commission recommended that –
>
> > "Use of technology should also be implemented in order to enhance, not only integrity' and accuracy of results, but to increase speed of transmission, storage, and further analysis and audits by the ECK. If the law does not recognize results that are transmitted or tallied electronically, this technical solutions should, at least before the law is amended, be used as a parallel system for providing a backup system for ensuring accuracy of tallies and results, while still using the paper-based system of statutory forms" [Emphasis supplied]

120. Based on the lessons drawn from the 2007 General Elections, technology was introduced to address the dual problem of (a) voter identification and (b) vote transmission. Following this recommendation, the Commission employed technology in the 2013 General Elections in the terms elaborated by the Committees Report hereunder:

> 360. The Independent Electoral and Boundaries Commission employed technology in the 2013 General Elections in the following forms-

1) The Biometric Voter Registration System (BVR) was used for registering voters. It comprises a laptop, a finger print scanner and a camera. The Biometric Voter Registration System (BVR) captures a voters facial image, finger prints and civil data or Personally Identifiable Information (PII), that is, the name, gender, identity card or passport number, telephone number among other details.

2) The Electronic Voter Identification System (EVID) is an electronic poll book. There are two types of Electronic Voter Identification System (EVID) technology: the laptop with attached finger-print reader and the handheld device with in-built finger print reader. The Electronic Voter Identification System (EVID) verifies and confirms voters electronically as registered by the Biometric Voter Registration System (BVR). They are used to check-in voters at polling station on polling day and are helpful in Streamlining. Electronic Voter Identification System (EVID) curbs impersonation and ensures that only those who registered to vote are allowed to vote.

3) The Political Party Nominations System (PPNS) ensures that primary data on candidates nominated by political parties are entered in a format that makes it easy for the Independent Electoral and Boundaries Commission to verify the accuracy of the candidate details, compliance and generate ballot paper proofs. This is achieved by cross-matching the voters register and the political party register.

4) The Results Transmission System (RTS) is a system for transmitting provisional results electronically to an observation centre. At the end of voting and when votes have been counted and tallied, the Presiding Officers enter the data on the signed results sheet (Form 35) into specially configured mobile phones and transmit the results simultaneously to the election results centres at the constituency, county and national level. The Results Transmission System (RTS) is meant to enhance transparency through electronic transmission of provisional results from polling stations and to also display and visualize provisional results at the tally centers and provide access to provisional elections data to media and other stakeholders in real time.

121. Several issues referenced in the Report and detailed in the decision of the Court in the *Raila* 2013 case emerged from the use of technology in elections. At paragraphs 233-235, the Court observed that:

[233] We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television- monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice.

[234] In the instant case, there is evidence that the EVID and RTS technologies were used in the electoral process at the beginning, but they later stalled and crashed. Different reasons explain this failure but, by the depositions of Dismus Ongondi, the failure mainly arose from the misunderstandings and squabbles among IEBC members during the procurement process – squabbles which occasioned the failure to assess the integrity of the technologies in good time. It is, indeed, likely that the acquisition process was marked by competing interests involving impropriety, or even criminality: and we recommend that this matter be entrusted to the relevant State agency, for further investigation and possible prosecution of suspects.

[235] But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done.

122. A stakeholder recommendation of employing an integrated electoral technology was implemented birthing the Kenya Integrated Electoral Management System [KIEMS). The functioning of this system is what has been contested in the Petition and supporting Affidavits. In summary: [See foregoing paragraphs of this Judgement and the pillars in Justice Ojwangs dissenting Judgement for a full outline]

i) That there was system manipulation occasioning unfair advantage to the 3rdRespondent and unfair disadvantage to the Petitioners. In particular, that there was a consistent 11% variance between the 1st Petitioner and the 3rdRespondent in the transmission results displayed on the Commissions portal.

ii) That certain results were not transmitted in the form mandated by the Electoral law, fatally compromising the result of the election.

iii) That the results transmitted using the KIEMS system were materially different between Forms 34A and B

iv) That the election results were pre-determined by the Commission

123. The case on transmission is supported by the Affidavits of Raila Odinga, Aprielle Oichoe, Koitamet Ole-Kina and Godfrey Osotsi.

124. The 1st Petitioners evidence can be summarized as follows:

(i) That the IEBC deliberately and/or negligently comprised the security of the integrated electoral management system (KIEMS) and thereby exposed it to unlawful interference by third parties.

(ii) Collation, tallying, verification, verification and transmission of the presidential results was riddled with procedural flaws, illegalities of the nature and extent that compromised the credibility of final result.

(iii) That soon after procurement of KIEMS and establishment of ETAC, the IEBC conducted itself in a manner that weakened the security of integrated electronic system and exposed it to risks of interference from third parties that may have compromised the integrity of system. In particular:

a. That the Elections Technology Committee (ETAC) was declared unconstitutional in Petition No 127 of 2017 and the Commission failed to defend the Regulations or inform the stakeholders of the said suit.

b. That the Commission filed Petition No 415 of 2016 to declare section 39(1C) unconstitutional, which section is the basis of electronic transmission of results.

c. That the Commission failed to put in place several preparatory measures set up by law to assure the integrity and efficiency of KIEMS such as preparation, development, publication and implementation of a disaster recovery and operations continuity plan in the event KIEMS collapsed.

d. That two days to the presidential elections, IEBC announced that over 11,000 polling stations were purportedly out of 3G and 4G network range and results from these locations would therefore be transmitted manually.

e. That the Commission commenced the testing, verification and deployment of technology two days to the general elections contrary to requirement of at least 60 days to the election and therefore denied the public opportunity to verify the efficiency and the security of the same.

f. That despite clear advice from the Communication Authority of Kenya against hosting a private cloud to supplement the Commissions primary

and disaster sites, it contracted OT Morpho SAS (France) thereby compromising the security of the cloud.

g. That the death of the Commissions ICT Manager in charge of the management of the integrated electronic system was a clear attempt to further weaken the electronic electoral system.

h. That failure to transmit results from polling stations and constituency electronically together with the prescribed forms exposed the collation and tallying process to manipulation.

i. That the unreasonable delay in electronically transmitting results together with the prescribed forms grossly affected the credibility and validity of the results. They averred that transmission of results without prescribed forms has no basis in law.

125. Aprielle Oichoe swore an Affidavit on the basis of expertise in cyber security. As such, her deposition was drawn on the basis that her observation of the transmission process, compounded by her expertise (although none was proven in terms of certifications) was useful in evaluating compliance with the six main components or principles which the Commission systems and database ought to have been tested against. The deponent outlined the six principles as follows:

1) Confidentiality: that information ought to be accessed by authorized persons.

2) Integrity: Information used should be accurate, complete and protected from malicious modification either by authorised or unauthorized persons. In this regard, she swore that non-authenticated forms and non-prescribed results appeared on the 1st Respondents public portal. No evidence with particulars of these forms was however adduced to support this expert opinion.

3) Availability: it was her sworn evidence that systems required must be available as and when required by those authorized to use it in accordance with Articles 35 and 47 of the *Constitution* and section 44 of the *Elections Act* as read with section 4 of the *Access to Information Act* and Regulation 15 (4) of the *Elections (Technology) Regulations, 2017*. She swore that during the voting process, some persons could not find their names on the register and the explanation given by the Returning Officer in Upper Hill High School Polling station was that the affected persons either shard identity cards with other persons or their data has been lost by the 1st Respondent. Once again, no evidence was adduced, either in the form of affidavits from the affected persons or the Returning Officer in question to support this allegation.

4) Non-repudiation: An audit trail must be maintained on activities related to the information. Logs are therefore essential to trace actions performed on a computer system. That an entry was made into the system and a strange return made in the system in the form of an exercise book. The non- repudiation principle is supposed to ensure security by the unique identifier, in this case it was the QR code used by presiding officer to map the KIEMS device within the Results Transmission system

5) Authenticity: the information itself must be proven to be genuine and the source must also be proven to be genuine. In her expert opinion, at the time of declaration of results, there were only 29,000 Forms 34A available and the 1st Respondent declared the results with the authenticity of most Forms in dispute. Some of the forms used to declare the results differed with those returned by the Agents from the field. Once again, these forms were not produced as annexures to the Affidavit.

6) Privacy: IEBC failed to secure its data justifying the conduct of a systems audit.

An Assessment of the 'Expert Opinion' of Aprielle Oichoe

126. Although the deponent claimed cyber security expertise, no certifications were provided to prove the existing expertise to warrant the weight placed on expert opinions by the Court. Section 48 of the *Evidence Act*, Cap 80 of the Laws of Kenya is instructive on this point:

> 48. Opinions of experts
>
> (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

127. Although the deponent outlined the six principles which the transmission systems and database ought to have been tested against, the source of that opinion was not provided. Sufficient evidence to prove the link between those principles, the imperatives of electoral conduct and elaborate omission by the 1st Respondent, supported by any evidence, was not provided. Experts, when admitted before the Court, in person or by deposition, in the words of Lord Justice Jacob in *Rockwater Ltd v Technip France SA (formerly Coflexip SA & Anor*, Case No A3/2003/107 have a primary function:

> " their primary function is to educate the court in the technology – they come as teachers, as makers of the mantle for the court to don."

Further, as elaborated by Sir Donald Nicholls V-C giving the judgment of the Court of Appeal in *Mölnlycke v Proctor & Gamble* [1994] RPC 49 at p. 113 (although determining a matter of patent):

> As a practical matter a well-constructed experts report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.
>
> [] In my view, this Affidavit does not meet the essential attributes of 'Expert opinion to guide the resolution of the question of transmission verification in issue.

128. Koitamet Ole Kina deponed that as a duly accredited agent of the Petitioners, he was at the National Tallying Centre and witnessed results Streaming into the online portal at 5:15pm, soon after the close of polling. They could not however verify the results of the elections because the same were not accompanied by hard copies of Forms 34A or the soft copies received by the 1st Respondent on their servers. They received 23,000 Form 34A on 10th August, 2017, and 50 Forms 34B. On 11th August, 2017, they were notified that only 29,000 Forms 34A were available with a shortfall of over 11,000 Forms 34A. Further, only 108 Forms 34B were available at the National Tallying Centre. Later that evening, the Commission confirmed that it was in possession of all Forms 34B and was ready to declare the result. In a letter dated August 15, 2017by the CEO of the 1st Respondent, it was indicated that all the Forms 34B had been availed by the Commission and handed to the deponent on August 14, 2017.

129. Godfrey Osotsi, the Secretary General of Amani National Congress Party and a duly accredited Agent nominated by NASA swore an affidavit as an IT expert with over 12 years experience. He swore that on the basis of information from Waqo Shuke, a member of the 1st Respondents ICT staff, the tallying process involved two sets of results, those with Forms 34A and those based on text messages only. The explanation obtained was that these results were coming from areas with no 3G or 4G network coverage. Despite a 10% variance (54 and 44%), the Petitioners' were denied access to the system back-end (servers) to ascertain the source of the variance.

130. He doubted whether each presiding officer used their unique QR code to transmit the results of the election from the various polling stations to the Constituency Tallying Centres and to the National Tallying Centre.

131. He joined Ole Kina in deposing that declaration of election results could only be done when the Commission was in possession of all Forms 34A and B, which was not the case during this election because at the time of declaration. He emphasized that the results could only

be called or declared when the Commission was in possession of all the Form 34A and 34B and at the time of declaration; the Commission had only 29,000 Forms 34A. He asserted that the results transmitted from the 11,000 polling stations out of 3G and 4G network coverage could not be ascertained and compromised up to 7 million votes. In his evidence, vote transmission could only be manual, not both manual and electronic.

132. I must however point out that his evidence cannot be considered as that of an expert witness because he describes himself as part of the Petitioners party and in my view, supporting the averments in the Petition as opposed to advancing expert opinion to the Court. This evidence must therefore be examined with that caution in mind. Ngaah J, in *Peter Kariuki Njenga v Gabriel P. Muchira & another* [2017] eKLR Civil Appeal, No 188 of 2010, referred to the following passage on expert evidence:

> In Cross on Evidence 5th Edition at page 446, the following passage from the judgment of President Cooper in Davie versus Edinburgh Magistrates (1933) SC 34,40, is set out as stating the functions of expert witnesses:
>
> > "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of the conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."
>
> So an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:
>
> 1. Establish by evidence that he is specially skilled in his science or art.
> 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
> 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness. [Emphasis supplied]

In response

133. The 1st and 2nd respondents averred that:

(i) Transmission was completed in accordance with the electoral law and Regulations thereunder and in terms of the decision of the Court of Appeal in the Maina Kiai case

(ii) The completion of the transmission of the image of Forms 34A was dependent on the availability of 3G or 4G network coverage and where this was unavailable,

alternative mechanisms to ensure completion in transmission of the image of the Form 34A in areas that lacked 3G or 4G network coverage, was established.

134. The 2nd Respondent swore that appropriate training had been completed before the KIEMS kits were deployed for elections.

135. The CEO of the Commission, Mr Ezra Chiloba reinforced this assertion by deposing that more than 360,000 election officials were recruited and trained across the country to conduct the elections.

a. It was the deponents testimony in response to the 1st petitioners Affidavit that that the law was amended vide the Election Laws (Amendment) Act, 2017 to provide for a period of four (4) months within which to procure and put in place the KIEMs He averred that the 1st Petitioners allegation in his affidavit evidence that electronic electoral system may have been exposed to risk of interference was speculative and untrue.

b. The cases referenced by the Petitioners were both filed by other parties and the Commission was enjoined to these causes on the basis of its role in electoral preparations. [See: *Collins Kipchumba Tallam v The Attorney General*, Petition No 415 of 2016 and *Dr Kenneth Otieno v The AG & IEBC*, Petition No 127 of 2017].

136. James Muhati, the 1st Respondents ICT Director referred to the History of Electronic Transmission in Kenya and swore that section 44 of the *Elections Act* was amended (by inserting section 44A to address the concerns raised by failure of technology in the 2013 General Elections.

137. Mr Muhati deposed that the Commission and ETAC ensured that mechanisms to satisfy the constitutional and Statutory while using the KIEMS were put in place by the Commission. He also averred that the Commission, pursuant to section 44(5) of the *Elections Act* published the Elections (Technology) Regulations 2017 on 21st April, 2017, 3 months before the general elections. He deponed that the 1st respondent developed and implemented a policy to regulate the progressive use of technology in the electoral process.

138. He swore that the transmission required 3G and 4G mobile network which was provided by three Mobile Network Operators (MNOs) i.e. Safaricom Limited, Airtel Kenya Limited and Telkom Kenya Limited. These providers were assigned zones of covered out of the thirteen zones established around the country. Each zone was powered by two providers, one as a primary service provider and the other as back-up. This was done to ensure consistency and accountability in operation and availability of service. It was his testimony that in a zone where an MNO was neither a primary nor secondary service provider, it was not expected to provide any results transmission system since KIEMS could only accommodate two SIM

cards. Accordingly, the Commission gave such provider the coordinates of polling stations within the zones to enable the service provider prepare itself for the provision of results transmission services. The zoning was to ensure effective data segmentation into manageable parts.

139. He averred that following a mapping exercise carried out by the Commission and analysis by the service providers, it was ascertained that about 11,155 polling stations within the country were not effectively covered by either 3G or 4G Network and this communication was sent out to the public vide a Notice dated August 6, 2017. As a result, it was averred that presiding officers in these areas were instructed to move to points where there was network coverage or in the alternative go physically to the Constituency Tallying Centres in order to transmit the results. He further swore that the Commission had made all the necessary arrangements to avail all Forms 34A in a public portal.

140. Regarding the security guarantees inbuilt within the KIEMS system, it was Mr Muhatis evidence that there was:

i) configuration of only pre-determined and authorized tablets for transmission which was under constant round the clock automated monitoring,

ii) secured network spectrum with a twin high-level perimeter firewall which filtered unauthorized transmission,

iii) robust database management solution with recommended security options such as pre-encryption or results;

iv) secure Virtual Private Network (VPN) and a granular role-based access control and user management for the entire Result Transmission System (RTS) and the SIM cards used during the exercise were disabled for voice and text messaging and had unique security features to conduct the exercise. Any attempts to relay data from a SIM card other than those provided by the service providers was easily detectible.

141. He further averred that the KIEMS kit was configured in such a way that it could not transmit data which bore more registered voters than those specific to a particular polling station.

142. Brian Gichana Omwenga swore an Affidavit in Response to the allegations in his capacity as the 3rdRespondents Party Technical Advisor and a software and systems engineer, holding a Masters Degree in Engineering Systems, Technology and Policy from the Massachusetts Institute of Technology (MIT) on the issue of transmission. It was his evidence he elaborated that although the results keyed-into the KIEMS kit would be accompanied by an image of Form 34A, in areas without 3G or 4G network coverage, transmission of the scanned image of Form 34A would either delay or not be sent at all, prompting the presiding officer

to deliver Form 34A physically to the Constituency Tallying Centre. These Forms would thereafter be used to tally the results in Forms 34B.

143. Having laid out critical elements of the petitioners issue with the transmission of the results of the Presidential election, I now turn to the analysis. The allegations, although in most part, bare of any evidence (eg, the blanket allegation of 11000 polling stations without proper particulars, and the link of tangential events such as publicly available law suits to the functioning of the system) present certain critical areas for examination:

(i) What is the import of Sections 39, 44 and 44A as far as transmission of election results is concerned?

(ii) Is technology a mandatory component of Kenyas electoral transmission process?

(iii) Is the Petitioners averment that technology was the only acceptable mode of election results transmission accurate and that lack of 3G and 4G coverage in 11,000 polling stations compromised over 7 million votes?

What is the complementary mechanism provided under section 44A of the *Elections Act*?

144. The High Court (upheld by the Court of Appeal) has had a chance to consider the use of technology in elections in Kenya and particularly, interpretation of Sections 39, 44 and 44A of the *Elections Act* in a decision wwhose final determination I concur with. In National Super Alliance (NASA) Kenya v The Independent Electoral and Boundaries Commission & 2 Others, Constitutional Petition No 328 of 2017 (The NASA case), the High Court held that:

> 80. A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is complementary to the one set out in section 44 of the Act. The system under section 44 is an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.
>
> 81. In the The Concise Oxford English Dictionary, Oxford University Press, 12th Edition 2011, the word complementary means forming a complement or addition, ... combining in such a way as to form a complete whole or enhance each other while complement means a thing that contributes extra features to something else so as to enhance or improve it.... That being the plain and literal meaning of the word complementary, our view is that section 44A of the Act presupposes a mechanism that will complement, add, enhance or improve the mechanism already set out in section 44 of the Act.

82. It follows therefore that the complementary mechanism in section 44A need not be similar, same, akin or parallel to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under article 38 of the *Constitution*. This complementary mechanism only sets in when the integrated electronic system fails.

145. While I find the decision of the High Court quite compelling, I would, with respect, reinforce it by applying the terms of the *Constitution*. The Honourable Justices only partially interpreted section 44A and restricted themselves to the *Elections Act* without due regard to Articles 38 and 86 of the *Constitution*. Having referenced the decision of this Court in Raila 2013 case, the High Court rightly observed at paragraph 54:

54. It is clear from this judgment that when the electronic system fails there should be a fall-back system to avoid the entire election falling into shambles

A situation not envisaged by Articles 38 and 86 (d) of the *Constitution*.

146. Article 86 of the *Constitution* lays down the parameters of voting in furtherance of the right to vote in free and fair elections pursuant to article 38 of the *Constitution*. The system of voting ought to be simple, accurate, verifiable, secure, accountable and transparent. It is peculiar that with regard to voting, article 86 does not make any direct reference to transmission of the election results. However, transmission, as discussed in the foregoing paragraphs is an integral part of the electoral process. It is the mode through which the results leave the polling station to the Constituency Tallying Centre and the National Tallying Centre. In order to enable voting and give full effect to the right to vote, appropriate structures must be set up. According to article 86(d) of the *Constitution*, these structures and mechanisms ought to eliminate electoral malpractice. The KIEMS system was one such mechanism. the *Constitution* goes further and mandates that included in those appropriate structures and mechanisms is the safe-keeping of election materials. This requirement completes the dictates of accuracy, verifiability, security, accountability and transparency of the election process. But why does the *Constitution* emphasise on the safe-keeping of election materials as part of the appropriate structures and mechanisms to eliminate electoral malpractice and what then ought to be the interpretation of Sections 39(1)(C), 44 and 44A with reference to this provision?

146A. These provisions provide as follows:

39. Determination and declaration of results

(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for—

i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) For purposes of a presidential election the Commission shall —

a. electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

b. tally and verify the results received at the national tallying centre; and

c. publish the polling result forms on an online public portal maintained by the Commission.

(1D) The chairperson of the Commission shall declare the results of the election of the President in accordance with article 138(10) of the *Constitution*.

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

44. Use of technology

(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The Commission shall, for purposes of sub section (1), develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(4) The Commission shall, in an open and transparent manner —

(a) procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections; and

(b) test, verify and deploy such technology at least sixty days before a general election.

(5) The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for —

(a) the transparent acquisition and disposal of information and communication technology assets and systems;

(b) testing and certification of the system;

(c) mechanisms for the conduct of a system audit

d. data storage and information security;

(e) data retention and disposal;

(f) access to electoral system software source codes;

(g) capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;

(h) telecommunication network for voter validation and result transmission;

(i) development, publication and implementation of a disaster recovery and operations continuity plan; and

(j) the operations of the technical committee established under subsection (7). (

(6) Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under subsection (4) within a period of thirty days from the date of commencement of this section.

(7) The technology used for the purpose of the first general elections upon the commencement of this section shall —

a. be restricted to the process of voter registration, identification of voters and results transmission; and

b. be procured at least one hundred and twenty days before the general election.

(8) For the purposes of giving effect to this section, the Commission shall establish a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary to oversee the adoption of technology in the electoral process and implement the use of such technology.

44A. Complementary mechanism for identification of voters

Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of article 38 of the *Constitution*. [Emphasis added]

147. The High Court kept a consistent eye on the essence of the *Elections Act* in general and section 44 and 44A in particular with regard to engaging and protecting the right to vote. Technology is a means to an end (a verifiable election result) not an end in itself. In fact,

the Court was aware of the enduring need to always consider article 38 and its reinforcing provisions while construing provisions in the *Elections Act* when it referenced the German Federal Constitutional Courts Judgement of the Second Senate in part:

bb) in a republic, elections are a matter for the entire people and a joint concern of all citizens. Consequently, the monitoring of the election procedure must also be a matter for and a task of the citizen. Each citizen must be able to comprehend and verify the central steps in the elections reliably and without any special prior technical knowledge.

cc) The Public nature of the elections is also anchored in the principle of the rule of law. The public nature of the states exercise of power, which is based on the rule of laws, serves its transparency and controllability. It is contingent on the citizen being able to perceive acts of the state bodies. This also applies as to the activities of the election bodies.

b. The principle of the public nature of elections requires that all essential steps in the elections are subject to public examinability unless other constitutional interests justify an exception. Particular significance attaches here to the monitoring of the *Elections Act* and to the ascertainment of the election result. An election procedure in which the voter cannot reliably comprehend whether his or her vote is unfalsifiably recorded and included in the ascertainment of the election result, and how the total votes cast are assigned and counted, excludes central elements of the election procedure from public monitoring, and hence does not comply with the constitutional requirements.

c. Despite the considerable value attaching to the constitutional principle of the public nature of elections, it does not ensue from this principle that all acts in connection with the ascertainment of the election result must take place with the involvement of the public so that a well-founded trust in the correctness of the elections can be created.....

It is certainly ensured in these cases that the voters are in charge of their ballot and that the result of the election can be reliably checked by the election authorities or by interested citizens without any special prior technical knowledge..... b) Restrictions on possibilities for citizens to monitor the election events cannot be compensated for by sample devices in the context of the type approval procedure or in the selection of the voting machines specifically used in the elections prior to their deployment being subjected to verification by an official institution as to their technical performance. The monitoring of the essential steps in the election promotes well-founded trust in the correctness of the election certainly in the

necessary manner that the citizen himself or herself can reliably verify the election event.

For this reason, a comprehensive bundle of other technical and organizational security measures (eg, monitoring and safekeeping of the voting machines, comparability of the devices used with an officially checked sample at any time, criminal liability in respect of election falsifications and local organization of the elections) is also not suited by itself to compensate for a lack of controllability of the essential steps in the election procedure by the citizen. Accordingly, neither participation by the interested public in procedures of the examination or approval of voting machines, nor a publication of examination reports or construction characteristics (including the source code of the software with computer-controlled voting machines) makes a major contribution towards ensuring the constitutionally required level of controllability and verification of the election events.

Technical examinations and official approval procedures, which in any case can only be expertly evaluated by interested specialists, relate to a stage in the proceedings which is far in advance of the ballot. The participation of the public in order to achieve the required reliable monitoring of the election events is hence likely to require other additional precautions. [Emphasis Added]

148. However, a sharp deviation from this consistence is marked by the Courts opinion at paragraph 72, in part:

> 72. Under sections 39 and 44 of the Act, the use of technology in our electoral system is entrenched. Registration of voters, their identification at the point of voting and the transmission of election results is purely electronic. However, the actual voting, tallying and collating of votes is wholly manual.

I disagree with the High Courts conclusion that transmission of election results is purely electronic. To maintain that standard would be to negate the purport of section 44A of the *Elections Act*. A clear understanding ought to be made of the components of our electoral system – whether electronic or manual.

What constitutes the electoral system in Kenya?

[] Article 83 of the *Constitution* provides that:

> (1) ...
>
> (2) A citizen who qualifies for registration as a voter shall be registered at only one registration centre.

(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

[] Section 4 of the *Elections Act, 2011* provides that the Independent Electoral and Boundaries Commission (Commission) shall compile and maintain the Register of Voters. Section 5 of the *Elections Act, 2011* provides that:

(1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times ...

(5) The registration officer or any other authorised officer referred to in subsection (3) shall, at such times as the Commission may direct, transmit the information relating to the registration of the voter to the Commission for inclusion in the Register of Voters.

[] Section 44 of the *Elections Act, 2011* provides that:

(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

[] These provisions are the basis of registration of voters by the Commission. Registration of voters in Kenya is conducted when the voter physically goes to the registration centre and his details are manually inputted into an electronic system and his biometrics are taken as part of his identification mechanism pursuant to Regulation 8 of the *Elections (Registration of Voters) Regulations*, 2012. This Regulation provides that:

> A register of voters shall contain biometric data and the particulars set out in Form A in the Schedule.

Further Regulation 13A provides the process to be followed during the registration of a voter, in the following terms:

Registration procedure

(1) A person who applies to be registered as a voter shall present his or her identification document to the registration officer stationed at a Registration Centre of his or her choice. (2) The registration officer shall, where the applicant is qualified to be registered as a voter, issue the applicant with Form A as set out in the Schedule.

(3) The applicant shall return the duly completed Form A to the registration officer and the registration officer shall confirm the details in the form and enter them in the biometric voter registration system and the Voters Record Book. (note the filling of the form is manual)

(4) The applicant shall be issued with an acknowledgement slip upon registration.
[] The details of the voter are thereafter transmitted by the Registration officer to the Commission for compilation, pursuant to the Regulation 12. This Regulation provides as follows:

12. Certification of Register of Voters

1. Where as a result of operation of section 5 of the Act, the registration of voters has been ceased, the Registration officer shall compile the list of registered persons.

2. The registration officer shall after effecting compilation of the register of voters relating to the constituency submit his or her component for compilation by the Commission.

3. The Commission shall compile the register of voters comprising of components under section 4 of the Act. (4) ...

149. Therefore the registration is electronic, but it can only be done manually by the Registration Officer or another officer designated to do the registration, hence a voter must physically present himself at registration centre.

The voters details and biometrics are then manually inputted into the Register of Voters which by law includes an electronic register. The definition section of the *Elections Act, 2011* describes the Register of Voters as:

> "[A] current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically."

150. During the elections the voter goes to the polling station and uses his National Identification Card as one means of identification and then undergoes a biometric voter identification process which is electronic. If for any reason the system is not able to identify the voter using the biometrics then a complementary manual system shall be applied in the identification of the voter, pursuant to section 44A of the *Elections Act, 2011*.

152. Therefore there is a twin scheme of manual and electronic voter identification at the polling station during the elections. Voting is also manual not electronic as voters mark their ballots and cast them into the ballot boxes. Once the voting process ends at the polling station, the votes are manually counted and the presidential election results recorded manually in the Form 34A by the Presiding Officer.

153. Regulation 5 of the *Elections (General) Regulations, 2012* unequivocally sets out the functions of the presiding officer in the following terms:

(1A) The functions of a presiding officer shall be—

a. presiding over elections at an assigned polling station;

b. tallying, counting and announcement of results at the Polling station;

c. submitting polling station results to the Constituency returning officer; and

d. electronically transmitting presidential results to the constituency, counties and national tallying centers.

154. Therefore upon signing Form 34A and ensuring the same is signed by the agents of the candidates present in the polling station, the presiding officer manually inputs the results and the scanned Form in the designated electronic kit and electronically transmits the results to the Constituency, County and National Tallying Centres. The Kenya Integrated Election Management System (KIEMS) kit applied for that purpose requires 3G or 4G network, as indicated by Learned counsel for the 1st respondent in order to transmit the results. In the areas where that nature of network is not available, the presiding officer will be required to move to an area where that network is available in order to electronically transmit the results. A copy of the Form containing the declared results is also pinned on the door of the polling station.

155. It is clear that the counting of the votes and the declaration of the results at the polling station is manual but the transmission is electronic. Nonetheless, by dint of section 44A of the *Elections Act, 2011* if the electronic transmission of the results fails then the presiding officer will revert back to the manual system of transmission in which case he will have to physically deliver the Form 34A to the Constituency Returning officer.

156. In like manner, the Constituency Returning Officer upon receipt of the Forms 34A from the polling stations in the constituency, will manually tally, collate and verify the results and complete the Form 34B. He will then send those results electronically to the County and National Tallying Centres. If that fails, he will deliver them manually. Similarly, at the National Tallying Center the results are tallied, collated and verified manually and the declaration of the winning presidential candidate is done. The Certificate of Declaration of Results is then manually handed to the President-elect.

157. Kenyas electoral process cannot therefore be said to be purely electronic. It comprises of both manual and electronic components. It is a rather ugly grouchy and reluctant mongrel of two very distinct processes. In fact it is a largely manual system. It is therefore very distinct from electronic electoral processes exhibited in foreign jurisdictions such as India, Australia, the United States of America, Canada, and Brazil among others.

158. In India, for instance, the process of voter registration is now electronic since a voter is able to register as a voter online by completing a form online and submitting it to the electoral body for registration. The process of voting is done by use of Electoral Voting Machines and the votes are counted and tallied electronically. There are no paper ballots.

158. In Australia the Parliamentary elections are conducted by an electronic voting system which uses standard personal computers as voting terminals. Voters use a barcode to authenticate their votes. The voting terminals are linked to a server in each polling location using a secure local area network. However no votes are transmitted over a public network such as the internet. The votes are then electronically counted and tallied. Again, there are no paper ballots.

159. In the United States of America voting is by way of optical-scan ballots or by direct-recording electronic devices that record votes electronically. The votes are counted and tallied electronically. Dominant in these jurisdictions where the electoral process is electronic is the electronic counting and tallying of the votes -an element which we do not have in our electoral process.

160. The upshot is that in Kenya, the system of voting is partly manual and partly electronic with the option of reverting to the manual processes should the electronic processes fail. However, the counting of votes, tallying, collation and verification of the results is entirely manual.

161. An interpretation of section 44A of the *Elections Act* is incomplete without due consideration to article 38 and 86(d) of the *Constitution* and section 39 and 44 of the *Elections Act*. With respect, the High Court considered it only in light of section 44 advancing an incomplete conclusion. At paragraphs 80-87, parts which I would construe differently, the High Court held:

> 80. A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is complementary to the one set out in section 44 of the Act. The system under section 44 is an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.
>
> 81. In the The Concise Oxford English Dictionary, Oxford University Press, 12th Edition 2011, the word complementary means forming a complement or addition, ... combining in such a way as to form a complete whole or enhance each other while complement means a thing that contributes extra features to something else so as to enhance or improve it.... That being the plain and literal meaning of the word complementary, our view is that section 44A of the Act presupposes a mechanism

that will complement, add, enhance or improve the mechanism already set out in section 44 of the Act.

82. It follows therefore that the complementary mechanism in section 44A need not be similar, same, akin or parallel to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under article 38 of the *Constitution*. This complementary mechanism only sets in when the integrated electronic system fails.

83. It was the petitioners contention that the mechanism envisaged under section 44A is akin to the one in section 44 of the Act; that the debate in Parliament did not indicate that the complementary mechanism was to be manual. With greatest respect, we do not think that there is any ambiguity in the language used in section 44A to resort to the Hansard of Parliament in order to decipher the true intention of the legislature in this case. The language and meaning in that section is plain and clear. To our mind, what was required of the respondent was to put in place a mechanism that would complement the one set out in section 44 of the Act. The particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in section 44A. If that were the intention of Parliament, nothing would have been easier than to specify so.

84. One other thing that buttresses our position that the mechanism contemplated in section 44A of the Act is independent of the one set out in section 44 of the Act, is the use of the words Notwithstanding the provisions of section 39 and section 44, ... The use of the term 'notwithstanding makes the mechanism in section 44A independent of what is contained in sections 39 and 44. The authors of Strouds Judicial Dictionary of Words and Phrases 6th Edition, London, Sweet and Maxwell 2000 at page 1732 have defined notwithstanding as follows:

> Notwithstanding: Anything in this Act to the contrary notwithstanding is equivalent to saying that the Act shall not be an impediment to the measure, ...

85. On the other hand, the Blacks Law Dictionary, 9th edition, Bryan and Garner, 2009, defines the word notwithstanding to mean despite, inspite of. In this regard, the use of the term notwithstanding in section 44A means that inspite of what the provisions of section 39 and 44 stipulate as to the mechanism in our electoral system, the respondent is to put in place a mechanism to complement sections 39 and 44 of the Act. All that is required is that the said mechanism be simple, accurate, verifiable,

secure, accountable and transparent; and, one which will not disenfranchise the citizens.

86. We are fortified in our finding by the decision of the Supreme Court of India in Chandavakar Rao v Ashalata Guram [1986] 4SCC 447. It was held-

> -A clause beginning with the expression notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract is more often than not appended to a section at the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment.

87. Accordingly, our determination on what constitutes the components of the complementary mechanism to be established under section 44A of the Act is: that the mechanism should be separate but which is meant to improve or augment the mechanism already set out in section 44. That mechanism has to be simple, accurate, verifiable, secure, accountable and transparent. It must also comply with article 38 of the Constitution, that is, it must ensure that every citizens right to register as a voter, vote at an election or vie for political office is safeguarded.

161. Article 39(1)(C) mandates that for purposes of a presidential election, the Commission shall electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the Constituency tallying centre. Technology however, per section 44, is used subject to the provisions of the entire section, meaning, that there are prerequisites to be met, before technology can be employed. Parliament was keen to introduce conditions preceding the use of technology in elections. These conditions are in-built in the provision as follows:

i. A policy for progressive use of technology in the electoral process (S. 44(2)

ii. The technology shall be simple, accurate, verifiable, secure, accountable and transparent (S. 44(3) which is in terms of Art. 86(a) of the *Constitution*)

iii. In an open and transparent manner, procure the technology at least 120 days before such elections

iv Deploy the technology at least sixty days before a general election

v Enact Regulations in consultation with relevant agencies, institutions, stakeholders, including political parties for the aspects listed under section 44 (5) (a-j)

vi. Technology shall be restricted to voter registration, identification and results transmission

vii. Establish a technical committee to oversee the adoption of technology and its implementation for the conduct of the General elections.

162. It is imperative at this juncture to highlight that the use of technology is progressive. Kenyas electoral system is a vivid recollection of progressive improvement. Emerging from the mlolongo (queing) system that made no use of paper ballots, to the introduction of paper ballots, the development of statutory transmission Forms and several layers of verification, to the maiden introduction of technology during the 2013 General Elections whose partial failure inspired the introduction of the KIEMS system which returned proper voter registration, identification and sufficient vote transmission with verifiable paper trail. I reiterate the finding of this case in the Raila 2013 case, at paragraph 237:

(237) From case law, and from Kenyas electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioners contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioners case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable.

163. The Petitioners and other interested parties sought guidance from the Courts on a significant aspect of these prerequisites, which were all settled in time for the elections.

164. In light of the provisions relating to the use of technology in elections and in transmission of the results in a presidential election, Parliament introduced a non-obstante clause in the terms of section 44A mandating the Commission to put in place a complementary mechanism for identification of voters and transmission of election results. According to Blacks Law Dictionary, 9th Edition, page 1155, a non-obstante clause is one which gives effect despite any laws to the contrary or which precludes interpretation contrary to the stated object or purpose.

165. The *Constitution* and the entire electoral code enliven this mechanism: the manual identification of voters and manual transmission of results in the prescribed instruments of transmission, verifiable by various agents including an election Court using election material expressly referenced under article 86 (d) and defined under section 2 of the *Elections Act*. The essence of this section was to save the Sovereign will of the people from the unpredictable nature of technology and to introduce a layer of verifiability to the electoral process. Parliament was clear, by the terms of section 44A that the complementary mechanism (which exists as the manual system of result transmission in the prescribed instruments of declaration and whose finality is only questionable before an election Court) was sufficient to deliver a presidential election, as happened in areas where there was no 3G or 4G network coverage.

166. I have already laid out the provisions of article 86(d) of the *Constitution* which provides for the security of electoral materials. Section 2 of the *Elections Act* defines Election material to mean ballot boxes, ballot papers, counterfoils, envelopes, packet statements and other documents used in connection with voting and includes information technology equipment used for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election. These items exist. Their non-utility, compromise, interference or unavailability for purposes of inspection was not challenged. Notwithstanding the shortcomings of technology in terms of article 44A, these materials stood as a testament of the *Elections Act*s exercised by millions of Kenyans-an exercise which the majority has termed, irrelevant.

167. The *Constitution of Kenya* is one drawn for efficiency. It communicates purpose with timelines. In the Mary Wambui case, this Court held that:

> (75) The electoral history of Kenya is replete with cases of delay in finalizing matters, thereby denying the voters the opportunity to have their chosen representatives in the organs of democratic governance. It is clear that the sovereign power belongs to the people, and is exercised either directly or through their democratically elected representatives in the State Organs, which include Parliament and the Legislative Assemblies in County Governments. The voters rights in this regard are quite clear, from the terms of the *Constitution* (article 1).

168. Article 138 of the *Constitution* is replete with these directives of time: Art. 138 (5); Art. 138(9); and Art 138 (10). the *Constitution* gives the Chairperson of the Commission a maximum period of seven days within which to declare the result of the election and deliver a written notification of the result to the Chief Justice and the incumbent President. This imperative allows enough time for the Commission to tally, verify the count of the

results from the polling station, and declare the result pursuant to article 138(4)(b) of the *Constitution*.

169. The complementary mechanism referenced in section 44A of the *Elections Act* is a function of verification. I am persuaded by the determination of the German Federal Constitutional Court in the Judgement of the Second Senate that, the public nature of elections requires that all essential steps in the elections are subject examinability, unless other constitutional interests justify an exception. This examination must be possible, by the voter/public, without special expert knowledge. Therefore, the voter in Kenya understands the function of the ballot and the critical importance of entries in the statutory Forms 34A, 34B and 34C. Election results are displayed in the relevant forms after the close of polling for all to see and scrutinize. Any mechanism that purports to complicate this simplicity is at variance with the *Constitution*. Technology reinforces the efficient and fast translation of the will of the people into an ascertainable return. It however does not supplant the critical primary instrument-Form 34A generated at the primary locus of the election and challengeable only in a Court of law.

170. There was lingering doubt, throughout the proceedings on the figures that were being Streamed on television. Counsel for the 1st Respondent submitted, to my satisfaction, that those figures (he referred to them as statistics) bore no status in law following the decision of the Court in the Maina Kiai case. I also note that the decision to Stream these statistics was proper to manage public expectation owing to the history of elections in Kenya. The following recommendations from the Krieglar Report are instructive:

> RecommendationsIREC recommends that the media must have full access to this new system, which will not be a problem if it is properly constructed. This will assist the media in obtaining fully reliable results at high speed from all over the country and will also place the ECK in the drivers seat in relation to providing the media with fast and reliable data.IREC recommends that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found or non- frivolous objections raised. Most countries allow one to two weeks for this – there must be sufficient time to check the provisional results, which are given status as final results only when all objections have been considered, all checks and rechecks conducted and the final verdict issued by the proper authorities. Given a clear explanation of what a provisional result is, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinised and checked.

171. In my view, the claim of a consistent 11% variance between the results for the 3rd Respondent and the 1st Petitioner in my view was not proved (reference to hacking is analysed in the part on Orders of Access to Information).

172. Having determined that failure of technology could not supplant the will of the people, recorded in verifiable ballots and other election material and the results declared in (a) available (b) ascertainable (c) unchallenged (d) proper statutory instruments of declaration, it is my opinion that the Petitioners case to exclude results from 11,000 polling stations which were out of 3G and 4G network would be an affront to the *Constitution* and the right to franchise.

Presidential Election Vote Tally: Are Rejected Votes Relevant In Computing Percentages?

The Legal Importance of Percentages in the presidential vote tally

173. The controversy surrounding the Presidential Election 2007 was based on a number of factors including the perception of what constitutes a popular winning candidate. the constitutional framework adopted in August 2010 sought to address this concern by introducing a possible two tier election for the position of President.

In accordance with article 138(4) of the *Constitution*, a candidate shall be declared elected as President if the candidate receives more than half of all the votes cast in the election; and at least twenty-five per cent of the votes cast in each of more than half of the counties. This means that in order for a candidate to be declared President-elect, he/she must receive more than fifty (50) per cent of the votes cast in the election, or what has been commonly referred to as the threshold of 50 plus 1.

174. If no candidate meets this threshold, then fresh elections must be held at which only the two candidates with the highest number of votes in the first round will participate. In this second round, it is the candidate who receives the largest number of votes or a simple majority, who will be declared President-elect.

175. Therefore percentage points play a critical role in determining the winner of a presidential election in the first round and whether there will be a second round of elections. Consequently, any factor that would affect the percentage of votes attained by a candidate needs to be addressed.

The Petitioners Case

176. According to the Petitioners, the number of rejected votes accounted for at least 2.6% of the total votes cast and affected the final result of the Presidential election. It was the Petitioners

averment that the exclusion of spoilt votes from the final percentage computation of the Presidential election results, rendered voting by a number of voters, irrelevant.

In that respect, the Petitioners sought the following reliefs:

a. A specific order for scrutiny of the rejected and spoilt votes;

b. A declaration that the rejected and spoilt votes count towards the total votes cast and in the computation of the final tally of the Presidential election.

The Law

177. In their written pleadings the Petitioners refer to the following applicable sections of the law and the *Constitution*:

a. Article 1-Sovereignty of the Kenyan people;

b. Article 2-The Supremacy of the *Constitution*;

c. Article 4-Establishment of the Kenyan Republic as a multi-party State founded on the national values and principles of governance referred to in article 10 of the *Constitution*;

d. Article 10-National values and principles of governance

e. Article 38 guaranteeing every citizen the right to exercise their political rights.

f. Article 81 (e)(v) read together with section 39 of the *Elections Act* and Regulations thereunder which undergird the conduct of free and fair elections administered in an impartial, neutral, efficient, accurate and accountable manner.

g. Article 86 which requires that at every election, the Independent Electoral and Boundaries Commission shall ensure that—the voting method is simple, accurate, verifiable, secure, accountable and transparent; votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including safekeeping of election materials.

h. Article 88 establishing the Independent Electoral and Boundaries Commission;

i. Article 138 outlining the procedure at an election petition.

j. Article 140-Questions as to the validity of presidential election

k. Article 163-The Supreme Court

l. Article 249-The objects, authority and funding of commissions and independent offices.

Issues for determination

178. The Petition outlines the following issues for determination:

(i) whether the colossal 2.6% of the total votes cast (constituting the number of rejected votes) substantially affects and/or invalidates the count and tally of the Presidential election; and

(ii) whether the total number of rejected votes should be considered in ascertaining whether any candidate met the constitutional threshold.

Analysis

179. A similar question of rejected votes arose in Supreme Court Petition No 5 of 2013 (See paragraphs 258 to 285). This Court considered the meaning of all votes cast and whether these included rejected votes? or were limited to the properly marked ballots which figured in the vote-tally for the individual candidates. The Court considered the provisions of the *Constitution of Kenya*, 1969 and the *Constitution of Kenya, 2010* specifically, reference to valid votes cast in determining the winner of an election in the previous constitutional dispensation (section 5 (5)(e) and all votes cast in article 138(4) of the *Constitution of Kenya, 2010*.

180. The Petitioners case is that all votes cast include rejected and spoilt votes (sic).

The ratio in the Raila 2013 caseOdinga v IEBC & 3 Others Supreme Court Petition No 5 of 2013

181. Analysis of this issue ought to commence with the question posed at paragraph 262 of Supreme Court Petition No 5 of 2013:

> Is it intended, in the *Constitution of Kenya, 2010* that the expression more than half of all the votes cast should mean, literally, all the ballot papers that were marked and cast into the ballot box Or should it mean only all the valid votes that were cast, and were counted in favour of one candidate or another?

This Court held that:

> The Elections (General) Regulations 2012 make no provision for rejected votes, though they provide for rejected ballot papers:absenting a distinction between a vote and a ballot paper. A ballot paper marked and inserted into the ballot-box is perceived as a vote, and becomes either valid or rejected, depending on the electors compliance with the applicable standards (see paragraph 281).

182. A non-compliant ballot paper yields a rejected vote which is invalid and therefore confers no advantage upon any candidate. Due to its numerical inconsequence on any candidates final tally, it should not be considered while computing the final percentage outcomes in a Presidential election.

Further analysis on the basis of the current Petition

183. The *Elections (General) Regulations 2012* defines a rejected ballot paper as a ballot paper rejected in accordance with regulation 78. Regulation 78-Rejected ballot papers-provides that:

(1) Every rejected ballot paper shall be marked with the word rejected by the presiding officer, and, if an objection is made by a candidate or an agent to the rejection, the presiding officer shall add the wordsrejection objected to and shall be treated as rejected for the purpose of the declaration of election results at the polling station.

(2) The presiding officer shall mark every ballot paper counted but whose validity has been disputed or questioned by a candidate or an agent with the word disputed but such ballot paper shall be treated as valid for the purpose of the declaration of election results at the polling station.

(2A) The presiding officer shall make a decision on the validity of the disputed ballot paper under sub regulation (2) and award it to a candidate and such decision shall be final.

(3) After the counting of votes is concluded, the presiding officer shall draw up a statement in Form 41 set out in the Schedule showing the number of rejected ballot papers under such of the following heads of rejection as may be applicable—

a. want of security feature;

b. voting for more than one candidate;

c. writing or mark by which the voter might be identified; or

d. unmarked or void for uncertainty, and any candidate, counting agent or observer shall, if he or she so desires, be allowed to copy that statement.

When/how is a ballot rejected?

Regulation 77 provides guidance on the rejection of ballot papers. It provides that:

1. At the counting of votes at an election, any ballot paper:

   a. which does not bear the security features determined by the commission;

   b. on which votes are marked, or appears to be marked against the names of, more than one candidate;

   c. on which anything is written or so marked as to be uncertain for whom the vote has been cast;

   d. which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or

   e. is unmarked...shall subject to regulation (2) be void and shall not be counted.

When is a vote cast?

184. As determined in Supreme Court Petition No 5 of 2013, the Regulations make no provision for rejected votes. However, they do provide for rejected ballot papers, spoilt ballot papers, stray ballot papers, and disputed ballot papers. This classification is consistent on the use of the term ballot paper and outlines the manner in which these ballots are treated by the presiding officers.

Section 2 of the *Elections Act*;

> ballot paper means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting;
>
> Ballot papers constitute election material and are required for the purpose of conducting an election while election results means the declared outcome of the casting of votes by voters at an election. (section 2 of the *Elections Act*). Casting of votes is an integral part of generating election results. In terms of article 138

(2)(c): In a presidential election- after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.

185. In line with the decision of this Court in Supreme Court Petition No 5 of 2013 spoilt ballots are those which are not placed in the ballot box but in fact are cancelled and replaced where necessary by the Presiding Officer in a polling station. This is unlike rejected and disputed ballots, which although placed in the ballot box, are declared disputed or invalid by the Presiding Officer for a range of reasons as enumerated in Regulations 77 and 78.

186. Regulation 69 (2) provides that: A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers— (a) cast his or her votes in accordance with regulation 70 without undue delay.

Regulation 70 outlines the method of voting:

1. A voter shall, upon receiving a ballot paper under regulation 69(2)—

    a. go immediately into one of the compartments of the polling station and secretly mark his or her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom that voter wishes to vote; and

    b. fold it up so as to conceal his or her vote, and shall then put the ballot paper into the ballot box in the presence of the presiding officer and in full view of the candidates or agents.

2. The voter shall after following the procedure specified in sub-regulation (1) put each ballot paper into the ballot box provided for the election concerned.

What is a vote?

While the term vote is neither defined in the *Constitution* nor the *Elections Act*, Blacks law dictionary defines it as the expression of ones preference or opinion by ballot, show of hands or other type of communication.

What is to cast?

Similarly, although the *Constitution* does not define the term cast, Blacks law dictionary defines cast as to formally deposit (a ballot) or signal ones choice.

Therefore, the act of a voter secretly marking his/her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against

the name and the symbol of the candidate for whom the voter wishes to vote, constitutes, a vote. However, that vote only counts to the final computation and is deemed cast, if the elector complies with the applicable standards elaborated under the *Constitution*, and the electoral law and regulations.

187. In certain instances, at the time the voter places his/her marked ballot paper in the ballot box, it remains a ballot, that can be rejected, unless, the voter has satisfied the requirements necessary to render their intention, a vote cast. This ballot paper however bears a mark against the name and symbol of the person whom the voter wishes to vote. The process of marking the ballot paper is therefore an expression of the voters wish/will to elect a particular candidate. This act, alongside other enabling electoral processes such as voter registration comprise the voters exercise of his/her political rights in line with article 38 (2) of the *Constitution*.

188. Regulation 76 clarifies is position more succinctly:

Regulation 76-Counting of votes:

1. The presiding officer shall, in the presence of the candidates or agents—
    a. open each ballot box and empty its contents onto the counting table or any other facility provided for the purpose and, shall cause to be counted the votes received by each candidate; and
    b. record the total number of votes cast in favour of each candidate.
2. Each ballot paper shall be counted as follows—
    a. the presiding officer shall in respect of every ballot paper, announce the candidate in whose favor the vote was cast;
    b. display to the candidates or agents the ballot paper sufficiently for them to ascertain the vote; and
    c. put the ballot paper at the place on the counting table, or other facility provided for this purpose, set for the candidate in whose favor it was cast.
3. The presiding officer shall record the count of the vote in a tallying sheet in Form 33 set out in the Schedule.
4. A candidate or an agent shall have a right to—
    a. dispute the inclusion in the count, of a ballot paper; or

b. object to the rejection of a ballot paper, where upon the presiding officer may decide to uphold or reject the complaint and act as provided under regulation 80.

In order for a ballot to translate into a verifiable vote (a vote cast), it must be clear in whose favour the vote was cast without identifying the voter.

Meaning, that a vote is cast only when a presiding officer, during counting, declares that the intention of the voter is clear and that the vote is made in favour of a particular candidate. The intention of the voter in a voting process that is by secret ballot is a core component of an individuals political right pursuant to article 38 of the *Constitution*.

Therefore:

(i) Spoilt ballots do not constitute votes eligible to be included in the tally of the final results in a presidential election. Regulation 71 which provides for spoilt ballot papers is clear on this position:

A voter who has inadvertently dealt with his or her ballot paper in such a manner that it cannot be conveniently used as a ballot paper may, on delivering it to the presiding officer and providing to the satisfaction of such officer the fact of the inadvertence, obtain another ballot paper in the place of the ballot paper so delivered and the spoilt ballot paper shall be immediately cancelled and the counterfoil thereof marked accordingly.

(i) Rejected ballots in accordance with Regulations 77 and 78 and are void and not counted unless; in terms of Regulation 77 (2):

-a ballot paper on which a vote is marked—

a. elsewhere than in the proper place;

b. by more than one mark; or

c. which bears marks or writing which may identify the voter, shall not by that reason only be void if an intention that the vote shall be for one or other of the candidates, as the case may be, clearly appears, and the manner in which the paper is marked does not itself identify the voter and it is not shown that the voter can be identified thereby.

189. Viewed purposively, it can be concluded that Regulations 2, 69, 70, 71, 77 and 78 exclude rejected ballots from the total votes cast; which are considered for purposes of computing the final results in a presidential election.

Do the Regulations conform to the provisions of the *Constitution* as set out in article 86(b) and 138(4) of the *Constitution*?

190. Article 86 (b) of the *Constitution* provides that;

> At every election, the Independent Electoral and Boundaries Commission shall ensure that
>
> a. ...
>
> b. the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.

Article 138(4) of the *Constitution* further provides that;

> A candidate shall be declared elected as President if the candidate receives
>
> a. more than half all the votes cast in the election; and
>
> b. at least twenty-five percent of the votes cast in each of more than half of the counties.

191. The Petitioners' logic collectivizing all votes as cast and therefore applicable in computing the final results of a presidential election, does not distinguish the Presidential election from other elections held on the same day. This reasoning accepts that stray ballots also ought to form part of the votes considered in computing the final percentages. A stray ballot paper means ballot a paper cast in the wrong ballot box (Regulation 2)

192. If any ballot for another election, for instance, Senate or Gubernatorial is placed in the Presidential ballot box, then that vote is not cast in the Presidential election. It is for all intents and purposes, a foreign object that cannot be considered a vote cast in that election. Consequently, it cannot be taken into account when considering the total number of votes cast in that election. Rejected ballots belong to no candidate. This however, is not to understate the statistical need to record rejected ballots. Such statistics may be helpful in assessing voter turnout and also acting as a barometer for evaluating civic education programmes for voters.

G. Burden of Proof

193. It is trite law that whoever alleges must prove. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya stipulates this in the following terms:

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Further section 109 in narrowing down to proof of particular facts, stipulates:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

194. Section 110 further provides that:

> The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

195. Regarding the incidence of burden, section 108 provides that:

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

196. This Court had the opportunity of pronouncing itself on the issue of burden of proof in a Presidential election petition in Raila 2013. It held [paragraph 195]:

> "There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made."

197. The Court further held [paragraph 203] that a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The Court cited with affirmation the Canadian case, *Opitz v Wrzesnewskyj* 2012 SCC 55-2012-10-256 where it was thus stated in the majority opinion:

> "An applicant who seeks to annul an election bears the legal burden of proof throughout.....

However, the Court qualified this position by finding that the burden of proof once discharged by the petitioner, shifts to the respondents to disprove the claims made. It proceeded to specify what exactly the petitioner would be required to do to discharge that legal burden holding [at paragraph 196 & 197]:

> " Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long- standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authoritys departures from the prescriptions of the law.
>
> [198] IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfilment to the peoples political rights [article 38 of the *Constitution*]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behooves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.

198. It is therefore clear that in an election petition the burden of proof at the very onset lies on the petitioner to prove the facts that he alleges. Once the petitioner discharges that burden it shifts to the respondent(s) to rebut the claims made. This decision was cited with affirmation in Munya 2 when the Court stated:

> 178. One of the grounds for impugning the judgment of the Court of Appeal was that the Court shifted the burden of proof from the petitioner to the 2ndand 3rdrespondents, contrary to the holding by this Court in Raila Odinga and Another v IEBC. Regarding the burden of proof, this Court held that:
>
> > " ...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of

> probabilities, though not as high as beyond-reasonable-doubt. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary.

179. We affirm that this statement represents the legal position regarding the question of burden of proof in election petitions.

199. This Court elaborated on the distinction between the legal burden and the evidentiary burden, noting that the legal burden is the initial burden on the petitioner to prove the facts pleaded in the petition. Once the petitioner discharges that legal burden to the standard required, then the burden shifts to the respondent to disprove those claims; that being the evidentiary burden. The Court held [paragraph 182]:

> " The allegation that the total number of votes cast exceeds the number of registered voters is such a serious one, that an election court would not treat it lightly. If proved, such an occurrence would call into question the integrity of the electoral process. The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue [Cross and Tapper on Evidence, (Oxford University Press, 12thed, 2010, page 124)]. In the Raila case, this Court echoed this trite principle (paragraph 195 of its judgment) when it remarked:
>
> > " ...an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswerable case has been made [emphasis supplied].

200. The petitioner must discharge the initial legal burden for the 1st Respondent to be under the evidentiary burden with respect to the register and the declared results. In that regard, this Court, in Munya held that [paragraph 188]:

> " [T]he evidential burden regarding the contents of the register and declared results lies on the IEBC; save that this burden is activated, in an election petition, only when the initial legal burden has been discharged. [Emphasis supplied]

201. In *Vashist Narain Sharma v Dev Chandra & others*, 1954 AIR 513; 1955 SCR 509 (Vashist Narain) the Supreme Court of India, with regard to the burden of proofing an election should be annulled on the ground that it did not conform with written law, held that – the volume of opinion preponderates in favour of the view that the burden lies upon the [petitioner].

202. In instances in which the respondent admits certain facts alleged by the petitioner, the burden of proof is deemed to have been discharged by the petitioner but only with respect to the specific facts admitted. The Supreme Court of India has had the opportunity to pronounce itself of this aspect in *Joshna Gouda v Brundaban Gouda & another*, SC Civil Appeal No 15174 of 2011. It held [paragraph 18]:

> " An admission must be clear and unambiguous in order that such an admission should relieve the opponent of the burden of proof of the fact said to have been admitted."

In the same matter the Court held that since the petitioner at the trial Court had failed to discharge the burden cast upon him the election petition had to fail.

203. In *Vashist Narain* (above) the Court in emphasizing the grave need for the petitioner to discharge the burden of proof before an election is upset, held:

> " If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and that the election must stand. Such result may operate harshly upon the petitioner seeking to set aside the election .... but neither the Tribunal, nor this Court is concerned with the inconvenience resulting from the operation of the law. How this state of things can be remedied is a matter entirely for the Legislature to consider. The English Act to which we have referred presents no such conundrum and lays down a perfectly sensible criterion upon which the Tribunal can proceed to declare its opinion. It directs the Tribunal not to set aside

the election if it is of opinion that the irregularity has not materially affected the result."

204. The Supreme Court of India shed light on the sacred nature of an election by virtue of the fact that it is the expression of the will of the people which the Court is enjoined to guard jealously and void the declared results only upon proof illegal practices supported by cogent evidence. These principles were thus enunciated in *Rahim Khan vs Khurshid Ahmed & Ors*, 1975 AIR 290, 1975 SCR (1) 643 in which the Supreme Court of India held:

> "We have therefore to insist that corrupt practices, such as are alleged in this case, are examined in the light of the evidence with scrupulous care and merciless severity. However, we have to remember another factor. An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded.‘‘

205. Therefore the petitioner must discharge the burden of proof in order to succeed in their pursuit to invalidate the declared results. The petitioner is not only required to prove that the irregularity was committed but also that the irregularity materially affected the election result. section 83 of the Evidence Act, 2011 specifically requires that no election shall be declared void by reason of non-compliance with written law if it appears that the election was conducted in accordance with the *Constitution* and with written law or that the non- compliance did not affect the result of the election. The implications of this provision are addressed in detail later on in this opinion.

H. Standard of Proof

206. In electoral offences the standard of proof was held by this Court in Raila 2013 to be higher than balance of probabilities by below beyond reasonable doubt.

The Court citing with approval various authorities held [paragraph 203]:

> " The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the *Constitution*, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to thenational values and principles of governance declared in the *Constitution* [article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in article 138(4) of the *Constitution*, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.

207. More specifically, where a claim of electoral malpractice is made the standard of proof is one above a balance of probabilities but below beyond reasonable doubt. Where a claim of commission of an election offence is made the standard of proof is similar to that in a criminal matter – it is beyond reasonable doubt. Where the claim relates to data-specific electoral requirements the standard of proof is also beyond reasonable doubt.

208. Where the petitioner assails the declared results on the allegation that the returned candidate committed election offences it is imperative for the petitioner to prove beyond reasonable doubt that the returned candidate or his agents working under his instructions committed the alleged offence. This Court in the Wetangula case was categorical that where an election offence is alleged in an election petition the standard of proof is beyond reasonable doubt similar to that in criminal matters due to the quasi-criminal nature of the cause. It held that [paragraph 120]:

> " [120] Now on account of this quasi-criminal aspect of bribery in elections, the offence is to be proved beyond any reasonable doubt. The

petitioner has to adduce evidence that is cogent, reliable, precise and unequivocal, in proof of the offence alleged. We may draw analogy with the Supreme Court of India decision in M. Narayana Rao v G. Venkata Reddy & Others, 1977 AIR S.C 208, in which it was thus held:

> "... The charge of commission of corrupt practice has to be proved and established beyond doubt like a criminal charge or a quasi-criminal charge, but not exactly in the manner of establishment of guilt in the manner of a criminal prosecution giving liberty to the accused to keep mum. The charge has to be proved on appraisal of the evidence adduced by both sides especially by the petitioner...

209. The petitioners alleged that contrary to section 2 of the *Elections Act*, S 14 and 15 of the *Election Offences Act*, the 3rd respondent, Cabinet secretaries and other public officers blatantly misused state resources in favour of specific candidates and the Jubilee party as a whole which as a result unfairly skewed the playing field in favour of the 3rdrespondent and as such the presidential elections could not be termed as free or fair. These they contended, amounted to gross violations of Articles 81(e), 232 and 73(2) the remedy of which could only be nullification of the said results.

210. Applying the principles espoused above it is clear that the onus is on the petitioners to prove beyond reasonable doubt that the 3rdrespondent committed the said electoral offences with detailed specificity by way of cogent evidence; bare allegation of commission of the alleged offences would evidently fall short of that standard.

211. In respect of the allegation that the Cabinet Secretaries committed the alleged electoral offences, the petitioners must show firstly that offences were committed and that secondly, they were acting under the instructions of the 3rdrespondent – they must show the nexus between the person who is alleged to have committed the offence and the returned candidate and they must have shown the full particulars of the allegation. The Supreme Court of India in making a determination in *Jagdev Smgli v Pratap Singh Daulla*, (A.I.R. 1965. S.C. 18), an election petition, in which it was alleged that the agents of the returned candidate had committed corrupt practices the Court held that it must be proven not only that the offence was committed but that it was committed by the returned candidate or his agents or with

the consent of the returned candidate – and the standard applicable is beyond reasonable doubt. It observed:

> " It may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches, i.e. the commission of acts which the law regards as corrupt, and the responsibility of the successful-candidate directly or through his agents or with his consent for its practice not by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail."

212. A digest of the Election Law Reports Vols. XI to XXII 1955-60 underscores the requirement to furnish full particulars of the alleged offences in the petition noting that where full particulars are not supplied the Court should strike out those alleged offences whose full particulars have not been provided. That has been set out in the following terms:

> " The requirement of full particulars is one that has got to be complied with, with sufficient fullness and clarification so as to enable the opposite party fairly to meet them - and they must be such as not to turn the enquiry before the Tribunal into a rambling and roving inquisition.
>
> ...
>
> Where the petitioner had ample opportunity to get his petition amended for supplying full particulars of a corrupt practice alleged in the petition and has not taken advantage of that opportunity, the Tribunal would be justified in striking off the allegations relating to such corrupt practice.

213. Section 2(c) of the *Representation of People Act, 1951* of the Laws of India, defines corrupt practices as any of the practices specified in section 123 of the Act. The elaborate definition of various corrupt practices under section 123 are —bribery, undue influence, appeal on the ground of religion, race, caste, community or language and the use of appeal to religions or national symbols, promotion of enmity or hatred between different classes of citizens on the ground of religion, race, caste, community or language, propagation of sati, publication of false statements, hiring of vehicles or vessels, incurring excessive expenditure, procuring the assistance of government servants, and booth capturing.

214. Where a petitioner imputes electoral offences on the part of the returned candidate the burden of proof lies on the petitioner to prove the commission of the electoral offences by the returned candidate or by his agents or by other persons with his consent, which claim

must be supported by cogent evidence – bare allegations, without more, that the offence was committed will not suffice. If the evidence supplied fails to meet the set standard the petition must fail. In *Jagdev Smgli v Pratap Singh Daulla*, (1965) AIR 183, 1964 SCR (6) 750 the Supreme Court of India in dealing with the issue of burden of proof and standard of proof where it was alleged that the winning candidate had committed corrupt practices during the election, held as follows:

> " It may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches i.e. the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agents or with his consent for its practice not by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail."

215. Akhil Kumar (an Assistant Professor in the University of Rajasthan, Jaipur) in his journal article, *Election Laws and Corrupt Practice in India*, International Journal of Multidisplinary Approach and Studies observes that electoral offences are akin to criminal offences and therefore must be proved strictly. He states:

> " [An] election may be avoided if corrupt practices have been committed. Attempts to influence may not be unlawful and not restrained unless corrupt intent or abuses of influence is established against the candidate or his election agent. Therefore, an allegation of undue influence must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practice of undue influence envisaged by the Act. It is settled view that a charge of corrupt practice under the Act of 1951 has to be proved beyond reasonable doubt, because if this test is not applied a very serious prejudice would be caused to the elected candidate who may be disqualified for a period of six years from fighting any election.

216. I am persuaded that the petitioners failed to provide full particulars of the electoral offences that they allege had been committed by the 3rd respondent. I would therefore have at that instance struck out all the allegations of illegality from their petition for want of full particulars as required by law.

Alleged Electoral Offences

217. The petitioners alleged that various electoral offences were committed by the 3rd respondent in during the electoral process. These are:

i. Bribery

ii. Intimidation

iii. Undue influence

218. I have already addressed these allegations earlier in this opinion however I would like to pay particular attention to the allegation that the Cabinet Secretaries breached the constitutional requirement not to be involved in any political activities as enshrined in Chapter Six of the *Constitution* relating to Leadership and Integrity, hence the declared results were vitiated.

219. The Leadership and Integrity Chapter of the *Constitution* provides for the conduct of State Officers. Article 80 of the *Constitution* mandates Parliament to enact legislation to provide to operationalize that Chapter. It provides:

> " 80. Parliament shall enact legislation—
>
> a. establishing procedures and mechanisms for the effective administration of this Chapter;
>
> b. prescribing the penalties, in addition to the penalties referred to in article 75, that may be imposed for a contravention of this Chapter;
>
> c. providing for the application of this Chapter, with the necessary modifications, to public officers; and
>
> d. making any other provision necessary for ensuring the promotion of the principles of leadership and integrity mentioned in this Chapter, and the enforcement of this Chapter.

220. In exercise of this mandate Parliament has enacted the *Leadership and Integrity Act*, which provides in section 23 as follows:

> "(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties—

a. act as an agent for, or further the interests of a political party or candidate in an election; or

b. manifest support for or opposition to any political party or candidate in an election.

(2) An appointed State Officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.

(3) Without prejudice to the generality of subsection (2) a public officer shall not—

a. engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

b. publicly indicate support for or opposition against any political party or candidate participating in an election.

221. The law therefore is clear that Cabinet Secretaries are exempt from the prohibition that public officers should not engage in the activities of a political nature, and for good reason. It is to be observed that Cabinet secretaries and County Executives members do serve at the pleasure of either the President or Governor. They are political appointees with the express purpose of delivering the manifesto of their appointing authority or his or her political party. This is an essential part of a political government in any democracy. A change in the Presidency signals the immediate resignation or replacement of these political appointees; not so with the rest of the civil service whose tenure is protected against the vagaries of politics. This is also the reason why civil servants do not and should not participate in active politics, as they should remain apolitical.

222. It was also alleged that the 3rd respondent and the Cabinet Secretaries gave donations to the Internally Displaced Persons with a view to influence them to vote for the 3rd respondent. These allegations were full rebutted by the affidavit of Engineer Karanja Kibicho who produced documents to prove that the assistance given to the Internally Displaced Persons was in line with a work plan of the government with a budget approval by Parliament in the previous financial year and which was no prompted by the aim to influence the voters in favour of the 3rd respondent.

223. In the foregoing, I therefore find that the Petitioners allegations on bribery, intimidation and undue influence are not proven.

I. Affidavit Evidence: An Analysis.

224. The petition sets out the following as the alleged illegalities that were committed by the 1st and 2nd respondent in conducting the electoral process:

a. Non-compliance with Articles 1, 2, 4, 10, 38, 81, 82, 86, 138, 140, 163, and 249 of the *Constitution*.

b. Non-compliance with the *Elections Act*.

c. Non-compliance with the Regulations made under the *Elections Act*.

d. Non-compliance with the *Electoral Code of Conduct*.

225. In summary the particulars of the petitioners claims are that:

1. The 1st respondent by failing or neglecting to act in accordance with the *Constitution* subverted the sovereign will of the people.

2. The Presidential Election was so badly done and marred with irregularities that it does not matter who won.

3. The nature and extent of the flaws and irregularities significantly affected the results to the extent that the 1st respondent cannot accurately and verifiably determine the election results.

4. section 83 of the *Elections Act* contemplates that where an election is not conducted in accordance with the *Constitution* and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected. The non- compliance with the *Constitution* and the written law is by itself sufficient to invalidate the Presidential Election.

5. Number of factors including the registration of voters and the rejected votes which accounted for 2.6% of the total votes cast affected the Presidential Election results.

6. This Court in Raila 2013 in determining that spoilt votes cannot be counted in computing the 50% plus 1, relied on the opinion of the minority yet the majority in that decision held that the total number of votes cast in an election refers to all votes cast whether valid or not.

7. The petitioners call upon this Court to reconsider its decision in *Raila* 2013 and correct itself.

8. The transmission of results from polling stations to the Constituency and National Tallying Centre and from the Constituency to the National Tallying Centre was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt which compromised and affected the requirement of free and fair elections under Articles 81 of the *Constitution*.

9. By an internal circular dated 2July 5, 2017, the 1st Respondent adopted a procedure that was contrary to and did not comply with the law as set out under regulation 87(3) of the *Elections (General) Regulations* made pursuant to Sections 39 and 109 of the *Elections Act* and article 82 of the *Constitution*.

10. The 1st Respondent declared the result without verification of the results from over 10,000 polling station representing approximately 5 million voters.

11. The information in Forms 34A is not consistent with the information recorded in Forms 34B as required and legitimately expected.

12. Forms 34B were not accurate and verifiable and consequently invalid.

13. The additions and figures do not add up.

14. The nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated.

15. The inaccuracies and inconsistencies affect and account for at least 7 million votes.

16. At the time of declaration of the result, the 1st Respondent did not have 187 Forms 34B nor did it publically display or avail the same for verification. The declaration of the final result was therefore invalid and illegal.

17. In numerous instances the 1st Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted particularly in favour of the 3rd Respondent thereby affecting the final results tallied.

18. the 1st Respondent grossly inflated the votes cast in favour of the 3rd Respondent thereby affecting the final results tallied.

19. There was massive and deliberate failure in operational transparency.

20. The 1st Respondent deliberately and intentionally disregarded the decision of the Court of Appeal rendered in the case of I*ndependent and Electoral Boundaries Commission v Maina Kiai*, Court of Appeal Civil No 105 of 2017 by:

    a. failing to electronically collate, tally and transmit the results accurately as per the Court decision;

b. failing to make the results at the polling stations final as per the decision;

c. failing to ensure accurate, verifiable and accountable results by posting varied, contradictory and ever changing results in Forms 34A, 34B and in its portal even at the time of filing this Petition; that without verifiability the purported results are unconstitutional and therefore invalid.

d. failing to ensure accurate, verifiable and accountable final result by declaring final results on August 11, 2017 before receiving all the results from all polling stations;

e. by colluding with the 3rd Respondent and ejecting the legitimate agents of the Petitioners from various polling stations in the Central and Rift Valley Regions, the 1st Respondent abdicated its responsibility of ensuring a transparent, impartial process of voting, tallying and transmission of results;

f. By allowing in excess of 14,000 fatally defective returns from polling stations representing in excess of 7 million votes, the 1st Respondent abdicated its responsibility of delivering verifiable results;

21. The votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under article 86(b) and 86(c) of the *Constitution* as read together with the *Elections Act*.

22. The results as displayed in the 1st Respondents Forms 34B variously exclude substantial numbers of polling stations within the constituencies and are incorrigibly inaccurate in mathematical additions in favour of the 3rdRespondent.

23. The results contained in Forms 34B in respect of the Presidential Election are not the results required under article 86 and are therefore a nullity.

24. The Petitioners aver that contrary to regulation 7(1)(c) of the *Elections (General) Regulations* the 1st Respondent illegally and fraudulently established secret and ungazetted polling stations wherefrom results were added to the final tally thereby undermining the integrity of the Presidential Election.

25. A significant number of Forms 34B were executed by persons not gazetted as Returning Officers and not accredited as such by the 1st Respondent thereby rendering those results invalid.

26. The results from over 10,000 polling stations transmitted to the National Tallying Centre did not comply with the mandatory requirement set since they were not accompanied by the electronic image of Forms 34A.

27. Forms 34B are contradictory, defective and bear fatal irregularities affecting 14,078 polling stations out of 25,000 ForMs

28. The use of inconsistent and different forms and returns demonstrates lack of consistency, uniformity, neutrality, impartiality and indicates and intention to manipulate the results and the returns.

29. The 1st respondent is still in the process of altering and tampering with the Forms 34A and is summoning its officers to sign Forms 34A.

30. Some of the forms and returns are not signed as required by law and Regulations.

31. Some of the Forms 34B do not indicate the names of the Returning Officer.

32. A substantial number of Forms 34A and 34B do not bear the IEBC stamp others do not bear the signatures of the candidates agents nor the reason for refusing to sign.

33. A number of polling stations in different areas show the same person as presiding in those stations.

34. In more than half of the 290 constituencies the returning officers failed to indicate the number of Forms 34A handed over to them as required by the law and the Regulations.

226. The petitioners in their petition made various further allegations upon which certain reliefs were sought which included the nullification of the results declared for the Presidential Election. The following is a summary of the assertions made:

1. By an internal circular dated July 25, 2017, the 1st Respondent adopted a procedure that was contrary to and did not comply with the law as set out under regulation 87(3) of the *Elections (General) Regulations* made pursuant to Sections 39 and 109 of the *Elections Act* and article 82 of the *Constitution*.

2. The 1st Respondent declared the result without verification of the results from over 10,000 polling station representing approximately 5 million voters.

3. The information in Forms 34A is not consistent with the information recorded in Forms 34B as required and legitimately expected.

4. Forms 34B were not accurate and verifiable and consequently invalid.

5. The additions and figures do not add up.

6. The nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated.

7. The inaccuracies and inconsistencies affect and account for at least 7 million votes.

8. At the time of declaration of the result, the 1st Respondent did not have 187 Forms 34B nor did it publically display or avail the same for verification. The declaration of the final result was therefore invalid and illegal.

9. In numerous instances the 1st Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted particularly in favour of the 3rdRespondent thereby affecting the final results tallied.

10. The 1st Respondent grossly inflated the votes cast in favour of the 3rd Respondent thereby affecting the final results tallied.

11. There was massive and deliberate failure in operational transparency.

12. The 1st Respondent deliberately and intentionally disregarded the decision of the Court of Appeal rendered in the case of *Independent and Electoral Boundaries Commission v Maina Kiai*, Court of Appeal Civil No 105 of 2017 by:

    a. failing to electronically collate, tally and transmit the results accurately as per the Court decision;

        i. to make the results at the polling stations final as per the decision;

        ii. to ensure accurate, verifiable and accountable results by posting varied, contradictory and ever changing results in Forms 34A, 34B and in its portal even at the time of filing this Petition; that without verifiability the purported results are unconstitutional and therefore invalid.

        iii. to ensure accurate, verifiable and accountable final result by declaring final results on August 11, 2017 before receiving all the results from all polling stations;

    b. By colluding with the 3rd Respondent and ejecting the legitimate agents of the Petitioners from various polling stations in the Central and Rift Valley Regions, the 1st Respondent abdicated its responsibility of ensuring a transparent, impartial process of voting, tallying and transmission of results;

    c. By allowing in excess of 14,000 fatally defective returns from polling stations representing in excess of 7 million votes, the 1st Respondent abdicated its responsibility of delivering verifiable results;

227. The votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under article 86(b) and 86(c) of the *Constitution* as read together with the *Elections Act*.

13 It was averred that the results as displayed in the 1st Respondents Forms 34B variously exclude substantial numbers of polling stations within the constituencies and are incorrigibly inaccurate in mathematical additions in favour of the 3rd Respondent.

14 It was also asserted that the results contained in Forms 34B in respect of the Presidential Election are not the results required under article 86 and are therefore a nullity.

15 The Petitioners aver that contrary to regulation 7(1)(c) of the *Elections (General) Regulations* the 1st Respondent illegally and 16 fraudulently established secret and ungazetted polling stations wherefrom results were added to the final tally thereby undermining the integrity of the Presidential Election.

16 It was his assertion that a significant number of Forms 34B were executed by persons not gazetted as Returning Officers and not accredited as such by the 1st Respondent thereby rendering those results invalid.

228. The petitioners in support of their petition have filed various affidavits and in some of those affidavits are an array of documents and video clips annexed as evidence.

1.The affidavit of the 1st Petitioner

229. The Affidavit of the 1st petitioner makes averments on the same claims contained in the petition and an additional deposition that the Presidential Election was compromised by intimidation and improper influence or corruption contrary to Articles 81(e)(ii) of the *Constitution* as read together with the *Elections Act* and Regulations 3 and 6 of the *Electoral Code of Conduct*. Further, that the 3rdrespondent, with impunity, contravened the Rule of Law and the principles of conduct of a free and fair election through the use of intimidation, coercion of public officers and improper influence of voters.

230. To that affidavit was one document annexed as evidence; a document indicating the areas that were outside the 3G and 4G network coverage. The affidavit indicates that further evidence in other affidavits serves as evidence in support of the matters deposed therein.

2. The affidavit of the 2nd Petitioner

231. The affidavit of the 2nd petitioner briefly reiterates some of the claims contained in the petition. However, it does not adduce any evidence in support of the claims made. The

deponent states that he relies fully on the evidence in the affidavit of the 1st petitioner and in the affidavit of Dr Nyangasi Oduwo.

3. The affidavit of Benson Wasonga

232. The deponent averred that there were irregularities in the declaration of the Presidential results by the Chairperson of the Independent Electoral and Boundaries Commission (IEBC) vis-a-vis the Forms 34C. He asserted that the actual summation of the total valid votes from the IEBC portal was 15,179,717, with Raila Odinga having 6,821,505 votes while Uhuru Kenyatta had 8,222,861 votes, and the total rejected votes being 477,195 votes. However, the IEBC portal displayed the results as follows; the total valid votes were 15,180,381, Raila Odingas votes amounted to 6,821,877 while Uhuru Kenyattas votes were 8,223,163 and the total number of rejected votes was 403,495. He attached an analysis of the number of rejected votes.

233. He deposed that the declaration of results for the election of the President at the National Tallying Centre as per the Form 34C indicated the results as follows; the total valid votes are 15, 114,622, Raila Odinga 6,762,224, Uhuru Kenyatta 8,203,290 and the total rejected votes were 81,685. His assertion was that the actual variation of rejected votes between the actual results and those displayed at the IEBC portal was 73,700 votes. His averment was that this was a violation of clear provisions of electoral laws to the disadvantage of the other presidential candidates.

4. The affidavit of Mohamed Noor Barre

234. Mohamed Noor Barre who is a resident of Mandera North Constituency, Mandera County swore that he had been appointed as Presiding Officer at Kalicha Primary School in Mandera North Constituency. He averred that on August 7, 2017 at around 5.00 pm, he convened with 70 other people, at the Independent Electoral and Boundaries Commissions Office in Mandera North Constituency. He deposed that they were all informed that their names had been replaced by others for unexplained reasons.

235. It was his testimony that elections proceeded the following day at Kalicha primary school polling station. He averred that the said elections were conducted by strangers who were acting as presiding officers who were untrained and had not taken an oath of secrecy. He asserted that as a consequence, Kalicha Primary School, polling station 2 of 2 polling stations, had a 100% voter turnout as all registered voters numbering 594 voted.

236. Further, he asserted that, these figures were filled in at a tallying Centre at the Sub County Commissioners Block contrary to a Court Order which had directed that the tallying centre should be at Rhamu Arid Zone Primary School. It was his assertion that this kind of rigging

happened throughout Mandera County. He gave as evidence, documents to support his averments.

237. I am of the opinion that the evidence in Mr Mohamed Noor Barre did not meet the standard of proof required since it comprised of bare allegations without any substantiation of the averrments made with regard to the fact that he was the appointed presiding officer, that the person who acted as presiding officer was not the one appointed initially, that there was rigging at the polling station and that persons who were not supposed to vote were allowed to vote. This affidavit evidence was rebutted by the affidavit of MaryKaren Kigen Sorobit.

5. The affidavit of Ibrahim Mohamud Ibrahim

238. Ibrahim Mohamud Ibrahim a resident of Mandera North Constituency, Mandera County deposed that he was appointed, trained and took oath to serve as a Presiding Officer at Guticha Primary School in Mandera North Constituency. He asserted that on August 7, 2017 at around 5.00 pm, he as well as 70 other people were summoned to the Independent Electoral and Boundaries Commissions Office in Mandera North and informed that their names had been replaced by others for unexplained reasons. A protest arose and they reported the matter to Rhamu police station.

239. Further he averred that the elections took place on the following day at various polling stations conducted by strangers who were acting as presiding officers. It was his testimony that these strangers had neither been trained nor taken oath of secrecy. It was his testimony that this opened voter numbers to alteration at the Constituency Tallying Centre which was in the Sub County Commissioners office boardroom. He averred the *Constitution* of the tallying centre was against a court order which had directed that the tallying centre should be at Rhamu Arid Zone. He took the stance that this kind of rigging happened throughout Mandera County.

6. The affidavit of Moses Wamuru

240. The deponent avers that on the August 8, 2017 he arrived at Thigingi Primary School in Kagaari North Ward, Runyenjes Constituency where he found all the NASA agents locked out of the polling station. He asserts that his effort to persuade the Presiding Officer to allow the said agents back into the polling station were unsuccessful. He avers that the NASA agents did not gain access into the polling station until the voters in the queue protested. He further deposes that the said agents were later evicted from the polling station at the time of counting. These averments are incredible given the fact that the Form 34A on record of Thigingi Primary School, polling station 01 bears the signature of an agent of the Orange Democratic Movement affiliated to the NASA coalition. The authenticity of that Form 34A has not been challenged by the petitioners.

241. Similar, averments have been made with respect to the NASA agents at Gichera Primary School polling station, Kagaari South Ward, Runyenjes Constituency, Embu County. Likewise, it is evident from the Form 34A on record that the NASA agents signed the Forms 34A for both polling stations at Gichera Primary School, as required by law. The authenticity of those forms was not challenged. In respect of Siakago Girls Secondary School which was the Talling Centre for Mbeere North Constituency Mr Wamuru averred that tallying was conducted in the absence of the NASA agents and that he was coerced into signing the Form 34A in order to get a copy. These averments are not supported by any evidence.

242. Further the deponent states that in Mbeere South Tallying Centre at Nyangwa Secondary School the Chief Agent, one Mr Donald Muchembi registered several complaints that included harassment by Jubilee and Provincial Administration Officers. It is also averred that the County Commissioner was acting as the Jubilee Chief Agent. It is unfortunate, that the deponent did not in any way attempt to support these claims with any form of evidence. The statement that Mr Muchembi was harassed is hearsay and therefore inadmissible in its entirety.

243. It was further asserted that at Mbeere South Tallying Centre the Returning Officer informed the persons present in the hall that she would wait for the County Commissioner to return before concluding the tallying process. It was also averred that in Gichera Primary, Runyenjes Central, Ngurweri: the indelible ink was not used and voters confessed to have voted more than once; the agents were sitted too far from where identification of voters was taking place hence they could not ascertain whether identification had happened; the presiding officers and the Polling Clerks were assisting those who were unable to vote; the Presiding Officers were counting rejected ballots in favour of the 3rdRespondent without any explanation; there were reports that NASA agents were compromised by the County Commissioner and the Head of Police; and, the conduct of the IEBC officials and the County Commissioner were repeated in all areas in Embu County. These statements are unsupported by any evidence and remain as bare allegations.

244. Other averments in this affidavit were with regard to the following:

a. Late commencement of the voting process at Karago Primary School in Kieni North Constituency.

b. The use of the manual identification of voters and abandonment of the electronic system of identification without justification, at Kathungu Primary School in Kagaari South.

c. The assertion that one of the NASA agents witnessed voters issued with two presidential ballot papers in the same polling station.

245. No evidence was adduced in support of these allegations. The allegation that some voters were issued with two presidential ballot papers is unsupported by any evidence. It would be expected that the deponent would have adduced more credible evidence in support of that claim. The mere statement of an account supposedly witnessed by some other persons in this case some NASA agents – is hearsay evidence which is inadmissible.

246. The affidavit of Moses Wamuru in support of the petition makes bare averments which have not been supported by cogent evidence.

7.The Affidavit of Godfrey Osotsi in support of the Petition

247. Mr. Godfrey Osotsi deposed that he is the Secretary Generay of the Amani National Congress Party and was accredited as the Chief agent nominated by the ANC Party affiliated to the NASA coalition. In respect of the time of streaming of the results, he averred at 1715hrs the presidential results had started streaming in. He explained that upon enquiry with one official of the 1st respondent by the name Waqo Shuke, he was informed that there were two sets of results; those with Forms 34A and those without Forms 34A which were based on the text messages only. He asserts that the 1st respondent had all along represented to them that all text results would be accompanied by scanned Forms 34A simultaneously. In evidence he annexed a transcript of video clips of the officers of the 1st respondents making statements on that issue.

248. It was his assertion that upon consultation the 1st respondent's Information Technology consultants from Saffron (which supplied the KIEMS gadgets) they confirmed that they were receiving results without Forms 34A for the reason that some areas lacked 3G and 4G network and could not, therefore, transmit the images. It is to be noted that this assertion is a bare allegation without supporting documents for the same rendering the statement as hearsay.

249. He admits that the 1st respondent availed 29,000 Forms 34A on the deponent's external drives. He however, emphasized that they did not get over 11,000 forms. He added that by the time the results were being announced, there were 10,480 Forms 34A outstanding and that upon request to get the outstanding forms Mr. Waqo an official of the 1st respondent sent him an email with the results from 10056 Polling Stations. He avers that out of those Polling Stations 100 of them had more than 700 registered voters. He annexes a copy of the said email and what is stated to be the accompanying data file containing the text only results.

250. It should be noted here that the said accompanying document contains data on the number of Polling Stations that were out indicated to be outside network coverage. Indeed, that document bears the title Analysis of network coverage in relation to IEBC Public Notice. That document is of no probative in respect of the claim that there were text-only results of

10,056 Polling stations or in respect of the allegation that there were polling stations with more than 700 registered voters.

251. Annexed to the same affidavit is another document that is lacking in clarity. It bears some data categorized in three columns indicating the county name and the number of Polling Stations. However, since its contents are vague and it is not possible to decipher the details contained in the document. It is therefore of no evidentiary value. Even if the contents of the document were clear it would only serve as evidence of the number of Polling Stations in specific Counties that is assuming that

8. The Affidavit of Olga Karani

252. Olga Karani deposed that she was one of the duly accredited agents nominated by the National Super Alliance (NASA) for the August 8, 2017 general elections as the Deputy Chief Agent. She asserted that there were irregularities and anomalies in the tallying process at the tallying center which were expressed by the members of public, NASA agents and candidates in several media platforms; details of which were set out in the affidavit of Dr. Nyangasi Oduwo.

253. She averred that the prescribed forms which were manually transmitted to the National Tallying Center or otherwise deposited in the IEBC website were impossible to verify as the same forms filled in by the presiding officers and the Returning Officers in the presence of the agents as prescribed by law. She asserted that she made a request for the 1st respondent to clarify why the forms were not processed in accordance with KIEMs procedure provided but it declined to disclose the source of the forms or make clarifications on the same. It was her assertion that by the time the results were announced by the Chairperson of the 1st Respondent, the Commission had neither collated or availed any Forms 34B and had not addressed any issues relating to the Forms 34A or the results published in its website which evidenced a lack of transparency on the part of the 1st Respondent. The affidavit has no documentary evidence annexed which are relevant in support of the averments made.

9. Dr. Nyangasi Oduwo's Affidavits

254. Dr. Oduwo deposed that he is a medical doctor with a Post-Graduate Diploma in Research Methods, a Masters in Project Management and Planning, a Second Masters in Economic Policy and Analysis and is the economic advisor to the current Governor of Mombasa County Government. He asserted that on August 8, 2017 at around 5.07 pm, barely 10 minutes after the closure of the polling stations, the Commission started streaming in results of the presidential vote in the media. He averred that from the very start of the results broadcast to the end, a constant percentage difference of about 11% was maintained between

the 1st petitioner and the 3rdrespondent despite the fact that the results were coming in a random manner.

255. He averred that the Chairperson of the Commission addressed the media and indicated that the 1st Respondent was yet to receive all the statutory Forms 34As in respect of the Presidential results it was streaming through the 1st Respondent's online web Portal and that the said results were provisional.

256. In line with the grounds in the petition he reiterated that in many polling stations within Kenya and the Rift Valley region, agents of the petitioner were chased away from the stations and replaced by imposters who were caused to create fictitious names and sign blank Form 34As. It was his averment that the Presiding Officers were caused to fill in such fictitious results as they desired in favour of the 3rdrespondent, and that they were filled by one person on the particulars of all 7 agents. In evidence he annexed a copy of a blank Form 34 A for Ruai Girls Secondary School polling in Kasarani Constituency.

257. I have found that that blank Form 34A has no probative value in respect of the assertions made in the Petition (in fact I have checked this allegation alongside the certified copy of the particular polling station and found it not to be correct), and those deposed to in the affidavit of Dr. Nyangasi. He makes a further assertion that upon analyzing the turn out in the presidential results vis-a-vis the gubernatorial results and the Parliamentary results vis-a-vis the registered voters and the votes cast he discovered that the total votes cast for the President are 15,588,038 while those cast for the Governors are 15,098,646 demonstrating that of 482,202 voted for the President and not for the Governor. Further, the same examination discloses that 15,008,818 people voted for MPs only demonstrating that 567,517 voted only for the President and not MPs. He posits that the foregoing disclosure is a factual and legal impossibility and shows that the presidential votes were inflated by these number of votes. He attached his analysis in support of that claim.

258. It is also averred that Forms 34A submitted by the petitioner's agent in respect of Igembe South, URA Tea Buying Centre Polling Station number 2 of 2, Amwamba Primary School Polling Station in Igembe South, Meru County, Tonye Primary Polling Station, North Kamagambo and Memba Primary School Polling Station Number 1, West Asembo Ward indicated results that differed from those in the respective Forms 34B.

10. Affidavit of George Kegoro in support of the Petition

259. Mr. George Kegoro the Executive Director of Kenya Human Rights Commission deposed that Kura Yangu Sauti Yangu which is a coalition of like-minded civil society organisations deployed 500 monitors in all the constituencies to monitor and observe the elections. He averred that Kura Yangu Sauti Yangu revealed contradictions and anomalies in the

final presidential results announced by the 2nd respondent and those displayed on the 1st respondent's website portal. He asserts that in Kisumu the verbal announcement was 60,000 votes less than what is in the portal. To the affidavit a report of Kura Yangu Sauti Yangu is annexed in evidence. That report comprises of an analysis that juxtaposes the number of valid votes in Nyanza on 11th August, 2017 against those in the portal on August 18, 2017 and it indicates the variance as 63,368 votes less.

260. It is worthy of note that the report was prepared by Kura Yangu Sauti Yangu which is a project of Kenya Human Rights Commission where the deponent is the Executive Director. Therefore, its veracity without additional corroboration from an independent third party is questionable.

11. The affidavit of Apprielle Oichoe

261. Apprielle Oichoe deposes that she is a cyber-security expert. She avers that she is a PhD candidate on cyber security and is a consultant on cyber-security matters.

262. She avers that the 1st respondent's systems and database ought to have been tested on the following components and principles:

(i) Confidentiality – the information should only be accessed by authorized persons only.

(ii) Integrity – the information used should be accurate and complete and protected from malicious modification.

(iii) Availability – the information and systems required must be available as and when require,

(iv) Non-repudiation – the audit trail must be maintained; and,

(v) Authenticity – the information and the source must be proven to be genuine.

(vi) Privacy – where the deponent avers that, on the basis of advice by her advocates on record section 55A of the *Elections Act* read with section 44 B (5) contemplates privacy and security of data.

263. It was her testimony that if it is proven as alleged in the petition that the 1st respondent failed to secure its data and public maintained portal there would be need and justification for an audit of all its systems.

12. The affidavit of Koitamet Ole Kina

264. Mr. Ole Kina who averred that he was a duly accredited agent nominated by the National Super Alliance (NASA) for the 8th of August 2017 general elections swore that he arrived at Bomas of Kenya August 8, 2017 at 1630hrs to activate his access card which took him about one hour. He asserts that he converged with fellow agents and at about 5.15pm the results started streaming in at the IEBC portal.

265. It was his testimony that his team realized that there was no way to verify the results as they were not accompanied by the hard copies of Forms 34A or the soft copies that IEBC was receiving from their server. They approached Commissioners Professor Guliye, Roselyn Akombe and the CEO Ezra Chiloba and requested them to avail the Forms 34B for purposes of verification of the results.

266. He avers that they waited for the response which was not forthcoming. As a result they requested for a meeting with the Commission. At the meeting, they raised their issues regarding the results. He averred that Professor Guliye asked Saffron consultants to access the document which they stated they could not. He asserted that Prof. Guliye explained that while the data had arrived, it was unaccompanied by the required image. Therefore, the deponent asserted, they had to wait to upload as soon as the KIEMS kit was taken to a physical location with either 3G or 4G. He averred that the consultant stated that there was a possibility that the data would not come at all.

267. He asserted that they pressed on for a solution to the problem, and agreed that an access point in form of an email would be created. Further, he added that the link provided was not working and the IT team took the whole night trying to access it but was only able to access one Form 34A on the morning of 9th of August 2017 but eventually, the credentials granting them access was revoked.

268. It was his testimony that on the 9th of August 2017, they approached the issue of verification and challenges in accessing forms again with the Chief Executive Officer of the 1st Respondent and were promised that they would be able to have access to 11,000 Forms 34A by the Commissions Director of ICT Mr. Muhati. They were asked to provide a two-terabyte external hard disk for the copies to be availed which they did but they only received 6,000 of the anticipated 11,000 soft copies.

269. He asserted further, that on the 10th of August 2017, the Commission continued to transmit unverifiable results implying that the same was verified. He indicated that this was pointed out to them, and they arranged for a meeting the next morning. It was his testimony that by the end of that day, the Commission was only able to supply 23,000 Forms 34A and about 50 Forms 34B.

270. In respect of the same, he averred, that his team officially wrote to the Commission highlighting their issues but no response was received. Further, he asserts that they agreed to an informal meeting, in which the NASA deputy Chief Agent Ms. Ogla Karani outlined discrepancies and inconsistencies in the results that were live streaming as well as those in the Forms received, and it was agreed that the Commission would respond immediately. It was further agreed that only those results with verifiable Forms 34A and 34B would be declared.

271. It was his testimony that on the 11th of August 2017, when all indications were that the Commission was ready to declare the results, he approached the Commission on request for the remaining 34As and was told that as at that moment there were only 29,000 available forms putting those pending at over 11,000. They were assured that the declaration could not be made without the remaining forms.

272. He swore that the Petitioners and the Chief Agent approached the Commission on the same issues and were reassured that results would not be transmitted until they were verified; that the commission would follow the law.

273. He deposed that his team was approached by Commissioner Lucy Ndung'u the Registrar of Political Parties to sign the Forms 34As, implying that despite assertion by the Chairman that he would not announce unverifiable results there was a possibility that he would do so. It was his assertion that the Registrar could not deny or confirm this. It was also averred that the Commission was not able to supply the remaining Form 34As and that although the chairman had at that time claimed that 288 Forms 34B had arrived, there were only 108 available at the tallying center.

274. It was his testimony that at 8:00 p.m. the Commission summoned them to a meeting where they were informed that they had received all the requisite Forms 34B and verified them and that the chairman was going to make a declaration. He deposed that the NASA team was asked if they were ready to sign the results which it declined to do on the basis that their request to be supplied with the forms had gone unheeded.

275. It was asserted further that on the 14th of August 2017 Ms. Ogla Karani formally wrote to the Commission requesting for the remaining forms and the 1st respondent replied indicating that the Forms 34B were available immediately but the Forms 34A were not available but would be availed as soon as it was possible to do so.

276. He averred that on 15th of August at around 1630hrs he received a phone call from a Mr Abednego Ominde, Ezra Chiloba's personal assistant requesting him to go and collect 5,150 scanned copies of Form 34A that were now available. In addition he stated that Ezra Chiloba did so in response to pressure from the public and the Petitioners on the non-availability of Forms 34A therefore questioning the authenticity of the results; especially seeing that the

results were announced without 10,000 Forms 34A and 187 Forms 34B. He stated that there was still a balance of more 5,000 forms to be supplied by the Commission. Mr. Ole Kina also attached Mr. Chiloba's letter dated August 15, 2017, addressed to Ms. Ogla Karani and reads as follows:

> -Reference is made to your letter dated 10th August, 2017 and August 14, 2017.....On 11th August 2017, the Commission supplied you with 29,000 Form 34As and 103 Form 34Bs as stated in your letter dated August 14, 2017. On August 14, 2017, you were supplied with the balance of 187 Form 34Bs which were collected by one Mr. Ole Kina. The CEO advised Mr. Ole Kina to visit our offices today, Tuesday August 15, 2017to collect additional Forms. Enclosed herein are 5,015 Form 34As part of those that had not been scanned. Please note that all the 40,883 Form 34As shall be made available at www.forms.iebc.or.ke So far, up to 35,314 Forms 34As can be found on the public portal....

277. Mr. Ole Kina averred that the chronology of the events pointed to the fact that the determination on the part of the 1st respondent to declare results that could not be verified as required by law. It was his evidence that 1st respondent is on record confirming the nonavailability of a substantial number of Forms 34A and 34B hence calling into question the authenticity of the results that were declared on the 11th of August 2017.

278. In conclusion he averred that the massive irregularities, discrepancies and anomalies contained in the Affidavit of Dr. Nyagasi Oduwo show that the 1st respondent's decisions were misinformed and are based on information incapable of verification as to their accuracy, transparency and credibility.

279. The letters annexed in evidence indicate that there was a delay in availing copies of the prescribed forms to the petitioners. However, it is evident from the letter by the 1st respondent to Ms. Olga Karani dated August 15, 2017that 29,000 Forms 34A had already been availed to the petitioners on August 11, 2017 together with 103 Forms 34B. On August 15, 2017, additional Forms 34A which were 5,015 in number were supplied enclosed with the said letter. It is also clear that the petitioners were informed that 35,314 Forms 34A were already available on the public portal and that all the 40,833 Forms 34A would be available on the said portal.

280. Mr. Ezra Chiloba in his affidavit controverts the allegation that the said forms were not supplied to the petitioners. He avers that the forms were supplied and attaches the said letters in evidence.

281. The allegation made by the petitioners is that since the Forms were not availed to them promptly then the 1st and 2nd respondents ' decisions were misinformed and were based on

information that was incapable of verification. This is intended to advance the claim of the petitioners that the election did not comply with article 81 and 86 of the Constitution.

282. I am conscious of the need by major stakeholders, in a process such as the one forming the subject matter of the present petition (the Presidential election), to gain access to all the relevant documents containing all the material facts relating to the process. Therefore the need for the petitioners to get all the relevant forms from the 1st respondent was completely justifiable. However, I am alive to the fact that the 1st respondents have been tasked with an immense constitutional mandate to conduct six elections on the same day which run concurrently. Though that is humanly possible it is a daunting task to count, tally and verify the results of all the six elections and more specifically the Presidential election within the Constitutional timeline of seven (7) days from the date of the election.

283. One cannot lose sight of the fact that the 1st respondent's officials had been working round the clock during the election period, therefore the reduced efficiency that ordinarily comes with long working hours and lethargy are inevitable irrespective of a person's will power to efficiently accomplish such a sacrosanct process that normally comes once in every five years. In my opinion the performance by the 1st respondent and availing all the Forms 34B to the public and to the petitioners within 4 days of the declaration is commendable in view of the fact that the KIEMS system was being used by the 1st respondent for the first time. The delay by the 1st respondent of about four days to supply the petitioners with the Forms 34A cannot be construed to be completely unwarranted under the circumstances.

284. It is imperative to state that after the Commission has declared the election results it becomes *functus officio* and it has nothing more to do with the concluded election. It was so held by this Court in *Joho* that [paragraph 65]:

> "-The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer. Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning off icer, according to regulation 83(3), terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the returning officer's mandate, thus shifting any issue as to validity, to the election Court. Based on the principle of efficiency and expediency, therefore, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer.

285. This was reinforced by the Court in *George Mike Wanjohi* in which this Court held that once a declaration of results is made by the returning officer the Commission becomes functus

officio and any alteration of the declared result has to be by an Order of the Court. The Court held that [paragraph 111]:

> "-The Returning Officer having declared the 1st respondent as the winning candidate, and duly issued the Form 38, became functus officio. There is neither scope for the Returning Officer to withdraw a declaration of the election result once made, and to cancel the certificate issued in favour of the winning candidate, nor is there a mandate to rectify the Form 38. Once the votes are polled, counted and results declared, it would be perilous to allow the Returning Officer to nullify the result, purportedly in rectification of some error. This would not only affect the very sanctity of the election process, but also encroach on the powers of theElection Court.

286. Having said that, it is necessary to state that going forward, if after the Presidential election results have been declared, a person is desirous of accessing the prescribed declaration forms relating to the Presidential election which the law does not expressly stipulate are to be availed to a party, such a party should seek access to such forms through the Court.

13. The Replying Affidavit of Immaculate Kassait

287. Ms. Immaculate Kassait deposed that she is the Director Voter Registration and Electoral Operations of the 1st Respondent. She averred that her duties included the management of electoral processes, voter registration processes (voter registration strategies and inspection of voters' register), electoral operations among others.

288. In response to Dr. Nyangasi's supporting affidavit she deposed that in most polling stations voting commenced at 6.00am and ended at 5.00pm after which the counting of votes began. Further, she averred that there were a number of polling stations in which voting process was delayed for some reasons and cited Turkana County as one of the Counties affected by floods and the voting materials had to be airlifted which in turn delayed the voting process.

289. She asserted that it was erroneous to state that Forms 34A from the polling station were the final results. She deposed that the Court of Appeal in the Maina Kiai case ruled that the electronically transmitted image of Form 34B is the final result for the Presidential Election with respect to each Constituency.

290. In response to the aspersions cast on the practicality of streaming results shortly after close of polling stations she averred that it was possible to count and tally votes in polling stations which had between 1-10 registered voters. She pin-pointed polling stations such as Boyani Primary School in Matuga Constituency, Arabrow in Wajir South Constituency, Ya algana in

North Horr Constituency which all had 3 registered voters, and Lowangina Primary School, in Tigania East Constituency which had one registered voter.

291. In respect of the constant 11% difference as alleged in the affidavits in support of the petition the deponent denied the same. She displayed a table in her affidavit based on thirty-minute interval analysis of the data which showed that the percentage ranged from 9.095 to 25.573.

292. She averred that the 2nd Respondent clarified that the statistics not backed by Forms 34A or 34B, including the statistics that were being projected on the National Tallying Centre's Television screens were not the final result.

293. She deposed that the 1st respondent did not chase away the agents of the petitioner in central Kenya and Rift Valley asserting that there was no evidence to substantiate that claim. Further, she averred that contrary to the claims in Dr. Nyangasi's affidavit, Ruai Girls Secondary School was a polling centre in Kasarani Constituency of Nairobi County with 13 polling stations and not a polling station. In addition, she deposed that in the said polling centre, the petitioners' agents duly executed Forms 34A in all polling stations.

294. She averred that the tallied votes for the 1st petitioner that were transmitted from the KIEMS kit in terms of text and image of the Form 34A URA Tea buying polling station 2 of 2 was 56 votes and not 66 votes as alleged in the supporting affidavit.

295. She denied Dr. Nyangasi's assertion that in Amwamba Primary School Polling Station in Igembe South, Meru County, the total tally for Odinga Raila was 323, while Form 34B in respect of the same polling station indicated 325 votes. She averred that Amwamba Primary School had two polling stations; in polling station 01, the 1st petitioner had an agent. She deposed that the total tally for the 1st petitioner in polling station number 1 was 51 votes. Further, she asserted that neither the 1st petitioner nor the 3rdrespondent had agents in polling station 02. She added that the 1st petitioner's tally in polling station 02 was 32 votes. In support of those assertions is a copy of the Form 34B annexed as evidence.

296. She admitted there was a data entry error leading to the 1st Petitioner who garnered 561 votes being shown as having received only 2 votes. She cited in support of these assertions the affidavit of John Ole Taiswa which set out the particulars of the circumstances under which the error occurred. It was also admitted that there was a data entry error leading to the 1st petitioner who garnered 437 votes being shown as having received only 4 votes. She deposed that the full circumstances as to how those errors occurred were set out in the affidavit of Rebecca Abwaku.

297. She denied the allegation that a partial form 34B was uploaded in respect of Karachuonyo Constituency. Instead, she asserted that the whole Form 34B was uploaded and was available online and she annexed a copy of the said Form 34B.

298. She denied the allegation that in Kilome Constituency, Makueni County, the original IEBC Form 34B reflected 38,269 votes while that uploaded in Commission's portal showed 33,757 thereby creating a variance of 4,512 votes. It was here assertion that the Form 34B as uploaded onto the online portal and the original Form 34B indicated a figure of 38,285 as valid votes cast. Further, she deposed that the reference to 33,757 votes in the said Form referred to the votes cast for the 1st petitioner.

299. The deponent refuted the allegations that in Igembe South, Meru County, the total number of votes in Forms 34As for the 1st petitioner was 41,834 yet according to Form 34B in the Commission's portal his total votes were 43, 209. She deposed that the accurate figure which was reflected in the uploaded Form 34B was 50,931 votes as opposed to the figures alleged.

300. She admitted that there was a clerical error in Form 34A submitted by the Petitioner's agent in respect of Mungoye Pimary School Polling Station Number 1, West Bunyore, Emuhaya Constituency, Vihiga County where a variation of -10 votes against the entry made on Form 34B.

301. She denied the allegation that the Form 34A in respect of St. John's Primary School Polling Station, Makongeni Ward, Makadara Constituency, Nairobi County, indicated the total number of valid votes casts as 468 against the entry on Form 34B which was stated to be 467.

302. Likewise, she denied the allegation that there was a variance in the Form 34B keyed in the KIEMS kit and that projected at the National Tallying Centre in of Morrison Primary School Polling Station Number 6 of 9 as alleged. She admitted that there was a clerical error which created a discrepancy in Form 34A of 6 votes.

303. It was admitted that there was a discrepancy in Forms 34A and 34B in respect of Rabai Road Primary School Polling Station Number 1 of 4, Harambee Ward, Makadara Constituency, Nairobi County due to a transcription error. She deposed that this had no material effect on the results, adding that the circumstances were explained in the affidavit of Moses Nyongesa Simiyu.

304. The deponent admitted that the Form 34A submitted by the Petitioner's agent in respect of Kaloleni Primary School Polling Station Number 8 of 10, Makongeni Ward, Makadara Constituency, Nairobi County, which indicated that the total number of rejected votes to be 4 while Form 34B in the portal did not indicate any rejected votes, had a transposition error.

305. The deponent averred that there were no discrepancies between Form 34B for Embakasi South Constituency and Form 34A for Jobenpha Community School Polling Station Number 17 of 21, Kware Ward, polling station.

306. She admitted that there was a discrepancy between Form 34 A and Form 34B regarding the votes for the 3rdrespondent in respect of Kewi – South C Polling Station Number 3 of 8, South C Ward, Langata Constituency, Nairobi County. However, she denied that there was a discrepancy between Form 34A and Form 34B in respect of both Nyandiwa Primary School Polling Station Number 2 of 2, Bogetenya Ward, South Mugirango Constituency, Kisii County and Omgogwa Primary School Polling Station Number 1 of 1, Bosetenya Ward, South Mugirango, Constituency, Kisii County.

307. It was admitted that there was an arithmetic error in Form 34A and Form 34B in respect of Manywand A' Primary School Polling Station Number 2 of 2, Boikanya Ward, South Mugirango Constituency, Kisii County. However, she deposed that the aggregate votes cast for each candidate in Form 34A showed that there were 300 valid votes cast which was reflected in Form 34B. She annexed as evidence the relevant Forms 34A and Form 34B.

308. It was denied that there were any discrepancies in Forms 34B and 34A in respect of Kiru Primary School Polling Station Number 1 of 2, Bokimonye Ward, Bomachoge, Borabu Kisii County. She asserted that Form 34B and the result keyed in the KEIMS kit and projected at the National Tallying Centre tally all matched showing 338 total votes. She however admitted that there was a computation error in Form 34A.

309. The deponent denied that there was a variance in Form 34B that indicated 4 rejected votes and Form 34A that did not indicate any rejected votes in respect of Nyanturago Tea Buying Centre Polling Station Number 2 of 2, Beno Ward, Nyaribare Chache, Kisii County. She however admitted that there was a clerical error in that Form 34A indicated 4 rejected votes, while Form 34B indicated 5 rejected votes.

310. It was denied that in Kiogoro Tea Buying Centre Polling Station Number 2 of 3, Kiogoro Ward, Nyaribari Chache-Kisii County, the Form 34As had a total of 516 votes compared to Form 34B which indicated 561 votes, thereby having an increased variation of 45 votes. She however indicated that Form 34A of this polling station indicated no rejected votes, while Form 34B indicated 2 rejected votes revealing a variance of 1 rejected vote.

311. She admitted that the Form 34A submitted by the Petitioner's agent in respect of Keoke Primary School Polling Station Number 1 of 2, Bironyo Ward, Nyaribari Chache, Kisii County, indicated 4 rejected votes while the IEBC Form 34B did not indicate any rejected votes which according to her was a transposition error.

312. In respect of the allegation that the Form 34A submitted by the petitioners' agent in Irondi Primary School Polling Station Number 1 of 1, Birongo Ward, Nyaribari Chache, Kisii County, indicated 3 rejected votes while Form 34B of the IEBC had no rejected votes and the allegation that there was a discrepancy as the total number of votes in Form 34A was 410

and Form 34B recorded 413, she averred that the valid votes cast in respect to the candidates when tabulated was 410. She deposed that the minor variance between the Form 34A and Form 34B was occasioned by a clerical error.

313. The deponent admitted that the Form 34A submitted by the petitioners' agent on Amabiria Primary Polling Station Number 1 of 1, Keumbu Ward, Nyaribari Chache Constituency, Kisii County indicated the total votes at 273 against 377 votes in Form 34B in the uploaded Commission's portal. She also admitted that the 3rd respondent's votes recorded in Form 34A were 138 while those recorded in Form 34B were 238, thus creating 100 extra votes in his favour. She deposed that the circumstances leading to the variance were set out in the affidavit of Julius Meja Okeyo.

314. It was admitted that the Form 34A submitted by the petitioners' agent in respect of Sosera Primary School Polling Station Number 1 of 2, Nyamasibi Ward, Nyaribari Masaba Constituency, Kisii County, recorded 386 total votes while those in the IEBC's Form 34B were 383. She deposed that it was a transposition error.

315. In response to the allegation that there was a discrepancy in the recorded votes in the Form 34A submitted by the petitioner's agent which recorded 273 votes in respect of Ibacho Tea Buying Centre Polling Station Number 2 of 2, in Kiamokama Ward, Nyaribari Masaba Constituency, Kisii County, while the Form 34B indicated 272 votes, it was deposed that the correct number was 272 votes and 273 votes was an erroneous record.

316. She denied that there were any discrepancies in Form 34B, which was alleged to record 340 votes, and Form 34A, which was alleged to indicate 343 votes, in respect of Ekemuga Primary School Polling Station Number 1 of 1, Ichuni Ward, Nyaribari Masaba Constituency, Kisii County. She asserted that the valid votes cast were 340 and the 3 extra votes were rejected votes.

317. The allegation that the Form 34B, recorded 260 votes, and Form 34A, indicated 261 votes, in respect of Kiamokama Township Primary School Polling Station Number 1 of 2, Gesusu Ward, Nyaribari Masaba, Kisii County, was denied. She swore that the total number of votes recorded and transmitted were 260. The deponent admitted that there was a variance in the Forms 34A and 34B as alleged with regards to Kiomiti Primary School Polling Station Number 2 of 2, Gesusu Ward, Nyaribari Masaba Constituency, Kisii County. She deposed that while it was alleged that Form 34A recorded 356 votes, the correct number of votes was 354 and the variance occurred due to a transposition error.

318. The deponent admitted that there was a variance in the Forms 34A and 34B as alleged with regards to Kiomiti Primary School Polling Station Number 2 of 2, Gesusu Ward, Nyaribari Masaba Constituency, Kisii County. She deposed that while it was alleged that Form 34A

recorded 356 votes, the correct number of votes was 354 and the variance occurred due to a transposition error.

319. The deponent averred that in respect of Riasongoro Tea Buying Centre Polling Station Number 1 of 1, Kiamokama Ward, Nyaribari Masaba Constituency, Kisii County there were only data entry errors. She asserted that Kaluyu Japheth Kavinga was recorded as having 1 vote in Form 34B while Form 34A indicated that he received 2 votes.

320. She denied the allegation that the Form 34B was missing in respect to Getare Tea Buying Centre Polling Station Number 1o 2, Ichuni Ward, Nyari Bari Masaba, Kisii County. It was her assertion that both Forms 34A and 34B indicated a similar record of votes.

321. Ms. Kassait also denied the allegations that there was a variance in Forms 34A and 34B in respect of Suguta Primary School Polling Station Number 1 of 1, Baasi Central Ward, Bobas Constituency. She swore that contrary to the allegations in the supporting affidavit of Dr. Nyangusi, the recorded votes in both forms were 508.

322. Similarly, she disputed the assertion that there was a discrepancy in the recorded votes in both Forms 34A and 34B in Bokinibanto Primary School Polling Station Number 1 of 1, Masige East Ward, Boasi Constituency, Kisii County. She deposed that both forms indicated 483 votes.

323. She refuted the allegation that there was a variance in Forms 34A and 34B in respect of Rusinga Primary Polling Station Number 1 of 2, Bobasi Constituency adding that the alleged votes received were false.

324. It was admitted that the Form 34A submitted by the petitioner's agent with respect to Nyabieyo Primary School Polling Station Number 1 of 1, Bomariba Ward, Bonchari Constituency, Kisii County, recorded the 1st petitioner as having 228 votes as compared to Form 34B where he was recorded to have 0 votes. She referred to the affidavit of David Kipkemoi Cherop to provide the relevant explanations.

325. The deponent admitted to a clerical error in Forms 34A and 34B in respect to Nyamiobo S.D.A. Primary School Polling Station Number 1 of 1 Majoye Ward, Bomache Chache Constituency, Kisii County. She swore that that the correct number of votes cast was 405 as opposed to the 407 that was recorded in error.

326. It was admitted that there were arithmetic errors in Musunji primary School Polling Station Number 2 of 2, Shiru Ward, Hamisi Constituency, Vihiga County in the statutory Forms in respect of the 1st petitioner's votes. Form 34A indicated that he had 357 and 34B indicated 356 votes. She similarly admitted to such error in Nyalendaa Community Hall Policing Station Number 5 of 6, Kisumu County where she deposed that the 3rdrespondent was

denied 12 votes. Similarly, she admitted to a variance of 1 vote in Wandiege Primary School polling stations where Form 34A indicated 503 against Form 34B‘ 504.

327. She refuted that there was any variance in the total number of votes recorded in the statutory forms in respect of both Angira Primary School Polling Station Number 2 of 2, Kajuu Ward, Kisumu East Constituency, Kisumu County and Nyanchenge Primary polling station number 1 of 2 in Bobasi Constituency in Kisii County.

328. She admitted to minor variances the Statutory Forms in Rusinga Primary polling station number 1of 2 within Bobasi Constituency in Kisii County due to a mathematical error and in respect of Amabiria Polling Primary number 1 of 1, Nyaribari Chache Constituency Kisii where the votes for 3rd respondent were increased by 100 votes. She deposed that the variance was explained in Julius Meja Okeyo‘s affidavit.

329. She refuted that the petitioners‘ votes in Nyabieyo Primary Polling Station 1 of 1 Nyaribari Chache Constituency Kisii were deducted by 228 votes.

330. Dr. Nyangasi‘s allegation that there was any variance in the number of votes recorded in the statutory forms in respect of: Maturu Primary Polling station 2 of 2 in Lugari Constituency Kakamega; Cheptoroi Polling station 2 of 3 in Njoro Constituency Nakuru and Kapkures Health Polling Station number 7 of 7 Nakuru county, was denied.

331. The deponent admitted that there was data entry error in Form 34A in respect of Kiptembwo Primary Polling number 4 of 8, Nakuru Town West Constituency where the votes for petitioner were deducted by 229, while 288 votes were added to the 3rd respondent. She averred that the circumstances leading to the variance were explained in the affidavit of Gilbert Serem.

332. The deponent denied that the 3rd respondent‘s votes in Ilomotioo Primary Polling Station number 1 of 1 in Kajiado Central Constituency were increased by 10 votes. She confirmed that the 3rd respondent garnered 234 votes from the said station as reflected in both Form 34A and 34B and not 224 votes as alleged Dr Nyangasi.

333. She refuted Dr. Nyangasi‘s allegations that there was any variance in the number of votes recorded in the statutory forms in respect of: URA Tea Polling Station number 2 of 2 Igembe South Constituency; Kiyanka Primary polling station number 2 of 2 Igembe South Constituency in Meru County; Kiegoi Primary polling station 2 of 2 in Igembe South Constituency and Nkiriana polling station number 1 of 2 in Igembe South Constituency in Meru.

334. The deponent admitted that there was a clerical error in Dandora III City Council Hall polling station number 9 of 9 in Embakasi North Constituency Nairobi where 2 votes were deducted from the petitioner‘s tally from 214 votes to 212.

335. The deponent admitted that there was a clerical error of wrong entry in Migori Main Prison polling station 1 of 1, Suna Central Ward, Suna East Constituency where the 1st petitioner's 12 votes were wrongly entered as votes for Nyagah Joseph.

336. Also admitted was the fact that there was a clerical error of wrong entry in Waitharaga Primary School polling station number 1 of 1 Suna Central, Suna East Migori county where petitioners 359 votes were wrongly entered as votes for Nyagah Joseph.

337. The deponent denied Dr. Nyangasi's allegation that the 1st petitioner garnered 663 votes from Nyarongi Primary School polling station number 1 of 2 Kakrao Ward, Suna East, Migori County and that his votes were reduced by 331 to 332 votes. She averred that registered voters in that station were 382 and thus it was impossible to for the petitioner to garner 663 which was more than the registered voters.

338. Ms. Kassait denied Dr. Nyangasi's allegations that there were instances of different presiding officer signing for another or voting presided over by ungazetted presiding officers.

339. It was denied that the 3rdrespondent's votes from Isiolo North Constituency were inflated by 5,422 votes or that there were inconsistencies between forms 34As and 34Bs. She added that there was no evidence of such variance, noting that Form 34B was duly filled. She deposed that handover section could not be filled because the Forms had to be sent to NTC electronically and not physically by returning officers. In support of her claim she attached the Form 34B.

340. The deponent denied that the 3rdrespondent's votes from Loima Constituency Turkana County were inflated by 7,934. She refuted the allegation that the Form 34B was blank asserting that it was filled, signed and stamped by the returning officer and agents as required by the law.

341. She refuted the allegation that there was a polling station named Nyakwara Primary School in Funyula Constituency which had 339 votes cast therefrom or that the candidates were only apportioned 13 votes. She was emphatic that polling station non-existent, hence no results could originate from a non-existent polling station.

342. The deponent refuted that in Busijo Primary School in Funyula Constituency total rejected votes exceeded the registered votes or that the hand over section of Form 34B was not filled as required by law. It was her testimony that the handover notes were not a legal requirement. She was emphatic that the Court of Appeal had held that the Forms 34B were to be sent electronically to the NTC. Further she deposed that it was not conceivable that the Returning Officer could have physically handed over and signed the section to the 2nd respondent at the NTC.

343. The deponent denied the allegations that the 3rdrespondent's results from Rabai Constituency, Kilifi were inflated by 83 votes and there was lack of handover notes. Similarly, she denied the allegations that in Maara Constituency, Tharaka Nithi, that the Statutory Forms were signed by a stranger and not the presiding office and that there were no handover notes. She deposed that Obadiah Kariuki Gacoki who signed form 34B was a duly gazetted returning officer. However, she deposes that the statistics projected in the online portal at the NTC were not a representation of the results.

344. The deponent denied that results posted in the online portal from Kipipiri Constituency, Nyandarua County were different from those in Form 34As, or that there was inflation of rejected votes from 92 to 1087, with lack of handover notes. In response she stated that the results projected in the online portal was not representation of the results.

345. The deponent denied the allegations that there were inflated votes in Ndaragwa Constituency, Nyandarua County by 153 in the online portal, inflation of rejected votes in the portal from 477 in Form 34B to 1,031 or that results for the 2nd respondent in Form 34B were 45,197. She deposed that 2nd respondent was not a candidate so results could not be allocated to him in form 34B, but that in any event the figure in the Form 34B was 44,595 votes not as alleged.

346. The deponent admitted that the rejected votes in respect to Ol-jorok Constituency, Nyandarua County were 121 and that the 1st petitioner garnered 515 votes. However, she denied that there were discrepancies of the rejected votes as reflected in the portal at 1, 233 and that announced at 121. She further denied that the 1st Petitioner was denied 2 votes as alleged.

347. She refuted the allegations in Doctor Nyangasi's Supporting Affidavit that there was variance in respect to total rejected votes in Tarbaj Constituency, Wajir County where the portal indicated total of 475 rejected votes whilst Form 34B indicate a mere 31 rejected vote. It was further alleged that the said Form 34B lacked evidence of hand over notes. She deposed that the total rejected votes indicated in Form 34B were 31 as was tallied from Form 34S. She deposed that handing over notes are not a requirement in law and were not applicable to the 2017 presidential election.

348. She denied allegations in the Supporting Affidavit that Form 34B in respect to Uriri Constituency, Homabay County did not indicate the final tally of the presidential candidate and that the results in the Commission portal indicated 1078 rejected votes whilst the Form 34B indicated 125 rejected votes. She averred that the correct results are the ones indicated in Form 34B at a total of 125 as the total rejected votes.

349. The deponent rejected the allegations that there were discrepancies in rejected votes as indicated in the portal as 860 as against the Form 34B which indicated 114 rejected votes in respect of Baringo Central Constituency, Baringo County. On the contrary, she averred that the correct number of total rejected votes was 121 as reflected in Form 34B and that the said figure matched the ones reflected in Form 34A.

350. The deponent denied that Forms 34A and 34B in respect to Kathiani Constituency, Machakos County; Chepalungu Constituency, Bomet County; Marakwet Constituency, Elgeyo/Marakwet; Sigowet/Soin Constituency, Kericho County; Changamwe Constituency, Mombasa County; Wajir North Constituency, Wajir County; Dagoretti Constituency, Nairobi County; Kericho County Yatta Constituency, Machakos County; Mwatate Constituency, Taita Taveta County; Voi Constituency, Taita Taveta County; Lamu East Constituency, Lamu County; Malindi Constituency, Kilifi County; Yatta Consituency, Machakos County; Eldas Constituency, Wajir County, Kuresoi Constituency, Nakuru County; Likoni Constituency, Mombasa County; Sigor Constituency, West Pokot County; Ndhiwa Constituency Homabay County; Kieni Constituency, Nyeri County; Kajiado Central Constituency Kajiado County; Belgut Constituency lacked handing over notes and bore no indication of date and time for handing over of the forms contrary to law. She deposed that the handing over notes are not a requirement in law and were not applicable in the 2017 presidential election as Form 34B was sent electronically and not physically taken to the National Tallying Centre physically.

351. In response to unstamped Form 34B's such as that alleged in Changamwe Constituency, Mombasa County, and Form 34As in Sigowet/Soin Constituency, Kericho County; Wajir North Constituency, Wajir County; Mukarara and Waithaka polling stations in Dagoretti South Constituency; Malindi Constituency, Kilifi County; Likoni Constituency, Mombasa County; Ms. Kassait deposed that while it was procedural to stamp an unstamped form could not be a basis for disenfranchising voters.

352. The deponent denied the allegations in the Supporting Affidavit that in Mwala Constituency Machakos County that there was a variance in the total rejected votes indicated in the portal and the Statutory Form 34B. She annexed the Form 34B marked as evidence.

353. She refuted the allegation that in Bureti Constituency, Kericho County, the summation of votes for the 3rd Respondent in the portal were 65,284 whilst those for the 1st petitioners were 3,106 yet in the Form 34B the 3rdrespondent was indicated to have garnered 56, 259 votes and the petitioner 3,106 votes. It was her assertion that the correct results were the ones indicated in Form 34B. She attached as evidence the Form 34B marked.

354. She denied that the 3rdrespondent's votes were inflated in: Marakwet Constituency, Elgeyo/Marakwet by 93 and Sigowet/Soin Constituency, Kericho County by 100 votes.

355. It was denied that in Wajir North Constituency, Wajir County the 3rd Respondent's votes were inflated by 282 votes. She disputed the allegation that there was a variance in the rejected votes in the portal and those Form 34B. She deposed that the correct number of the rejected votes were those found in Form 34B.

356. She also denied the allegation that there were discrepancies in the number of rejected votes in Voi Constituency, Taita Taveta County as recorded in the portal against the Form 34B. She deposed that the corrected number of rejected votes was 260 as indicated in Form 34B.

357. In respect of the allegations that in Mavoko Constituency, Machakos County, Jetview polling station, there was a variance in the number of votes recorded in the Statutory forms favouring the 3rd Respondent to the detriment of the 1st petitioner she denied the allegation and refuted that no Form 34A was submitted in respect of Githunguri polling station.

358. The deponent denied the allegations that the stamp used in Eldas Constituency, Wajir County was not the official IEBC Returning Officer's stamp and that the Returning Officer did not indicate his/her name on the Form. She deposed that an authentic stamp was utilized and there was no basis for invalidating Form 34 for Eldas Constituency.

359. The deponent rejected the allegation in the Supporting Affidavit that in Embakasi Central Constituency, Nairobi County there was a discrepancy in the columns of valid votes and valid votes tally in the following polling stations: Kayole North, Imara Primary, Bondeni Primary, Thwabu Primary and Mwangaza Primary. She deposed that the total votes with respect to Mwangaza Primary for each candidate were captured correctly as they were indicated in Forms 34A and 34B. She also denied the allegation that the official IEBC stamp was not used.

360. The deponent admitted that there was a variance in votes in Gem Constituency, Siaya County. She averred that there was a variance between the total votes tallied and the total valid votes that led to 461 unaccounted votes. She stated that this was a data entry error. She deponed that this did not mean the votes were deducted from the 1st Petitioner. She stated that the 1st petitioner's votes were correctly reflected and remain unaltered and it was the other candidates whose votes were affected.

361. She denied the allegations in the supporting affidavit that in Sigor Constituency, West Pokot County, that Form 34B was signed by unknown persons whose name was not stated. It was her evidence that the form was signed by the gazetted Returning Officer for Sigor Constituency.

362. The deponent refuted the allegation that in Starehe Constituency, Parkroad Primary School, there was 1 rejected vote not captured in Form 34B and that the stamp used in the Form did not match the IEBC Returning Officer's stamp. She also denied allegations that the Form

was unsigned and gave no reasons for absence of signatures. She averred that the Form 34B indicated the number of rejected votes as 24, and that the stamp used on the form was that of the Returning Officer issued by the 1st Respondent. She swore that the agent duly appended his signature to the form including his name, ID number and Contact.

363. With regards to the allegations made in Turbo Constituency, Uasin Gishu County that there were discrepancies in the votes cast and tallied, she admitted that there was a computation error in respect to the votes cast. She deposed however, that the valid votes for each of the Presidential candidates was accurate. She attached as evidence the Form 34B for Turbo Constituency marked as EC.10. The deponent further denied that unsinged and undated Forms in that Constituency were not handed over in the prescribed manner, had discrepancies in the tally of votes, and that the handover was done by an ungazetted person.

364. She denied the allegation that in Turkana Central Constituency, Turkana County, the Forms did not indicate a date or time and was not handed over in the prescribed manner. She further denied that the portal indicated 1,393 rejected votes while the petitioner's votes were reduced by 7 votes. She asserted that the rejected votes were 156 and not 1,393 as alleged and tendered in as evidence the relevant Form 34B as an annexure marked-EC.11.

365. She refuted the allegation that in Kipkelion West Constituency, Kericho County, Kipkelion Primary School polling station had discrepancies in Form 34A and 34B decreasing the Petitioners votes. It was her evidence that Kipkelion Primary School had two polling station where Raila Odinga had 61 votes and the same is reflected in 34B while the 3rdRespondent garnered 269 votes as indicated on Form 34A properly reflected in Form 34B.

366. She denied the allegation that in Kipsigei Primary School, Simotwet Pry School, Kaula Nursery School, Kimologit Pry School, Lelechwet Primary School, Siret Pry. School, Kapkese Pry School, Kaplelit Pry School, Murgut Pry. School, Chilchila Pry School, Bararget Cooperative, Tunnel Pry. School, Boror Nursery School, Koisagat Pry School, Smolel Pry School, Magire Pry School, Cheborus Nursery School, the requisite Forms were unstamped.

367. The deponent refuted allegations that in Emurua Dikir Constituency, Narok County that Forms were not handed over in the prescribed manner and that Form 34B indicated the 3rdrespondent garnered 22,213 votes while the portal indicated 21,910 votes. She averred that the total number of votes garnered by the 3rdRespondent was 22,313 and the same was confirmed by both Form 34A and 34B.

368. The deponent denied the allegations that in both Bahati Constituency Nakuru County at Dundori Primary School and Dundori Youth Polytechnic there were discrepancies in Forms 34A and 34B in the votes for the 3rdRespondent.

369. The deponent admitted that in Ndia Constituency, Kiangai Primary School Form 34A indicated that the 3rdRespondent got 461 votes while Form 34B indicated he got 467. She attributed this to data entry error. She denied the allegations that the Forms were not handed over in the prescribed manner and that they were not stamped.

370. She denied the allegation that in Othaya Constituency, Nyeri County the Forms lacked handing over notes and that Form 34B indicated the 3rdRespondent garnered 51,186 votes while the portal indicated he had 51,184 votes. It was further alleged that the rejected votes were at 72 while the portal indicated 124. It was her evidence that the 3rdRespondent garnered 51,186 votes and that the rejected votes are 74 and not 124 as alleged.

371. The deponent admitted that in Naivasha Constituency, Nakuru County, there were some arithmetic errors in completing Forms in Bishop Ndingi Sec School, Unity Farm Nursery, Manera Pry School, Lakeview Pry School, Kihoto Trading Centre, Ngeya Pry School, Shermoi Pry School, Sher Social Hall, Rev. Jeremiah Primary School and Mununga Primary School. She denied all other allegations alluding to lack of signed forms and lack of handover notes. She averred that the number of votes cast in favor of each candidate was clearly indicated and that the forms were signed by the Presiding Officer and Party agent.

372. The deponent denied allegations that in Wajir South Constituency, in Wajir County the Form 34B lacked a bar code, and that in Serif Dispensary Polling Station the total valid votes indicated 113 votes but the vote tally was more than the total valid votes.

373. She denied allegations that in Mandera East Constituency the IEBC stamp used was rectangular and different from the circular stamp used on other forms, and that only two agents signed the forms while one did not indicate the date, as well as his/her name.

374. The deponent refuted the allegation that in Lamu West Constituency not all pages and sheets were signed. It was her evidence that there was no requirement in law for signing all pages.

375. The deponent rejected the allegations that in Turkana South Constituency there were discrepancies in the number of valid votes and the summation of votes. She also denied that some Forms were neither stamped or signed in this constituency.

376. She disputed the allegation that Trans Nzoia Constituency had a table format in its Form 34B that included a column reading rejected‘, objected to‘ and disputed‘ not the norm in any other form. She averred that Trans Nzoia is a County and not a constituency therefore there cannot have been a Form 34B in respect to it.

377. The deponent rejected the allegation that in Malava Constituency in Bulupi Pry School, Imbiakalo Pry School, Mukhone Pry School, Chimoroni Pry School, Isanjiro Pry School,

Machemo Pry School, Lwanda Kabras Pry School, Shianda Pry School and Ikoli Pry School; the handing over sections on the forms were not signed and that not all sheets/pages of form 34B were stamped.

378. She admitted that there were discrepancies in Form 34B in Bomet Central Constituency but only to the extent that in Bomet Primary School, the Form did not show any rejected votes although there was 1 rejected vote. She attributed this to a transposition error. All other allegations of use of excessive whiteout and corrected figures as well as those of missing data from 63 polling stations were denied. She also denied that there were discrepancies in the votes recorded in the Statutory Forms in Kabusare Primary School.

379. She denied the allegations that in Kitui South Constituency there were unstamped pages in the Forms, the number of Forms 34As submitted were not indicated, the Returning officer signed the form but did not indicate his name and that no agent of the Petitioner signed the Forms.

380. The deponent denied the allegations that in Elda Constituency the stamp used was not the official IEBC Returning Officer Stamp and the Returning Officer neither indicated his name nor signed the form. It was her evidence that the stamp used was the official IEBC stamp.

381. The deponent disputed the allegation that in Kuresoi North Constituency, no agents signed Form 34B, and that the Form had no indication of receipt/submission of Form 34A and did not have an aggregate. She deposed that the Returning Officer signed, dated and stamped the form and the total number of votes for each candidate were clearly indicated on the Form. She averred that only agents who are present sign forms and that there was no evidence that the Petitioners agents were present.

382. She denied the allegation that there was a discrepancy in the vote tallies in Garsen Constituency in Wardei Primary School. She averred that the actual vote tally was 159 and not 169 as alleged. It was her testimony that the votes garnered by each candidate were entered correctly in Form 34B.

383. It was deposed that there was a variance of 40 votes in Wajir South Constituency (IEBC NTC/080) in terms of the total valid votes. It was averred that this variance was due to a computation error. The deponent denied the allegation that the stamp was not authentic.

384. The deponent admitted that although there was a computation error in both Turbo constituency (IEBC NTC/190) Kapkoross Primary school and Turbo Constituency (IEBC NTC/190) Kapsaos Primary school the total votes cast in respect to every candidate was accurately tallied.

385. She rejected the allegation that in Likoni Constituency (IEBC/NTC/208), Form 34A of Mirima Primary school did not bear any official stamp; an unstamped Form 34A was

transferred to Form 34B; Ushindi Baptist primary school results did not have an official stamp and data of unstamped Form 34A was transferred to Form 34B. She deposed that the Forms 34A of Mirima Primary School and Ushindi Baptist Primary School were duly stamped before the results were transferred to Form 34B.

386. The deponent denied the allegation that in Embakasi Central (IEBC/NTC/176) there were discrepancies in the number of valid votes and valid votes tallyin: Kayole North (18), Imara Primary (18), Bondeni (1), Thwatu (19) and Mwangaza (19). She deposed that the total votes for each respective candidate was captured correctly as they were indicated in Forms 34 A and 34B.

387. The deponent denied the allegations that in Gem constituency, no agent signed Forms 34B; the stamp on the Form 34B was inconsistent with the Returning Officer's official stamp; the final tally was inconsistent with the stated constituency tally of 65,128 valid votes, thus 461 votes not accounted for. She also denied that in Makadara Constituency (IEBC/NTC/186) there was no proper identification of the Petitioners' agent and that not all sheet/pages were stamped with the official IEBC Returning Officers stamp.

388. She admitted there was a computation error in Dagoreti North Constituency where the total valid votes were indicated as 104,789 while a summation indicated 105,840. She agreed with the petitioner that the total number of valid votes received by the candidates was 105,840. She further responded that the Returning Officer's Stamp was authentic and the allegations that the Form did not have a bar code was denied.

389. She rejected the allegation that in Sigor Constituency (IEBC/NTC/044) the name of the Returning Officer was not indicated in the statutory form. She further disputed the allegations that in Starehe Constituency (IEBC/NTC/195) in Park Road primary school, there were vote discrepancies in the Statutory Forms, not all the pages were signed; the stamp used was suspect and only Petitioners' agents appended her signature. She deposed that Park road was polling centre with three polling stations and these allegations were not specific to allow for a response.

390. She averred that on the 5th August 2017 the Chief Executive of the 1st Respondent issued a directive invalidating any ballot paper that was not stamped and directing that the same to be marked as rejected. She stated that the said directive was limited to ballot papers and did not extend to Forms 34A. She deposed that if the intention was for the directive to extend to Forms 34A as alleged in the supporting affidavit, then the directive would have specifically provided so.

391. She rejected in toto the allegation that in the following polling stations, the Form 34A as uploaded in the Commission's portal, were not clear/illegible: Chaani primary school; Miritini World Bank; Jomvuu Kuu primary school 2; Taratibu Social Hall 3; Miririni

primary school 4; Aldinnah nursery 5; Jomvuu nursery 6; Swaleh Khalid Social Hall 7; Nuru CBR 001 8; Nuru Community based Rehabilitation 8; Abu-Ubaida primary 9; Miritim primary school 10; Miritim primary school 11; Railways Station hall 12; Mwamlai primary school 13; Ministry of Water Tanks 14; Mikindani Social Hall 15; Owino Uhuru nursery 16; Kiembeni Baptist primary 21; Mtopanga primary 22; Concordia primary 23; St Joseph Herman primary 25; Kiranzoini primary, Mwamanga; Jogoo; Football Ground; Mbuwani primary; Emgwen primary; Kamkunji Market; Chemalal primary school; Chepkemel primary school; Maraba primary school; Maraba primary school; Union primary school, Railways Dispensary; St Andrews primary school; Railways Dispensary; Radar Station; Lelboinet primary school; Tarus primary school; and Kiptaruso primary. She deposed that all these forms were clear and legible.

392. It was denied that in Kiptendon primary school, Form 34As had not been signed by the Petitioner's agent and the Returning Officer had not indicated the reason for the failure. She deposed that the 1st Respondent did not gazette any polling station or centre known as Kiptendon primary school as alleged. Further, only agents present could sign the relevant forms and no evidence was provided that the petitioners' agent was present and was denied the opportunity to sign the form or refused to sign the same for a valid reason.

393. It was denied that the allegation that in the following polling stations, Forms 34A had been filed by the same person as evidenced in handwriting: Kipkongen primary 48; Bemja primary; Chepsioch 57; Kabusagawat 87; Timbilil primary school 13; Kitum nursery; Cheptabach primary; Siwo Health Centre Taboinyat primary 60; Tartar nursery 62; President 63; Chepngetuni primary 65; Keben primary; Koilot primary school; Kepkechui primary school; Kapsabet Boys primary school; AIC Kosira estate; AIC Baraton; Nandi primary school; Kamurguywo primary; Chenare primary; Kaptildil primary; Kamonjil primary; Kapkimbimbir; Segut primary; Chepterit primary; and Belekenya 001. She deposed that no report by a handwriting expert was produced to substantiate the allegation that the same person filled or completed Forms 34A.

394. She countered the allegation that in Tikiyo primary school, the name of the Deputy Presiding Officer was not given to aid verification. She also refuted the allegation that Form 34A in Kilingile and Kataingo primary school had not been signed by the presiding officer or the deputy presiding officer. She further denied that in Njoguini primary school 6 Form 34As were unclear and unreadable. The allegation that in Shimo La Tewa Forms 34As as uploaded in the portal had been severally repeated was denied by the deponent.

395. She rejected the allegation that in Wareng High School, Kapsaret constituency, Ngesia Ward, Kiambaa primary school the Forms had been crossed and did not indicate the candidates' results. She asserted that the Forms from the referenced centre had not been crossed as alleged and they indicated the votes the candidates garnered.

396. Further, she rejected the allegation that in Chebirir primary school only one agent signed form 34A and that no reason was given as to why the others did not sign. In addition, she denied the allegation that in Chepsioch primary no NASA agent signed Form 34A and no reason was given for this. She asserted no evidence had been provided to show that there was any agent who was denied an opportunity to sign the forms or that they refused to sign and provided reasons.

397. She denied the allegation that the Forms 34As were illegible and the photos incomplete in the following polling stations: Lakole North Centre; Waso girls; Matho Dam; Kanjara Centre Dandu primary school; Huruma primary school. She deposed that the referenced places were not polling stations. She also denied the allegation that Form 34A was not signed by any agent in Bargugue Dam and Mathah Boqay. She deponed that there was no mandatory legal requirement for agents to sign Form 34A and that only agents who were present could sign. Further, there was no allegation that the Petitioners' agents were present or were refused the opportunity to sign.

398. The existence of a polling station by the name Habasein Boys primary school was denied along with the allegation that only one party agent signed form 34A in that polling station and no reason was given as to why the other agents did not sign. She further noted that there was no polling station by the name Kisina primary school and contested the allegation that the stream had been changed from 1 of 2 to 2 of 2 using a pen.

399. She refuted the allegation that in Nunguni primary school the Form 34A was signed by one person and was similar to that of Nunguni primary school in Kitui East. She however admitted that Form 34A belonging to Maluma primary school was erroneously uploaded as being for Kalivu primary school.

400. She refuted the allegations that in Mitalani primary the handwriting in the form 34A was altered; that in Makueni primary school the handwriting and signatures on the Form 34A appeared made up. She deposed that other than the relevant forms having been signed and witnessed by agents, no evidence had been provided to prove the allegation on the alteration of handwriting and further that the forms referenced to were not annexed to the supporting affidavit.

401. The deponent refuted the allegation that in Kanziko Cotton Stores the Forms were unclear and illegible; in Tetu primary school; Mugumo primary school; Kivumbuni primary school; Kisayani primary school; Kunguluni primary the tallying is incorrect. She averred that the specific form that is alleged to be unclear was not identified and the tallying alleged to be incorrect was not specified.

402. She refuted the assertion that: the statutory form of YKivuti primary school was unclear, Kalima Kio primary school had no code and the stream was indicated in the uploaded picture. Further that in Molemuni primary school, the Form did not indicate the total results and was incomplete and that Form 34As were not clear in Ta Farmer and Kitoroch 135. She averred that there were no polling stations known as Ykivuti primary school, Molemuni primary school and Ta Farmers School.

403. She countered the allegation that in respect of; Mikimbi Full Gospel Grounds; Full Gospel Church Ground Njukikiri; Teachers Advisory Centre Hall; Nembure polytechnic; ACK Muchonoke Church Grounds; Faithful Church of Christ Makumbiri; Kwa Douglas Bus Stage; Full Gospel Churches Grounds Ndunduri; Full Gospel Churches Grounds-Gitururu; Ngurueri Coffee factory; Nguire primary school; Muchangor primary school; Kavutiri primary school; Gatura Tea Buyng Centre; Gichera primary school; Kangondi primary school; Kanduri primary school; Ugweri primary school; Kithunguthia primary school; Gikuuri primary school; Ndamunge Tea Buying Centre; Kirimiri Coffee Factory; Thigingi primary school; Magara Tea school; Mugaari Tea Buying Centre; Kanyaueri Tea Buying Centre; Kiameceru Tea Buying Centre; Kiandongó Tea Buying Centre; Kathari primary school; Kathageri Youth Polytechnic; Muhanda primary school; Ramula primary school; Burlwolo primary school; Nyangunda primary school; Tambach prison; Kapsabet prison; Eldama Ravine prison; Nanyuki prison; Nanyuk prison; Vihiga prison; Kanoth primary school Kiritiri primary school; Kauraciri market; Kanduku primary school; Marimari primary school; Ndithini primary school; Raciina primary school and Kariari primary school the respective Form 34As had been filed with the same handwriting. She averred that no evidence had been provided to support the allegation.

404. She further contended, in relation to the allegation that there were no agents in Taveta prison; Moyale prison; Embu Women prison; Kitui Women Prison; Kitui Prison; Machakos Main prison; Machakos prison; Makueni prison; Nyeri Medium prison; Mwea prison; Kerugoya prison; Muranga prison; Muranga Women prison; Maranjau prison; Kiambu prison; Kapenguria prison; Kitale medium; Kitale women prison; Kitale main prison; Eldoret prison; Tambach prison; Kapsabet prison; Kabarnet prison; Eldama Ravine prison; Rumuruti prison; Naivasha medium; Nakuru women prison; Kericho main; Sotik prison; Bomet prison; Shikusa Farm prison; Busia women prison; Busia prison; Kisumu women prison; Kibos main prison; Kibos medium; Homa Bay prison; Kehancha prison; Kisii women prison; Nairobi Remand and Kilgoris prison, she was aware that the 1st respondent did not receive and therefore did not reject any application from a candidate seeking to appoint agents in the abovementioned polling stations or centres. She further stated that it had not been demonstrated how the absence of agents had affected voting or tallying in the said places and/or how it had affected the petitioners.

405. Ms Kassait denied the allegation that in Kinyaga primary school; Nyambori primary school; SDA Mariari primary school; Kwa-Andu-Ambogo primary school; Mwondu primary school; Siakago Hall; Itiira primary school; Ndutori primary school; Gangara primary school; Gatakari primary school; Kathigagaceru primary school and Karauri primary school, the Form 34As had been filed with the same handwriting. She stated that no evidence had been provided to support the claim.

406. The deponent, in response to the claim that in Uruku Primary School the number of registered voters was not indicated, stated that the number of registered voters in that station was 12, which number was gazetted.

407. She deposed that: the 1st respondent did not gazette any polling station known as Gatinja primary school and therefore could not comment on the claim that the Form 34A in respect of that station was only signed by the 3rdrespondent's agents and that no reason had been given as to why other agents did not sign. In response to the claim that the form 34A was not clear in Runyenjes Municipal Hall, she averred that all the forms for the three (3) polling stations were legible and that copies of the said forms had been provided to the Court.

408. In response to the assertion that in Nduuri primary school the total number of registered voters and total number of votes cast was not indicated and that the polling station was not legible, Ms. Kassait averred that the said forms were legible. She further remarked that the total number of registered voters and total numbers of votes cast was clear as were the polling station names. She stated that copies of the said forms had been provided to the Court.

409. In response to the assertion that the form 34A in Kathungu Primary indicated the party agent to be the petitioner and the 3rdrespondent being shown as the candidate, she deposed that she noted that instead of indicating their names, the agents for the respective parties simply indicated the names of their principals. She further stated that this did not affect the results and that the petitioners did not demonstrate how the indication of the principals' names materially affected the result of the presidential election.

410. She denied the assertion that in Kithangari Tea Buying Centre the Presiding Officer and the Deputy Presiding Officer had the same handwriting.She also denied Dr. Nyangasi's allegation that in Kithagutari primary school the same handwriting had been used to fill and sign the form 34A and that the form was a photocopy. She averred that the 1st respondent did not gazette any polling station by the name Kithagutari primary school.

411. The deponent denied the allegation that the form 34A was not clear for Ciangera primary school. She swore that the respective forms 34As for both polling stations at Ciangera primary school polling station centre were clear and legible and that copies of the said forms had been provided to the Court. She contested the allegation that the Form 34As for

Kiathambu primary school, Kamwaa primary school and Gwakathi primary school were not stamped.

412. She countered the deposition that in Gwakathi primary school the tally results had been cut off and that the agent signed off as a NASA agent. She also denied the allegation the Presiding Officer in Qvaaine also signedGwakathi primary school's Form 34A. She stated that the 1st respondent did not have a polling station under the name Qvaaine. She further denied the assertion that in St. Peters primary school and Itururi primary school were not stamped.

413. She denied the allegation that in Mugwanjogu primary school and Mbaci primary school the handwriting in the two forms was similar and that the form 34A for Kamarindo primary school was illegible. It was her testimony that no expert evidence had been provided to demonstrate the similarity of handwriting and that such similarity did not mean that the same person signed the forms in the 2 polling centres.

414. Ms Kassait denied the allegation that in Muruaki secondary school; Kahuru primary school; Matundura primary school; Muthoni primary school; Munyaka primary school; Kaimba primary nursery school; Kanyungi primary school Vijiweni Grounds; Likoni Muslim primary school; Consolata nursery school; Mirima primary school Ngurubani primary school; Kamuchege primary school; Karuangi primary school; Defathas; Karoti girls and Ciagini the same handwriting had been used for all the Form 34As. She further denied the assertion that in Likoni primary school the Form 34A did not indicate the name of the Presiding Officer.

415. She also denied the assertion that the Forms 34A were not stamped in Thome primary school; Gakuo primary school; Kutus primary school; Karoti girls; Murinouko; Musinduko; Ichangi; Tongoye; Karuangi primary school; Kamuchege primary school; Murubara Social Hall; Wanguru County Counsil; Ngurubani primary; Wanguru secondary school; Samburu primary school; Mwambani primary school; Chituoni nursery; Matumbi primary school; Mivirivirini primary school; Mlola nursery; Vikolani primary school and Kipni.

416. The deponent denied the averments that the Deputy Presiding Officer did not sign the Form 34A in Mwambani primary school and that an evidently fake IEBC stamp was used in Chituoni nursery and in Mugamba Ciura primary school. It was her testimony that the 1st respondent's stamp was authentic.

417. She further denied the assertion that both the Deputy Presiding Officer and the Presiding Officer did not sign the Form 34A in Kafuduni primary school while in Mazerus primary the Deputy Presiding Officer did not sign the Form 34A.

418. Further she rebutted the following allegations:

(i) In Tarasaa Secondary the Form 34A had been filed using the same handwriting and signatures.

(ii) In Ngao Social Hall the Deputy Presiding Officer did not sign the Form 34A.

(iii) In Onwadei primary school and Tanan nursery the same handwriting had been used but there were no signatures in the Form 34A.

(iv) In Imani Primary, Mswakini primary and Maua primary the same handwriting had been used to fill the Form 34As.

(v) In Walkon, the Deputy Presiding Officer did not sign and in Maua Primary the Form 34A was not signed at all.

(vi) In Konkon the same handwriting had been used but no signatures had been appended, in Gatuto primary, Kirinyaga Tech the Deputy Presiding Officer did not sign and the Form was not stamped.

(vii) In Kaitheri primary, Kaitheri youth polytechnic, Kiabarikire primary, Kianderi primary, Karitha, Kirugoya coffee factory, Kirigo primary, Valley road primary, Gakararu; Amani gardens; Kiamuruga primary; Karaini primary; Holly Rosery primary and Karuri primary the Form 34As were not stamped.

(viii) In Iego primary the same handwriting had been used to write and sign for agents.

(ix) In Mukarara primary and Kiawambogo primary the Forms had been filed suing the same handwriting.

(x) In Laciathuriu primary the Form had been signed by three Jubilee candidates and no reason was given as to why the other candidates did not sign.

(xi) In Kisorngot primary the signatures were similar for all the agents.

419. Her averment was that in Pangani Girls Secondary there was no number of total votes cast or registered voters indicated in the Form 34A. In addition she averred that Pangani Secondary polling centre had several polling stations, all of which had the total number of votes cast and registered voters indicated on the respective Form 34A and that copies of the said forms had been provided.

420. In respect of the allegation that the code was unclear or illegible in Kuni Primary, she swore that there was no polling station with the name Kuni Primary.

421. In her deposition she denied the following allegations:

(i) In Empaash primary the Form had been signed by the same person and no record of the registered voters was recorded.

(ii) In Kimulot primary the agents' signatures were similar.

(iii) In Murguiwet primary the agents' signatures were similar.

(iv) In Mugenyi primary two jubilee agents signed the Form and it was not indicated why other agents had not signed.

(v) In Kapkweni primary school the agents had similar handwritings.

(vi) In Meru primary school all agents signed using one handwriting and no results were given.

(vii) In Mosque Road Hall and Nteere Park all agents had a similar handwriting.

(viii) In Kokoin Constituency, polling stations number Kimulot primary school, Murgiwet primary school, the agents had a similar signature and handwriting.

422. She based her averment on the fact that no evidence had been provided to back up the claims nor had it been demonstrated how similarity of signatures, if any, affected the results.

423. The deponent, in response to the allegation that in Pimbiniet primary there was no agent's signature in the posted Form 34A, stated that only agents who were present signed the relevant Form 34A and that no evidence had been provided to show that there were agents who were present but failed or refused to sign the relevant forms.

424. She refuted the assertions that the information in the uploaded form had been cut out in Ololchurra Centre and that in Nkosuash nursery, there was no entry for all the Presidential candidates in the uploaded Form 34A. it was her testimony that the relevant forms for the abovementioned centres were clear and legible and copies of the same had been supplied to the Court.

425. In denying the assertion that in Teldet primary school the Form 34A was illegible and unverifiable and that in Kiplegut primary school, the number of valid votes as well as the rejected votes were not specified. Ms. Kassait swore that there were no polling stations known as Teldet primary school and Kiplegut primary that were used in the 2017 Presidential Election.

426. The allegation that in Kapkilaibei primary school only independent candidates' agents signed the form and no reasons were given as to why the other agents did not sign. She asserted that only agents who were present signed the relevant forms and that no evidence had been provided to show that the petitioners' agents were present but failed or refused to

sign the relevant forms. It was also denied that whiteout had been used to alter Form 34A in 'Masset', stating that 'Masset' was a non-existent polling station.

427. The allegation that there were discrepancies in figures in Makutano Market was denied on the basis that the allegation had neither been substantiated nor particulars of the same provided. She also rejected the assertion in respect to Miriga, that Form 34A had not been stamped or signed.

428. She refuted the averments that the Forms 34A in Njukinjiru, Tinderet, Kalyet Primary School and Gakoromone Market were illegible and unverified. She also denied that the form in Kathurini Coffee was only signed by the 3rd respondent agent and that in Keses, the picture form was incomplete and in Kilelgut. She rejected the allegation that valid votes and rejected votes had not been specified. She averred that there were no polling stations with the names Njikinjiru, Kathurini Cofee, Keses,Kilelgut, Kalyet Primary School or Gakoromone Market used in the 2017 Presidential election.

429. While denying the allegation that there was a discrepancy in figures on form 34A in Makutano Market polling station, North Imenti, the deponent contended that the allegation was not substantiated and that no particulars had been furnished. Further, she denied that Form 34A in Masste Pry. polling station, Bomet Central Constituency, had been erased using a white out and averred that the allegation had not been proved and further, but most importantly, there was no polling station with the name Masste Pry.

430. She refuted the allegations that Form 34A had no signature of agents in St Patrick Primary in Gilgil Constituency. Further, she denied that form 34As in Ole Sultan Pry, Muricucuria ECD Primary, Ndibai Primary and St Barnabas Trading had only been signed by the 3rd Petitioner's agents. Discrepancies in the addition of figures in Munanda Primary, Gitare Primary and Nyondia Primary were also denied.

431. In addition, she refuted that form 34A for Kahuho Primary, Kamathat Primary, Echacharia Primary and Loldia Primary polling stations were illegible. The deponent also denied that Forms 34A in Ndogo Primary, Itherero Primary and Kiunguria Primary were filled by the same person. Allegations that no summations were made in Nuthu Primary and that the Deputy Presiding Officer did not sign the form for Komothat Primary were contested.

432. It was the deponent's averment that there were no polling stations with the names St. Patrick Pry, Ole Sultan Pry, Muricucuria ECD Pry, Ndibai Pry School, St Barnabas Trading, Munanda Primary, Gitare Primary and Nyondia Primary. Further, she refuted the allegation that form 34A were illegible for Kahuho Primary, Kamathat, Echacharia Primary, Loldia Primary, Itherero Primary,Kiunguria and Komothat Primary.

433. The deponent asserted that allegations of discrepancies in Bishop Ndungi Primary were not substantiated. Further, she denied that only the 3rdrespondent's agents signed in Milimani Primary, Naivasha Constituency and averred that no evidence had been furnished to show that the petitioners agents were present and denied the opportunity to sign the relevant form or that they refused to sign the form for valid reasons.

434. She denied the allegations that the presiding officers: Isaac M Omari Jeremiah Kumutai, Judy Doreen Chelegat and Deputy Presiding Officer sDerrick Ngetich and signed Form 34A in more than one polling station.

435. Further she rejected the allegations that in the following polling stations the result did not tally mathematically N. Chebelyon Pry; Murunga; Kapkagogoron Pry; Chepsumei; Kapkatoi; Madaraka School; Rise And Shine; Birongo Pri; Ibeno Sec School; Matieko Dok Pry; Muramati Pry; Westlands Pry; Hospital Hill; North Highridge Pry; Karura Forest Pry; Cheleta Pry; Mji Wa Huruma Pry; Kttc ; Hospital Hill High; Kianjagi Pry; Seretut Pry; Bishop Ndingi School; Nyakinyua Pry; Rev Jeremiah; Chekeliek Nursery; Cheplelakbei Pry; Muruguyu Woo Pry; Kwangoly Pry; Athi River; Sirimon; Kithithi Pry; Kombe Pry. She averred that no evidence was provided to show or substantiate the claim that the result in the mentioned places did not tally mathematically moreover, she deposed some of the places mentioned were not polling stations.

436. She denied the allegations that the defects and irregularities outlined in Dr. Nyangasi's affidavits render the Statutory Forms invalid, null and void. She contested the allegations as unverified and incapable of being relied upon as the basis upon which to nullify the declared results. It was her evidence that the Presidential Election was conducted in accordance with the requirements of the Constitution, the *Elections Act* and regulations thereunder as well as all relevant applicable laws and regulations as demonstrated in the 1st and 2nd respondents response to the Petition.

437. The deponent denied the allegation that there were persons other than the gazetted County Returning Officers, Constituency Returning Officers and Returning Officer for citizen residing outside the country who signed statutory forms.

438. She deposed that that no elections were conducted in ungazetted polling stations/tallying Centres and further that the alleged ungazetted polling stations/tallying Centres do not exist.

439. In relation to the variance in the total number of votes cast been the Presidential and county level elections, she deposed that the said variance was not of 482,202 votes as alleged and is in any event within acceptable statistical limits. She tendered in as evidence of this a document marked Ec.12.

440. In reply to the further affidavit, Ms. Kassait deposed that the annexures marked as DNO-2A and DNO-2-2A to the said further affidavit were not supplied to the 1st and 2nd respondents .

441. On the security features of the Statutory Forms, the deponent averred that the Commission developed standards for its electoral goods prior to their procurement. The standards included specific security features for each ballot paper and statutory form in order to prevent duplication, misuse, piracy, fraud, counterfeiting and to improve controls. She deposed that all the ballot papers and statutory forms used in the August 8, 2017 election contained these security features.

442. Some of the features employed on the result declaration forms 34A and 34B were averred to include: guilloche patterns against which all background colours on the declaration forms were printed, anti-copy patterns, watermarks, micro text, tapered serialization, invisible UV printing, polling station data personalization, self-carbonating element, barcodes.

443. It was her testimony that each ballot paper included different colour coding of the background. She averred that the security measures were to ensure that the Commission detects counterfeit statutory forms or ballot papers and discharge its constitutional mandate of conducting secure and verifiable elections. In addition, she asserted that all ballot papers were to be stamped before issuance to a registered voter to cast the vote. She deposed that this was an extra measure initiated by the 1st respondent to ensure that the electoral process was secure. She added that lack of the stamp did not invalidate or by itself speak to the authenticity of the ballot paper.

444. She concluded by confirming that all the Form 34A's received by the Commission at the National Tally Center had all the above-mentioned security features.

445. I am convinced that, apart from the specific admissions made, the affidavit of Immaculate Kassait rebutted all the allegations made in the affidavits of Dr. Nyangasi, in support of the Petition and supplied evidence in support of the averments made by the deponent and where the evidence was contained in the affidavit of another deponent reference was made to that other affidavit. I have taken into consideration the effect, on the declared results, of the admitted administrative errors appearing on the Forms 34A and 34B, and I have arrived at the conclusion that the said administrative errors do not taint the declared results.

14. The affidavit of the 2nd respondent - Wanyonyi Wafula Chebukati

446. The 2nd respondent filed a replying affidavit sworn and dated August 24, 2017. He deponed to being the returning officer for the August 8, 2017 presidential election.

447. He averred that both he and the 1st respondent had no stake in the outcome of the August 8, 2017 elections and that throughout the election cycle, they were neutral referees; their

resolute mandate being to provide the electoral infrastructure for the people of Kenya to exercise their sovereign will to elect leaders of their choice.

448. He averred that after tallying all the votes, the presidential candidate who emerged the winner was Uhuru Kenyatta, having garnered 8,203,290 votes; followed by Raila Odinga, who garnered 6,762,224 votes. He swore that this declaration was based on the contents of the Form 34C prepared from forms 34B forwarded to the NTC from the constituency tallying centres plus the tally of the diaspora votes.

449. It was his assertion that given the election management infrastructure that was deployed, the primary results declaration forms (Forms 34A and Forms 34B) could not possibly have been interfered with at all. He added that the forms were transmitted through the KIEMS system in the scanned format and they had special security features that could not be replicated. Further that the security features included anti-photocopy and self-carbonated copies upto a depth of six (copies).

450. He averred that the presiding officers at the 40,883 polling stations were required to scan and electronically transmit the original Forms 34A to both the constituency and NTC. In turn, the constituency returning officers were required to electronically submit to the NTC the Forms 34B for purposes of tallying and declaring the results of the presidential election and therefore, the outcome of the election could easily be verified by reconciling the figures in Forms 34A.

451. He swore that upon his assumption to office, on 20th January, 2017, together with fellow commissioners, they embarked on a process of managing the remaining part of the election cycle to ensure that the August 8, 2017 election met all the constitutional and statutory ingredients of a free and fair election. Specifically, his task as the Chairperson was to provide policy leadership and strategic direction to the Commission to ensure that the entire electoral infrastructure for elections management was accountable, efficient, systematic and methodical.

452. He deposed that despite the numerous challenges arising from litigation against the Commission; the commissioners ensured that the procurement of strategic electoral materials by the Commission's secretariat was done in a transparent and timely manner; that the other electoral cycle processes including the supporting technology were deployed in a manner that was congruent with the constitutional and legal requirements of simplicity, accuracy, verifiability, security, accountability, and transparency.

453. He deposed that in compliance with the law, all the required steps and processes were firmly in place for a free and fair election. He precedes to enumerate the steps that were taken to ensure compliance with the Constitutional principles.

454. He deposed that it is neither true that the Commission presided over a shambolic presidential election nor that the entire electoral processes had failed before and during the August 8, 2017 elections or that they were riddled with grave breaches of the Constitution and applicable laws during the tallying and transmission of results.

455. He averred that the presidential election met all the requirements of free and fair elections: they were conducted through secret ballot; they were free from violence, improper influence or corruption; the entire electoral cycle was exclusively administered by the Commission; they were transparently conducted; and they were administered in an impartial, neutral, efficient, accurate and accountable manner.

456. Invoking article 138(10) of the Constitution, he deponed that he is mandated, within seven (7) days after the presidential election, to declare the result of the election as set out in Form 34C and deliver a written notification of the result to the Chief Justice and the incumbent President which he did. It was his testimony that throughout the electoral cycle, he discharged his mandate in full compliance with the Constitution, electoral laws and the applicable regulations and oversaw the conduct of the election in compliance with article 81(e) of the Constitution. He deposed that he was not influenced by anyone at all and maintained high levels of professionalism.

457. As regards the Commission as a body, he swore that it conducted and supervised the election in accordance with article 81(e) of the Constitution. Particularly, that:

(a) every registered voter who participated in the General Election cast their vote by way of secret ballot;

(b) polling stations were adequately secured by the police to ensure the electoral process was free from violence, intimidation, improper influence and corruption;

(c) the election was independently conducted by the Commission;

(d) candidates and various observers were allowed to have their appointed agents present at the various polling stations to observe the voting process to ensure transparency;

(e) the said agents observed the closure of the voting process and were involved in counting of the votes at the various polling stations to ensure that the administration of the electoral process was done in a transparent, impartial, neutral, efficient, accurate, and accountable manner; and

(f) the presidential candidates‘ agents/representatives were given access to the various Forms including Forms 34A and 34B thereby increasing the 1st Respondent‘s transparency and accountability during the electoral process.

458. It was the 2nd respondents deposition that the Commission staff that operated the KIEMS gadgets was trained in good time, and the gadgets were configured with the register of voters. He deposed that the KIEMS sought to ensure a transparent, secure, verifiable, reliable and accurate framework for elections management. It was his testimony that the system allowed for integration of the biometric voter registration, biometric voter identification, electronic results transmission and the political party and candidate registration systeMs He averred that it was successfully deployed on August 8, 2017 and significantly helped to increase efficiency, effectiveness and accuracy of the electoral process. He deposed that the system never failed.

459. He avers that the relaying and transmission of the results was done in compliance with section 39 of the *Elections Act* regulation 87 of the *Elections (General) Regulations 2012*, and the Court of Appeals decision in the Maina Kiai case.

460. The deponent states that he was present at the NTC between 8th and August 11, 2017, tallying and validating Forms 34B that were being electronically transmitted by the constituency returning officers. He attached as evidence copies of the Form 34Bs marked WWC-3. He averred that upon receipt of these Forms 34B, he proceeded to collate and confirm the consistency of the results and availed the Forms 34B to the presidential candidates through their agents for confirmation and verification. He thereafter used the same results to tally and complete Form 34C in compliance with section 39(3)(b) of the *Elections Act*. He tendered in as evidence a copy of the Form 34C marked WWC-4.

461. He avers that on August 11, 2017, upon receipt of the 290 Forms 34B from the constituencies and also the tally of the diaspora, the presidential election results were confirmed by the presidential candidates through their agents present as follows:

462. On the basis of these results, he avers that in compliance with Articles 138(4)and 138(10) of the *Constitution*, he publicly declared the presidential results on August 11, 2017.

463. He testified that there were inadvertent and/or arithmetic human errors in a few of the Forms, which errors were minor and did not have any effect on the outcome of the presidential election. In this regard he tendered in as evidence a document marked WWC-5 and also referred to the affidavit of Immaculate Kassait, the 1st respondents Director Voter Registration and Electoral Operations.

463. Responding to the affidavit sworn by Godfrey Osotsi in support of the petition, he deponed that throughout the electoral cycle, the Commission variously engaged the petitioners (in person and through their representatives), the 3rd respondent through his agents, the public and other interested stakeholders in conformity to best electoral practices including the

reform of electoral laws. He deposed that there was no engagement in any partisan drive howsoever for the reform of electoral laws or at all.

464. He swore that the Commission fully complied with the law guiding the transmission of presidential results, including through its website, which access was granted to the general public to download Forms 34A, 34B and 34C.

465. In response to Godfrey Osotsis allegation that the commission did not have all the Form 34Bs at the time of declaration of results, he deposed that the Commission had received all Forms 34B. It was his testimony that to ensure the transparency of the process, all the Forms 34B and 34C were availed to all presidential candidates and their agents for verification before declaration of the results. They were all allowed to attend to the NTC at BOMAS to verify the said tally of the presidential votes, from commencement to declaration.

466. In response to Godfrey Osotsis evidence that the petitioners were sidelined during the tallying process, he deposed that no one was side-lined during the tallying process. He averred that he personally chaired numerous consultative meetings with the petitioners agents to consider their concerns. He testified that prior to thedeclaration of the final result the petitioners' agents decided to leave the NTC for unexplained reasons.

467. In response to the 2nd petitioners affidavit sworn on August 18, 2017 disparaging the credibility of the final outcome of the presidential election, he deposed that the declaration and announcement of the Presidential Election results on August 11, 2017 was done strictly and fully in compliance with the *Constitution of Kenya* and electoral laws.

468. In response to the 1st petitioners affidavit sworn on August 18, 2017, he stated that the commission notified the public throughout the electoral cycle of the anticipated challenges and demonstrated the alternative mitigation measures which included the confirmation of the petitioners agents in verification of voters in the polling stations, tallying of results and transmission of the results.

469. In further response to the 1st petitioners affidavit allegation that there were procedural flaws, illegalities and/or irregularities in the collation, tallying, verification and transmission of presidential election results, the deponent stated that the tallying process carried out by the Commission was in compliance with article 81(e) and 86 of the *Constitution* as read together with section 39 of the *Elections Act*. He also deposed that at every result management level, the petitioners were allowed to have their agents present to confirm the tallying, announcement and declaration of the results. He emphasized that the electronic transmission of the results by the Commission was secure, prompt, accurate, verifiable, accountable and efficient. Further that all the results declaration Forms were subject to verification by the candidates agents/representative and immediately thereafter forwarded to the National Tallying Centre.

470. In further response to the 1st petitioners affidavit evidence that there was avariance between the declared result and the actual results as tallied by the petitioners the deponent averred that the Court should take cognizance that the 1st petitioner deposed that they were given access to the Forms 34B through their agents thus the issue of lack of transparency and accountability in the tallying process did not arise at all.

471. The deponent denied the 1st petitioners allegation that the 1st respondent condoned voter intimidation, undue influence, bribery and/or flagrant commission of Electoral offences by the 3rd respondent. He denied Dr Nyangasis allegation thatthe 3rd respondent was declared winner without verification of all the requisite documents. He deposed that all presidential candidates and their agents or representatives were invited to verify the results before the declaration. He averred that he did not announce the final results of the presidential election until he received and validated the Forms 34B from the constituency tallying centers.

472. He deposed that on August 10, 2017 the Commission received a letter dated August 10, 2017 from the Petitioners Deputy Chief Agent, James Orengo raising concerns over the presidential election results. It was his testimony that upon receipt of the letter, the Commission internally considered all the issues and communicated its response via a letter dated August 10, 2017. He tendered as evidence copies of this communication marked.

473. He swore that the declaration and announcement of the presidential election results on August 11, 2017 was done strictly and fully in compliance with the *Constitution of Kenya* and electoral laws, contrary to the averments of the 2nd petitioner.

474. In conclusion, he deponed that the allegation in the petition that the Commission failed to take steps against the 3rd respondent for alleged breach of the provisions of section 14 of the *Election Offenses Act* was untrue. He stated that on June 21, 2017, he wrote a letter to the Director of Public Prosecutions (DPP) informing him of the alleged breach for his action. The DPP responded via a letter dated July 6, 2017 informing him that he had directed the Director of Criminal investigations to take action. He tendered in as evidence, copies of the communication.

15. Replying affidavit by Ezra Chiloba

475. The 1st respondents replying affidavit was sworn by Ezra Chiloba, its Chief Executive Officer on August 24, 2017. He averred that the 1st respondent conducted the presidential election on August 8, 2017 in accordance with the provisions of Articles 81, 83 and 86 of the *Constitution*, the *Elections Act* and the Regulations thereunder.

476. It was his deposition that there were key milestones achieved in the lead up to the presidential election. He annexed the Elections Operations Plan (EOP) as the roadmap towards free, fair

and credible 2017 General Election. He asserted that the EOP was formally and publicly launched in January 2016.

Also annexed to the affidavit as evidence was a copy of the audit report of the registered voters. Copies of Gazette Notices were annexed to prove:

i. Closing the registration of voters pursuant to section 5(1) of the *Elections Act* as read together with regulation 12 of the *Elections (Registration of Voters) Regulations* on March 7, 2017.

ii. Opening the register of voters for verification of biometric data by members of the public between 10th May and June 9, 2017.

iii. Certification of the register of voters in accordance with section 6A (3) (a) of the *Elections Act*.

iv Publication of the timetable and roadmap for the party primaries and General Election.

v Gazettement of 40,883 polling stations and 338 tallying centres across the country including the prisons and for the Diaspora. Annexed was a copy of the relevant Gazette Notice.

vi. Gazettement of County Returning Officers, Deputy County Returning Officers, Constituency Returning Officers and Deputy Constituency Returning Officers through various Gazette Notices, Addenda and Corrigenda, copies of which were annexed and marked EC-11.

477. Among other milestones deposed to were that the Commission acquired and deployed an integrated electoral management system for voter registration, voter identification, candidates registration and results transmission. Further, there was recruitment, training and deployment of over 360,000 election officials across the country; and continuous voter education programmes undertaken across the country using different strategies and platforMs

478. In addition it was deposed that there were over 15,000 individual observers, 105 international observer institutions, 254 local institutions and more than 7,000 journalists from over 30 local and international media houses were accredited to participate in the general election.

479. It was his testimony that despite the complex political and legal environment in the lead up to the 2017 General Election, the 1st respondent put in place mechanisms and infrastructure towards what has been lauded as the most free, fair and credible election in Kenyas history.

480. Responding to the affidavit by the 1st petitioner, the deponent stated that the general election was conducted in a transparent, open and accountable manner. He averred that the process was peaceful and credible, a fact confirmed by both local and international observers. He attached as evidence a copy of various observer reports.

481. He deposed that the tallying and transmission of results was undertaken at the polling stations, collated and declared at the constituency tallying centers and at the NTC, hence the results declared were credible and represent the will of the Kenyan people. It was his testimony that the system used was credible, transparent and accountable. Further, that there was no compromise or interference with the system for results transmission before, during or after the declaration of the outcome of the presidential outcome. He reiterated that the collation, tallying and transmission of the results were in accordance with the *Constitution*, the *Elections Act* and the Court of Appeal decision and the *Maina Kiai* decision.

482. Referring to the documentary evidence on record, he deposed that the results declared were substantially consistent with and a true reflection of the actual results tallied and declared at the gazetted polling stations with the consequence that the finality of the results declared by the 1st Respondent could be faulted.

483. It was the deponents testimony in response to the 1st petitioners affidavit that that the law was amended vide the Election Laws (Amendment) Act, 2017 to provide for a period of four (4) months within which to procure and put in place the KIEMs He averred that the 1st petitioners allegation in his affidavit evidence that electronic lectoral system may have been exposed to risk of interference was speculative and untrue.

484. He deposed that the 1st petitioners allegation in his affidavit that Petition No 127 of 2017, *Dr Kenneth Otieno v The AG & IEBC*, that sought and got orders declaring the Elections Technology Advisory Committee (ETAC) unconstitutional, was not defended by the 1st respondent was true. He averred that the Commission filed a defense and advanced arguments in the matter. He stated that the fact that the Court ruled against it does not mean that it did not oppose the petition.

485. He further averred that the 1st petitioners allegation in his affidavit falsely accused the 1st respondent of filing Petition No 415 of 2016, Collins Kipchumba Tallam v The AG. This petition sought to declare section 39(1C) of the *Elections Act* unconstitutional. The deponent denied this allegation and stated that it was unfair and malicious to accuse the 1st respondent of filing the case as it was not a party to it.

486. He denied the 1st Petitioners allegation that the 1st Respondent failed to put in place several preparatory measures to assure the credibility of the KIEMS system. He deponed that the KIEMS system performed exceptionally well in identification of voters and results

transmission. He averred that where there were anticipated challenges in voter identification and transmission, the legal complementary mechanism was invoked. He termed the allegation of failure in transmission and that of breach of security as unfounded and untrue.

487. He denied the petitioners allegation that they were ambushed two days to the election date when they were informed by the 1st respondent that over 11000 polling stations were out of range for the 3G and 4G network and were expected to transmit election results from locations other than gazetted polling stations and/or manually is false.

488. He averred that the petitioners were not ambushed as alleged since in a workshop held on May 22, 2017, representatives of the petitioners were informed of the mapping of network coverage and how the same had been shared by the mobile network operators. He deposed that the Communication Authority of Kenya (CAK) at no time advised the 1st respondent against hosting a private cloud to supplement the 1st respondents primary as it was satisfied with the Commissions arrangements.

489. The deponent denied the petitioners allegation that the 1st respondent delayed in carrying out testing verification and deployment of technology. He deposed that the 1st respondent tested the KIEMS system on June 9, 2017 as required by law. He averred that the 1st respondent also conducted other tests, verified and deployed the KIEMS system.

490. It was the deponents testimony that the 1st petitioner made reference to an affidavit of one Professor Kaloki, which affidavit was not served on the 1st and 2nd respondents. The 1st respondent reserved its right in respect of what it termed a false allegation that Professor Kaloki had sworn an affidavit in support of the petition. He deposed, without prejudice to the preceding averment, that the allegation that the CAK advised the 1st respondent against hosting a private cloud to supplement the 1st respondents primary and disaster recovery sites was untrue. He deposed that on the contrary, the CAK was satisfied with the arrangements put in place by the 1st Respondent.

491. He attached a copy of a letter dated July 31, 2017 from the CAK marked EC- 14 as evidence. Accordingly, he averred that the allegation, by the 1st petitioner in his affidavit that the KIEMS system was compromised and that the presidential election was substantially conducted using manual processes, lacked merit.

492. He disputed the petitioners allegation that the voting process was not conducted in accordance with article 86 of the *Constitution*. He deposed that the results were transmitted from polling stations and constituency tallying centres as by law required. He denied the petitioners allegation they had not been supplied with all Forms 34B and all Forms 34A. He deposed that they were supplied with all the Forms 34B all the Forms 34As were available on the public portal. He averred that by their own letter dated 14th August 2017 the petitioners

acknowledged having been provided with access to all the requested forMs He attached copies of the relevant correspondence marked EC-15.

493. The deponent denied petitioners allegations that the Form 34As and 34Bs had substantial, systemic, glaring, qualitative anomalies that put to question the credibility of the presidential election. It was his testimony that the petitioners did not dispute the presidential election results as declared but only alleged unsubstantiated qualitative anomalies.

494. Mr Chiloba averred that the petitioners deposition that they had compared Formsn34A and 34B supplied by the 1st Respondent was a tacit admission that the Petitioners had received Forms 34A and 34B from the 1st Respondent. He deposed that there were no massive numerical discrepancies as alleged by the petitioners that affected the results declared by the 2nd respondent.

495. The deponent denied any partiality on the part of the 1st respondent as alleged by the petitioners. He deposed that he was aware that the 1st Respondent wrote to the Director of Public Prosecutions to discharge his constitutional mandate. He attached, as evidence, a copy of the said letter marked EC-16. It was further deposed that voting was conducted only in gazetted polling stations and only results for the gazetted polling stations were tallied and ultimately declared. He adopted the averments in the affidavit of Immaculate Kassait on these allegations.

496. Responding to the affidavit of Apprielle Oichoe, he reiterated and adopted the responses in the replying affidavit sworn by James Muhati. In addition, he deponed that it was not true that the 1st respondent replaced Forms 34A and entered results in Forms not provided for. He deposed that results in all polling stations were entered in the statutory Forms 34A.

497. He further deponed that although all presiding officers had been trained and instructed to take an image of the Forms 34A for transmission through the KIEMS, in some instances, they decided to take images of other documents for purposes of testing the kits. Consequently, given that one of the security features of the system was for the system to capture and transmit one image only for each of the six (6) elections and thereafter lock itself, the test documents were transmitted instead of the Forms 34A.

498. He averred that upon noting this error, the 1st respondent uploaded the Form 34A for the said polling stations on the public portal. He deposed that this inadvertent transmission of wrong images did not affect the results as contained in Forms 34A. As example, he annexed a letter dated 16th August 2017 from the Presiding Officer Bulla Dadacha Stream 02 polling station explaining the erroneous uploading of an exercise book page marked EC-17. He deposed that upon noting this error, the 1st respondent uploaded the Form 34A for the said polling stations on the public portal. He annexed said Form 34A marked EC-18 as evidence.

499. He termed the report in Aprielles affidavit titled The Travesty that was the electoral process Kenya 2017 as untrue. He deposed that the alleged report was not dated or signed and neither was the source or author indicated. He averred that it was a document with no probative or evidentiary value. He reiterated that the system deployed by the 1st respondent was not compromised and that the allegations contained in the said report were without basis.

500. In response to the affidavit of Mohamed Noor Barre and Ibrahim Mohamud Ibrahim, he reiterated and adopted the responses contained in the Replying Affidavit of Abdibashir Alinoor. In response to the affidavit of Benson Wasonga, Mr Chiloba averred that the result of the election from each polling station was contained in Forms 34A, the declaration of the results of the presidential election was on the basis of the results contained in Forms 34B from the 290 constituencies and the diaspora. He also swore that the total number of rejected ballots as declared in Form 34C was 81,685 and not 477,195 as alleged. He stated that Mr Wasonga had misconstrued the statistics published on the public display mode of KIEMS which was not a result within the meaning of the law. He deponed that the cause of the variance between the actual number of rejected ballots and the public website were as a result of human error.

501. In response to affidavits of Moses Wamuru, Koitamet Ole Kina and supporting affidavit and 2nd affidavit of Godfrey Osotsi, he reiterated and adopted the responses contained in the Replying Affidavits of Amina Shaku and James Muhati respectively.

502. In response to affidavit of George Kegoro, he reiterated and adopted the averments in the affidavit sworn by Immaculate Kassait. He responded that the statistics displayed electronically did not constitute and were not the results of the presidential election. He deposed that the final result of the presidential election is verifiable and certifiable from an inspection of Forms 34A and 34B.

503. He denied Mr Kegoros allegation that IEBCs portal showed varying levels of votes cast for the different elective offices. It was his testimony that upon closer inspection of the subject Supporting Affidavit of George Kegoro, it was evident that it was not underpinned in the petition. He deposed that it lacked foundation in the pleadings and or primary affidavits of the petitioners and could only be described as an attempt to litigate a substantive presidential petition under the guise of presenting a Supporting Affidavit to the Petition herein. He averred that since it was filed out of time, the affidavit suffered the fatal defect for being time barred and in blatant defiance and abuse of this Honourable Courts process and the law and ought to accordingly be struck out.

504. In response to the affidavit of Olga Karani, he reiterated and adopted the averments in the affidavits sworn by Immaculate Kassait and James Muhati. In addition, he stated that the allegations in Ms Karanis affidavit lacked proper specifics and were untrue. He deposed that

in instances where a voter could not be identified biometrically, the said voter would still be identified by keying in the KIEMS system their alpha numeric details. Contrary to her allegations, he averred that agents at the National Tallying Centre were provided with access to the Forms 34A and 34B and given an opportunity to verify the results before declaration.

505. He emphasized that the presidential election held on August 8, 2017 was conducted in accordance with the *Constitution* and the Electoral laws and that the same was free, fair and credible.

16. James Muhati's affidavit evidence sworn on August 24, 2017

506. He swore that he was the Director in charge of Information Communication and Technology (ICT) for 1st respondent. His deposition was in response to matters touching on ICT in the petition and affidavits of Raila Odinga, Apprielle Oichoe and Godfrey Osotsi.

507. He deponed that consequent to the 2007 General elections, a number of concerns were raised relating to human intervention and how it affected the credibility and integrity of the results. He deposed that the concerns were addressed in the Independent Review Commission also known as the Kriegler report. It was his testimony that the 1st respondent took on board the recommendations of the Kriegler Report to utilize ICT in future elections to improve their accuracy, transparency and verifiability. In this regard, the 1st respondent deployed use of ICT in the following: Biometric Voter Registration (BVR), Electronic Voter Identification Device (EVD), Candidate Nomination System and Result Transmission System (RTS).

508. It was his testimony that when the 1st respondent utilized ICT as forestated in the 2013 General Election, the system experienced technical challenges. He deponed that these were addressed by amending section 44 of the *Elections Act*. The amendment mandated the Commission to establish an integrated electronic electoral system which would enable biometric voter registration, electronic voter identification and electronic results transmission and thus the Kenya Integrated Elections Management System (KIEMS) was born.

509. He swore that the system was put in place and successfully deployed in the 2017 elections. He deponed that it enabled the 1st respondent to successfully verify the biometric data by the public during the May 10th – June 9th verification exercise as required by law, successfully verify voters on polling day and successfully transmit the results of the election results from polling station to constituency and to the National Tallying Centre.

510. He deponed that he was aware that the legislative framework was the *Constitution*, Statutory Provisions and Regulations. He cited Articles 81 and 86 of the *Constitution* as read with section 4(m) of the IEBC Act which obligates the voting system used to be simple, accurate,

verifiable, secure, accountable and transparent. He averred that the KIEMS was established with the approval of the Elections Technology Advisory Committee (ETAC) established under section 44(8) of the *Elections Act* and comprising relevant agencies and institutions including political parties. He annexed minutes marked JM-1 of ETC to this effect.

511. He deposed that the Commission and ETAC ensured that the ICT put in place satisfied the constitutional and Statutory threshold required under section 44(1) of the *Elections Act*, and had capabilities pursuant to section 44 of the *Elections Act*. He also averred that the Commission, pursuant to section 44(5) of the *Elections Act* published the *Elections (Technology) Regulations 2017* on April 21, 2017, 3 months before the general elections. He deponed that the 1st respondent developed and implemented a policy to regulate the progressive use of technology in the electoral process as required and annexed as evidence a copy of the said policy marked JM-2.

He also annexed copies of the public notices on the testing of the technology to be deployed and the minutes of the simulation carried out at Bomas of Kenya marked JM-3A and JM-3B.

512. On statutory compliance and implementation, he averred that at the time of carrying out the general election, the Commission had fully and successfully deployed the use of ICT in the following manner: First, the Commission had developed and implemented a policy to regulate the progressive use of technology in the process as required under section 44(2) of the *Elections Act*. Secondly, prior to deployment of KIEMS, the commission undertook a series of tests on the KIEMS including public test carried out on June 9, 2017, (60 days before the elections) and a simulation done on August 2, 2017. Lastly, as part of preparations for the deployment and use of ICT in the elections the Commission developed a robust training manual and schedule aimed at building the capacity and competence of all its staff members and included training of candidate agents on the KIEMS systeMs

513. On the implementation of ICT in the 8th August general election, he averred that the use of technology comprised voter identification and result transmission system. The transmission component in KIEMS enabled the Commission to relay the presidential election results and the statistics from the said results from the polling stations to the constituency tallying centre and the NTC in respect of the presidential election.

514. He deposed that during the transmission of election results through KIEMS the Presiding Officer would complete Form 34A as required by law then input into the KIEMS the statistics of the results as captured on Form 34A. The Presiding Officer would then take the image of Form 34A. Before sending the data, the Presiding Officer would first show the entries made to agents of the candidates and political parties for confirmation. He annexed as evidence, copies of the directions that were issued to the Presiding Officers, the Training Manual and a transmission flow chat marked JM-5A, JM-5B and JM-5C respectively.

515. He averred that the allegations in the petition that the relay and transmission was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt and that article 81 e(iv) and (v) of the *Constitution* were contravened was inaccurate and misleading and no evidence had been adduced to buttress the allegation.

516. On transmission, he swore that the transmission required 3G and 4G mobile network which was provided by three Mobile Network Operators (MNOs) being Safaricom Limited, Airtel Kenya Limited and Telkom Kenya Limited for whom the Commission entered into contracts with MNOs for a secured transmission of the results. He referred to a meeting held on the 22nd day of May 2017, minutes (marked JM-6) of which he annexed, between the Commission and MNOs who had been identified by the Commission.

517. He deponed that for purposes of offering election results transmission services, the country was zoned into thirteen (13) Zones with two (2) MNOs providing election results transmission services for each zone. He averred that, of the two MNOs in every zone, one MNO was the primary service provider and the other MNO was the secondary service provider. The MNOS were assigned zones to ensure consistency and accountability in operation and availability of service.

518. It was his testimony that in a zone where an MNO was neither a primary nor secondary service provider, it was not expected to provide any results transmission system since KIEMS could only accommodate two SIM cards. Accordingly, the Commission gave such provider the coordinates of polling stations within the zones to enable the service provider prepare itself for the provision of results transmission services. The zoning was to ensure effective data segmentation into manageable parts.

519. He averred that following a mapping exercise carried out by the Commission and analysis by MNOs, it was ascertained that about 11,155 polling stations within the country were not effectively covered by either 3G or 4G Network and this communication was sent out to the public vide a notice dated August 6, 2017. He annexed a copy marked JM-7 of the said notice. He averred that it became apparent to instruct presiding officers to ensure that they move to points where there was network coverage or in the alternative to constituency tallying centres in order to transmit results. He further states that the Commission was nevertheless able to avail all form 34As in a public portal through https:formsiebc.or.ke

520. On security and verifiability and in response to allegations on the compromise of KIEMS and access by unauthorized third parties, the deponent averred that the allegations are misleading and unsupported by evidence or explanation. He deposed that the Commission engaged a highly qualified team and eventually partnered with internationally recognized and accredited institutions to provide top of the range government-grade information

security system. He annexed copie of certification and accreditation documents from the providers with a guaranteed 99.99% security service to the whole system.

521. It was his testimony that the architecture of the KIEMS has in-built as well as process related features aimed at guaranteeing the integrity and security of the system. He annexed as evidence the architecture index and flow chart marked JM-9. He also averred that the Communication Authority granted approval contrary to the allegation that the Commission disregarded the advise of the Communication Authority as evidenced by the letter dated 31st July 2017 a copy of which was annexed as evidence.

522. The deponent listed some of the security parameters entailed in the KIEMS system and information management environment. These include configuration of only pre-determined and authorized tablets for transmission of which transmission was under constant round the clock automated monitoring, secured network spectrum with a twin high-level perimeter firewall which filters unauthorized transmission, robust database management solution with recommended security options such as pre-encryption or results and secure Virtual Private Network (VPN) and fourth tier security measure, a granular role-based access control and user management for the entire RTS.

523. It was his testimony that this fourth-tier security measure meant that:

(i) only authorised users could access the system through randomly issued credentials none of which was biometric

(ii) the permitted users had distinct but interdependent roles at different levels, such that not a single person could perform an end to end operation in the system

(iii) no password was issued to any of these users of the system until the eve of the election.

524. He averred that technical safeguards were introduced as the Commission had outsourced the network provision services from the MNos These safeguards included use of unique specialized SIM cards configured on secured APN for result transmission from KIEMS devices; Static Internet Protocol addresses for use in specific gadgets where the SIM Cards could only be used within the Commissions Access Point Network (APN); the use of specialized SIM Cards MSISDN which should not allow any duplication and was disabled for any SIM Card cloning; the SIM Cards were disabled for voice or text messaging; and a unique internet mobile subscriber identity (IMSI) a unique identifying number within the network which is the primary identifier of the subscriber.

525. He deponed that all the SIM cards used for transmission were placed under monitoring and periodic reports generated confirming that the cards were transmitting data. It was his testimony that that no intrusion or compromisewas noted in the system.

526. He averred that the electronic result transmission system was configured in a way that enabled it to detect any SIM card which was not in the list of those assigned by the MNos The SIM cards transmitted the results in the form of Hyper Text Transfer Protocol (HTTP) packets encrypted with Secure Socket Layer (SSL) technology. He deposed that this is a concealed protocol used by the internet to define how messages are formatted and transmitted. The link was meant to secure all the data by securing it with a code which was not availed to any of the MNos He averred that the sole duty and obligation of the MNOs was to transmit the data and monitor the continuous flow of such data.

527. He swore that the election results data were all transmitted wirelessly across the 3G & 4G network installed and secured by the Commission with controlled access with a clear trail and event logs that capture log-on and log-off data according to time and user name.

528. It was his testimony that as a monitoring and control tool, the MNOs generated and provided Call Data Records commonly referred to as CDRs which were forwarded to the Commission at intervals. He averred that studied and ascertained that the CDRs showed no stoppage in transmission of data or intrusion by any strange unidentified number. He deposed that the cyber security procedures and safeguards protected against any possibility of intrusion by an unauthorized third party and no evidence had been adduced to demonstrate any compromise, intrusion or unauthorized access/ entry by any party

529. He confirmed the position set out by the 2nd affidavit of Godfrey Osotsi sworn on 18th August that the Presiding Officer was required to input the QR code into the KIEMS upon which the machine became polling station specific in terms of data and usage. He deposed that the KIEMS cannot allow more voters that those provided for in the polling station and cannot therefore transmit results where there are more votes cast that the number of registered voters at the particular polling station. As such, he disputed the allegation that in some stations more voters than those registered were recorded.

530. On the implementation of the complementary system, the deponent reiterated the need to comply with article 38 of the *Constitution*. He deposed that where a voter cannot be identified by the device the Presiding Officer shall invite the agents in the station to witness that the voter cannot be identified using the device, complete verification Form 32A in the presence of the agents and candidates, identify the voter using the printed Register of voters, and once identified proceed to issue the voter with the ballot paper to vote.

531. The deponent referred to regulation 83 of the Elections (General) Regulations 2012 as the complementary system of result transmission envisaged by law. He averred that the complementary mechanism for failure to transmit results involves physical delivery of forms 34A by the Presiding Officers to the Returning Officers in the respective constituencies. The deponent referred to the Court of Appeal decision Civil Appeal No258 of 2017 which

involved the petitioners, where the Appellate Court directed the Commission to comply with its internal memorandum issued on July 27, 2017.

532. With respect to issue of access to the back end of the system, the deponent alleged that it was erroneous for the Petitioners to claim that they demanded that access. On the contrary, he averred that the petitioners had demanded that since the Forms 34A were not being displayed on the screen, the entire system should be switched off. He deposed that as a way of enhancing transparency, the Commission volunteered to provide secure dedicated links to agents of the presidential candidates to have access to the forms 34A being transmitted from polling stations. He asserted that the petitioners claim that facilitating the access took more than eight (8) hours and that the same access was not available outside the auditorium underscores the fact that the Petitioners did not appreciate the importance of guaranteeing security of the system.

533. Based on the totality of the foregoing responses, the deponent averred that the Commission conducted the election in accordance with the *Constitution* the applicable law and regulations in relation to the use of technology.

17. Affidavit by Davis Kimutai Chirchir in response to the Petitioners Affidavit

534. Mr Chirchir deponed that he was the Chief Presidential Agent of JP for the 2017 General Elections. He averred that he was conversant with the conduct of elections including voting, counting, tallying and transmission of results from the training given by IEBC to party agents and others, his own knowledge and from his role as the Chief Presidential Agent.

535. He denied Petitioners allegations that the elections were not free, fair, transparent, accountable, credible or verifiable. He deponed the on the contrary, they were conducted in accordance with the *Constitution* and the *Elections Act*. It was his testimony that a comparison of Form 34A and the actual results announced together with the text transmitted results confirms that there was no interference.

536. He deposed that on or about May 2016 the Coalition for Reforms and Democracy (CORD), the predecessor of the National Super Alliance (NASA), held a series of nationwide protest rallies to agitate for electoral reforms which included: use of technology in elections, legal framework for verification of the principal register of voters and removal of the IEBC Commissioners.

537. He deposed that as a result, a joint parliamentary select committee was established to inter alia agree on electoral reforms that had to be undertaken before the general election of August 2017. He averred that the Election Laws (Amendment) Act, 2016 (the Amendment Act) made provision for inter alia: the resignation from office of the Chairperson and Commissioners of the IEBC; the Audit of the Register of Voters by a reputable professional

firm; the establishment of an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results; and opening of the Register of Voters for verification of biometric data by members of the public.

538. It was deposed that the current IEBC was reconstituted in January 2017 following a bipartisan process where the candidates were vetted through a special sitting of Parliament. The deponent also averred that at least 41 cases were filed challenging the implementation of the amended Act by the IEBC within the past twelve months, majority of which were filed by NASA or persons affiliated to NASA.

539. The subject matter of the cases included inter alia, the procurement processes of the technology and voting materials that were used in the 2017 general elections, the complementary mechanism set up by IEBC for identification of voters and transmission of election results and the finality of results declared at the constituency level by the Constituency Returning Officer.

540. He stated that all this litigation demonstrates NASAs habit of constantly filing cases challenging the decision of the IEBC and revealed their intention to ensure that IEBC conducted the 2017 elections on NASAs terms He deposed that from his observation and the communications from IEBC to all parties, the 2017 general elections were conducted in compliance with the various decisions of the Courts with regard to the various aspects of the elections.

541. On the conduct of elections, Mr Chirchir averred that election materials and ballot papers were received in all polling stations across the country. He deposed that there was no incident of lack of ballot papers and only insignificant cases of malfunctioning of the electronic voter identification devices were reported. It was his testimony that the conduct of 2017 elections was an improvement from the 2013 elections in that the Commission had deployed the use of technology to enhance transparent, accountable, and credible and verifiable elections. To buttress this assertion, he annexed observer reports.

542. It was Mr Chirchirs testimony that the voting process was a marriage of electronic and manual processes. He deposed that the elections process was neither wholly and exclusively manual nor electronic. He averred that it was a hybrid complementary process in that technology was incorporated into a manual process to enhance accountability and transparency

543. He swore that the 1st respondent informed all the agents and representatives of political parties at the National Tallying Centre that the final results would be ultimately declared based on Form 34B. As such, it was his testimony that the results that were being transmitted were provisional based on the text message transmissions (the alpha numeric). In addition, the screened results were provisional subject to confirmation of the Form 34B from the

respective constituencies. He deposed that in the event of any discrepancy between the televised data (based on the alpha-numeric data) and Form 34B, the latter would prevail.

544. Mr Chirchir deponed that candidates or their agents were allowed to be present when the votes for each polling station were being counted and tallied. He averred that the election process complied with the provisions of regulation 79(1) of the *Elections (General) Regulations, 2012* which requires a presiding officer of every polling station, the candidates or their agents to sign Form 34A which contains the presidential election results. He deposed that in the event that the candidate or agent fails to sign Form 34A, the candidate or agent is required to record the reasons for refusal or failure to sign.

545. He averred that the IEBC acted in a transparent manner during the entire vote counting, tallying and transmission exercise. He stated that all Forms 34A were made accessible to all parties at the polling stations while all Forms 34B were given to candidates or their agents at the constituency tallying centres and a print copy was availed at the National Tallying Centre. He further deposed that the IEBC was in constant communication with agents of the candidates at the National Tallying Centre updating them when Forms 34As and Forms 34B were received from the presiding and returning officers. He denies the averments that the petitioners agents were ejected from polling stations in central and rift valley regions or elsewhere.

546. It was his averment that the petitioners were making sensational statements without providing any evidence to support their claiMs These statements include that there were 14,000 fatally defective results that affected over 7 million votes; that in more than half of the 290 constituencies the Returning Officers failed to indicate the number of Forms 34A; that the IEBC is yet to receive 5,015 Form 34As which represent in excess of 3.5 million votes; that the Form 34As the Petitioners have received from IEBC showed fatal and irredeemable irregularities; that the votes cast as captured in Forms 34A differ from results as captured in Forms 34B and that the rejected votes/ballots were unlawfully deducted from the petitioners and added to the 3rd respondent.

547. As part of his evidence, he relied on an analysis marked DKC6 showing that the total voters in areas gazetted by IEBC as not having the 3G or 4G network was 4,433,652 and not the 7,700,000 as stated by the petitioners. Out of these 4,433,652 voters, a sum of 3,506,558 voters representing 79 % of the registered number of voters turned up to vote and their votes were tallied. It was his testimony that election observers monitoring the gave the process a general clean bill of health save for a few isolated incidents. He relied on reports from the African Electoral Observation Group, the Elections Observation Group (ELOG), EAC Observer Mission, ICGLR Observer Mission, AU Mission, and Commonwealth Mission. He also tendered them in as evidence as well as an audio/video recording by John Kerry.

548. Mr Chirchir deposed that JP won a majority of the seats in all other elective positions, retaining their popularity and it to new frontiers. He averred that this was an indication that the Jubilee Party was the preferred party across the country. He tendered in as evidence graphical representations of the deposed numeric strength.

549. He denied the allegation that the 1st respondent illegally Streamed results not verified by Forms 34A to create an impression that the 3rdrespondent was winning. He deposed that: the Streaming of the results by the IEBC was intended to ensure that the tallying process was open and transparent; the IEBC was not prohibited from Streaming the electronically transmitted results provided the same was verified using the forms before the declaration of the results; the Streaming of results electronically could not, in any event, have affected the results finally declared. The final results were based on Forms 34B obtained from the constituency tallying centres.

550. The deponent averred the petitioners approached the Court in a deprecatory and contemptuous manner aimed at bullying and intimidating the Court to find in their favour. As evidence, he cited various statements made by the petitioners or their representatives.

551. He deposed that the petitioners unfortunate rhetoric about the death of Mr Musando, the Deputy ICT director was reckless, irresponsible and sensational and was aimed at distracting from the real issues in the instant dispute in that: the said death was under investigations and the petitioners were free to avail the investigative agencies whatever evidence in their possession; the KIEMS was not handed over to IEBC but remained in the hands and management of the contracted consultant, a French firm, Safran; and, the IEBC had well-established structures including sufficient well-trained ICT personnel capable of handling the electoral process.

552. Mr Chirchir denied petitioners allegation that the presidential election results were computer generated. He deponed that that the electronically submitted data, with timestamps, had been analyzed against the results of accumulated votes for the 3rd respondent and the 1st petitioner accumulated for the span of transmission so as to plot a graph of the 3rd respondents votes minus the 1st petitioners votes as a percentage against the timestamps of submission.

553. He deposed that from what was observed from the graphs, the data showed that the lead oscillated between the two at the start of transmission. Splitting the transmission times into time sections, the first hour showed oscillations between the two ranging between 42.6% and 3.2% percentage difference which were observed to be very random. In support of this averment Mr Chirchir, relied on copies of data from IEBC showing timings at which results arrived and an analysis of the matrix showing how the computer maintained the data with percentages. He also tendered in these as evidence showed the time stamp sheet for the first

presidential results which Streamed in and this were from Narok Women Prison received at 17:07hrs indicating that 10 out of the 20 registered voters had voted.

554. In response to the petitioners allegations that the rejected votes were substantial, Mr Chirchir averred that none of the candidates were in any way deprived of their legitimate votes in the postings of the rejected votes. He deponed that the rejected votes were erroneously entered on the text transmissions of votes that were provisional. In the end they did not count as the rejected votes were properly captured in Forms 34A and Form 34B. He averred that correct rejected votes eventually went into Form 34C and informed the final declaration of the results. He deposed that the rejected votes did not exceed 90,000 votes.

17. Affidavit by Davis Kimutai Chirchir in response to the Affidavits of George Kegoro

555. The deponent, in his sworn testimony averred that Mr Kegoro had exaggerated facts, peddled outright falsehood and supressed material facts in a bid to mislead this Court and obtain an unjust advantage in favour of the petitioners. He asserted that Mr Kegoro's averments were vague and unspecific.

556. He added that the process of voting, collating, tallying and declaration of results was conducted and done in full or substantial compliance with the provisions of the *Constitution* and all electoral laws; that the presidential results announced by the 2nd respondent on August 11, 2017, were accurate and verifiable in accordance with the standards established by law and were announced in a transparent and lawful manner as contemplated by article 86 of the *Constitution* and the *Elections (General) Regulations, 2012*; that most local and international observers accredited by the 1st respondent have issued preliminary reports terming the election substantially free, fair and credible notwithstanding the minor transmission problems experienced during the election process and lastly, that the 1st respondent has posted on its website scanned copies of each and every Form 34B received in its servers, which upon collation and tallying into Form 34C, demonstrates that the election results announced on August 11, 2017 were accurate, verifiable, transparent and lawful.

557. It was his testimony that as at the time the 2nd respondent announced the presidential results, the 1st respondents online portal had not yet transmitted all the presidential results. These results were being retrieved from the Form 34As received from the polling stations, which results had already been transmitted to the constituency level. He explained that the contradiction in the data displayed was as a result of Forms 34A, 34B and 34c that had not been transmitted to the online portal. He stated that as at August 21, 2017, at approximately 8:14am (10 days after the general election), the transmission rate was at 99.99% meaning that the reported valid votes of 15,180,381 at the portal did not include valid votes from all the 40883 polling stations.

558. He further stated that the presidential results were based on Form 34C which form, did not contain results from Nyando Constituency which is made up of 60,370 valid votes as captured in Nyando Constituencys Form 34B, as such there is no significant differences in the number of valid votes reported in Forms 34Bs and Form 34C.

559. While responding to the averment that there is evidence of turnout in excess of 100 per cent, Mr Chirchir stated that no prison station had a voter turnout in excess of 100%. He noted that the total number of registered voters in Moyale prison, Kitale Medium prison and Manyani Prison were erroneously entered as rejected votes in the KIEMS kit. He also stated that the rejected votes as seen in the 1st respondents online portal is due to erroneously keying in the value of the valid votes in the rejected votes column of the KIEMS kit which explains why the rejected votes equals the valid votes. In giving an explanation to the averments that the valid votes in different elective position in Igembe Central Constituency Mr Chirchir stated that the figures are close to one another making them even more reliable.

560. Mr Chirchir averred that the violence that was witnessed a few days after declaration was occasioned by the demands by of the 1st and 2nd petitioners who sought to be declared the President and Deputy President elect respectively even before collation of results in Form 34C on the basis that the petitioners were in possession of what they termed actual results as contained in the 1st respondents servers. He deposed that the situation was worsened by the Petitioners holding a press conference at Caramel Restaurant in Nairobi at which the Petitioners urged their supporters not to accept the results that were about to be announced and ominously to await further instructions. He observed that as the Kreigler report noted, the use of such coded and/or ambiguous language in highly charged and polarised political environment more often than not lead to violence.

561. My opinion is that this affidavit fully rebutted the averments in the affidavit of Mr Kegoro notwithstanding that the burden of proof had not shifted to the respondent in respect of the allegations made in the affidavit and the fact that the affidavit introduced new issues which were not pleaded in the petititon.

18. Affidavit of Brian Gichana Omwenga in reply to Koitamet Ole Kina

562. The deponent swore his affidavit in the capacity of Technology Advisor employed by Jubilee Party. He deposed that he is a software and systems engineer, holding a Masters Degree in Engineering Systems, Technology and Policy from the Massachusetts Institute of Technology (MIT). He averred that Mr Ole Kina erroneously stated that Form 34As were used to declare the presidential results, yet it is the Forms 34B that forms the basis for declaring the presidential results. He deposed that in some cases, at the time of electronically

transmitting the results, the scanned image would either fail to load or delay especially in areas lacking 3G or 4G network coverage.

563. He clarified that such network challenges had been anticipated and the 1st respondent had issued a prior communication to that effect. However, regardless of whether or not the electronic transmission effectively worked, Form 34A would still be physically delivered at the Constituency tallying centre. Accordingly, the Form 34As would then be used to tally the constituency votes and thereafter results would be entered in Form 34B. The Form 34B would then be transmitted to the National Tallying Centre, wherein the Commission would sum them up in a Form 34C which would then be the basis for declaring the results. Consequently, he averred that it was not necessary to have in possession Form 34A during summation of the presidential results.

564. Accordingly, he deposed that the results transmitted on the television screens were only provisional since the final results were to be based on the constituency tally in Form 34B. This affidavit controverts all the allegations made in the affidavit of Mr Koitamet Ole kina. Therefore the allegations that there was deliberate non-compliance with constitutional principles cannot stand.

19. Affidavit of Dr Karanja Kibicho sworn on August 24, 2017 in reply to the affidavit of Dr Nyangasi Oduwo

565. In his sworn affidavit, Mr Kibicho averred that he is the Principal Secretary, Ministry of Interior & Co-ordination of National Government. He swore his affidavit in response to the averments made concerning the payments made to the Internally Displaced Persons (IDP).

566. He stated that following the post-election violence in 2007, several persons were displaced from their homes and thereafter the Government embarked on a settlement programme. Soon after, it was realized that due to the complexity and the magnitude of the IDP problem, there was need to formulate an appropriate legal framework to strengthen the Governments effort. He averred that, it was against that background that Parliament enacted the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012.

567. He stated that the IDP Act established a National Consultative Coordination Committee (Committee) which is tasked with the obligation to manage the IDP affairs on behalf of the Government. In his sworn testimony, the deponent averred that in the 2016/2017 Development Budget for the State Department of Interior, there was an allocation of kshs. 6 Billion. On the basis of the said budgetary provision, the Committee prepared a detailed work plan which they submitted to the Accounting Officer for approval to enable them undertake the necessary processes towards achieving the resettlement of the IDPs. The said

funds were however reduced by the National Treasury to Kshs. 2 Billion which was the amount disbursed to the Integrated IDPs across the 17 counties.

568. Mr Kibicho further averred that the said funds were disbursed through the beneficiaries Bank accounts and it is upon that background that the 3rd respondent witnessed the announcement regarding the said disbursements being made in Kisii and Nyamira counties. Consequently, the deponent denied that the 3rd respondent made any payments to the IDPs as stated by the petitioners.

569. He further averred that as the Principal Secretary of Ministry of Interior & Coordination of National Government, it is within his docket to oversee all field National Government Administrative Officers that include Regional Commissioners, County Commissioners, Deputy County Commissioners among others. In line with his scope of work, he averred that in the month of July, he received information that some chiefs in Makueni County were unlawfully using their positions and government motor cycles to campaign for the petitioners. In his sworn testimony, he provided the names of the chiefs whom he avers that were implicated in the said allegation of misuse of office.

570. He depose that, upon receipt of the said intelligence report on the conduct of the chiefs, he reported the same to the 3rd respondent and it is against that background that the 3rdrespondent made the impugned remarks during a campaign rally at Makueni. According to him, the 3rd respondents statement was meant to ensure that no Chief takes any political side or use public resource to campaign for anyone.

571. I find that this is a complete rebuttal of the allegation and the video transcripts adduced to prove that the 3rd respondent had committed election offences and that the principles in article 81 and 86 of the *Constitution* were violated since the Cabinet Secretaries expended government funds in campaigning for the 3rd respondent.

20. Affidavit by Marykaren Kigen-Sorobit in response to Moses Wamuru

572. The deponent, Ms Kigen, averred that she is an advocate of over 20 years experience and is the Jubilee Party, Deputy Chief Executive Officer and Director of Legal affairs & Compliance. It was her averments that it was her responsibility to oversee and supervise all party agents retained at various counties, sub-counties, wards and polling stations. In addition to this, she trained the party agents on their expected roles in consultations with the Chief Party Agents.

573. She stated that the 3rd respondent had agents deployed in all the polling stations across the country and such agents were assigned their respective stations at each county, constituency and wards with a chief agent to report to. She averred that the roles of the chief party agents includes _acting as the chief agent for the 3rd respondent in their respective stations;

mobilizing the 3rd respondents agents; monitoring and advising the party agents on the progress of the elections; liaising with the 2nd respondents officials conducting the election and reporting any incidences likely to negatively affect the interests of the 3rd respondent.

574. In her sworn testimony, Ms Kigen averred that, contrary to the position taken by the petitioners witness, Mr Wamuru, there was a NASA agent at Gichera primary school, Thigingi primary school, Karurumo primary school and Kiangongi primary school by the names of Josphat Nyaga, Martin Thati Njeru, Eunice Muthoni Ndwiga and Eliud Gitari respectively.

575. Furthermore, she stated that Mr Wamuru has misled the Court as to the existence of polling stations called Ngurweri primary school and Kiangongi primary school when in fact no such polling stations exist. She also stated that there was no NASA agent called Donald Muchemi at the Nyangwa secondary school which was the tallying centre for Mbeere South Constituency. In addition, she attached Form 34A of Gichera primary school which shows that, unlike what has been averred by Mr Wamuru, a person by the name of Josphat Nyaga, being a NASA agent signed Form 34A belonging to that polling station.

576. Further, she impugned the deposition by Mr Wamuru that as at 12.30 am, voting was still on-going at Thigingi primary school. In doing so, she attached a copy of Form 34A and the transmission report for that polling station which indicates that the transmission was done at 23.31 hours. She also stated that the 3rd respondents agent, by the name of Martin Thati Njeru was present all through yet he signed Form 34A without any reservations or adverse comments.

577. With regard to allegations that voting began at 2.00 pm at Karago primary school, the deponent averred that she has sought information from the 3rd respondents agent at the polling station who stated that voting begun at 8.00am. Ms Kigen, also questioned why the NASA agent, by the name of Juliet Wamburu, who indeed signed the Form 34A, did not mention that there was delay in opening the polling station.

578. With regard to allegations that NASA agents were kicked out of Karurumo youth polytechnic polling centre, the deponent attached Form 34A which showed that a person by the name of Eunice Muthoni Ndwiga, a NASA agent signed Form 34A without any reservations. She stated that even Kyeni Girls secondary school polling station, NASA agents signed Form 34A hence they could not have been kicked out as alleged. Further Ms Kigen stated that according to the information received from the 3rdrespondents agent deployed at New Farmers Hall polling station, there was no NASA agent present at that polling station hence the allegations that the agents were threatened are untrue.

579. The deponents concluded by stating that no County Commissioner acted as the 3rdrespondents agent as alleged.

I wish to state that the allegations made in the affidavit of Mr Moses Wamuru and the evidence adduce in support of those claims did not shift the burden of proof to the respondents. More specifically the claim that the NASA agents were kicked out of the polling stations during the counting of the votes and that the County Commissioner was the chief agent of Jubilee Party. No evidence was adduced in support of this claim hence the respondents were under no evidentiary burden to disproof the allegations since they had not been proven in the first instance. Nonetheless, the affidavit of Ms Marykaren Kigen-Sorobit sufficiently counters those allegations.

21. Affidavit by Marykaren Kigen- Sorobit in response to the affidavit of Benson Wasonga

580. The deponent, Ms Kigen stated that no proof has been availed of the alleged anomalies with regard to the declaration of the presidential results by the 2nd respondent, thus the averments contained in the affidavit of Benson Wasonga are unsubstantiated and do not raise any factual issues.

581. She asserted that the actual summation of the total valid votes under the portal is 15,180,381. Further, that according to Form 34C, the 1st petitioners votes were 6,762,244 and the 3rdrespondents votes were 8,203,290 and hence the assertion that the 1st petitioners votes were 6,821,505 while the 3rdrespondent votes were 8,223,163 is false.

582. It was her assertion that the Form 34C, upon which the results were declared by the 2nd respondent pursuant to the provisions of regulation 87(3)(e) of Elections (General) Regulations, 2012 does not include the results for Nyando constituency where the Petitioner had 60,715 votes against the 3rd Respondents 214 votes. She stated that those votes would not have made any material difference within the contemplation of the proviso to regulation 87(3). I find that the issue as to the results of Nyando constituency being left out in the declaration of the presidential election results is fully supported by the proviso to regulation 87 (3) of the Elections (General) Regulations, 2012. In the constituency the petitioner had 60,715 votes while the 3rdrespondent had 214 votes. The justification for the results being declared without those from Nyando is that the results from the constituency could not have materially affected the result.

22. Affidavit by Marykaren Kigen - Sorobit in response to the affidavit of Ibrahim Muhamud Ibrahim

583. In her sworn statement, Ms Kigen averred that the 1st respondent vide an email dated July 21, 2017, forwarded to all Political Parties and Independent Candidates a list of presiding

officers for Mandera North Constituency which indicates the presiding officer at Guticha primary school as Isaak Alasow Abdi.

584. She asserted that Guticha primary school has only one polling station and the registered number of voters is 660. In that polling station the total number of valid votes cast were 581 representing a percentage of 88% voter turnout. She compared the voter turnout at Kiatine primary school in Mbooni Constituency, Makueni County wherein the registered number of voters was 2 and the voter turnout was 100% same as Kwataruk Water Point polling station in Loima Constituency, Turkana County where the registered number of voters was 5 and the number of valid votes was 5 which indicates 100% voter turnout. Accordingly, she averred that it is not unusual to have record of 100% voters turnout.

585. In response to the averment that figures were filled in at the tallying centre which was done at the Sub County Commissioners Block, against a court order which had directed that the tallying centre be at Rhamu Arid Zone Primary School, she explained that the Decree attached was served in Mandera North Constituency on August 3, 2017 which was a Thursday and four days to the elections hence, the practicability of the execution of the Decree became impossible.

I find that the this affidavit controverted all the allegations contained in the affidavit of Ibrahim Muhamud Ibrahim.

23 Affidavit by Marykaren Kigen-Sorobit in response to the affidavit of Mohamed Noor Barre

586. In response to the averments made on Mr Barres affidavit, Ms Kigen stated that the 1st respondent vided an email dated 21st July, 2017 forwarded to all Political Parties and Independent Candidates a list of all presiding officers for Mandera North Constituency which indicated that the presiding officer at Kalicha Primary School was Mohamed Abass.

587. She averred that Kalicha Primary School has two polling station and the registered number of voters at polling station 2 is 594; and the voter turnout was 100%. She avers that there is nothing unusual in having a voter turn -out of 100%. I find that the allegations of rigging and replacement of presiding officers with untrained officers has not been proved at all. These were bare allegations in the affidavit of Mohamud Noor Barre in respect of which the petitioners did not discharge their burden of proof. Nonetheless, the respondents adduced evidence to controvert those allegations which evidence I find was a complete rebuttal of the claims made in the said affidavit.

24. Affidavit by Andrew Wakahiu in response to the affidavit of Dr Nyangasi Oduwo & Olga Karani

588. Andrew Wakahui, swore his affidavit dated August 23, 2016, in his capacity as the Secretary of Delivery and Head of the Presidential Delivery Unit (PDU) which is a functional office in the Executive Office of the President.

589. He averred that the 3rd respondent did not violate the provision of section 14 of the *Election Offences Act* by sponsoring or causing sponsorship of advertisement in printed electronic media, business and billboards of the government achievements during the election period. He stated that the work of the Presidential Delivery Unit is to enhance the accountability of a government to its citizens through making information relating to ongoing projects available. He went on to explain the roles and function of the PDU which includes accountability.

590. He deposed further, that the web portal is one of the tools the PDU uses to enhance accountability as it is the easiest ways of making information on government projects available. According to his averments, it was necessary to sensitize Kenyans on its existence by way of *inter alia* advertisements through the electronic and print media.

591. It was his deposition that this was necessitated by the numerous efforts by the general public inquiring information from the various state departments of the Government of Kenya especially on all ongoing projects undertaken from April, 2013 onwards and especially after the launch of the Jubilee Coalition and shared manifesto which outlined the coalition's vision, pledges and agenda from 2013 to 2017.

592. Mr Wakahui stated that the purpose of setting up the president's delivery unit and specifically the delivery portal was to ensure that the members of the general public are informed and are able to track projects undertaken by the government and which is an obligation under article 35 and article 201 of the *Constitution* which requires that there be openness, accountability and public participation in financial matters. Further that since the web portal was set up there have been over 6 million impressions (visits) which shows it is a very useful tool for monitoring government projects and the feedback from the members of the public.

593. In addition he stated that there is pending litigation before the High Court which seeks to determine inter alia the constitutionality of section 14 of the *Elections Act*. The cases are Constitutional Petition 162 of 2017 *Apollo Mboya vs Attorney General and 3 others* and Constitutional Petition 182 of 2017 *Jack Munialo & 12 others -vs- Attorney General*. Moreover, there was a bill which was introduced to the National Assembly seeking to repeal section 14 of the *Election Offences Act* in order to ensure that it confirms to article 35 of the

Constitution, unfortunately the National Assembly was adjourned sine die before the bill was passed.

594. This affidavit offered a full explanation as to the functions of the Presidents Delivery Unit which was set up to ensure that the members of the general public are informed and are able to track projects undertaken by the government and which is an obligation under article 35 and article 201 of the *Constitution*. I find that this fully rebuts the imputations of electoral offences on the part of the 3rd respondent.

595. On the issue of the pending Constitutional matters pending in other Court it is imperative to note that this Court will respect the hierarchy of Courts and will not usurp the jurisdiction reposed in another Court. This Court will allow other Court below it to exercise their jurisdiction in accordance with the law and will allow a matter to come before it in the ordinary course of appeal. *In Re the Matter of the Interim Independent Electoral Commission*, Sup. Ct. Civil Application No 2 of 2011 this Court held [paragraph 45]:

> "In this instance similar questions, entailing constitutional interpretation, have been brought simultaneously before the High Court and the Supreme Court; and, as already noted, such a move by parties is apt to precipitate contretemps in resolving the question of jurisdiction. In principle, the Supreme Court commits itself to order and efficacy in the administration of justice, and to that end it may require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict; and each case will be carefully considered on its merits.

Similarly with respect to allowing other Courts to exercise their jurisdiction, this court held, in *Peter Ngoge v Hon Ole Kaparo* that [paragraph 30]:

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

It is my considered view that this Court should not delve into any matter pending before another Court; instead this Court will give room to the High Court to hear and determine any matter or matters pending before it including that relating to the constitutionality of any provisions in the Election Offences Act.

25. Winifred Waceke Guchu Affidavit sworn on August 24, 2017, in Reply to Dr Nyangasi Oduwo

596. The deponent, Ms Guchu averred that she is the Executive Director of Jubilee Party and was the Deputy Chief Presidential Agent for the 3rd respondent during general elections held on August 8, 2017.

597. She averred that the difference of 1,441, 066/- between the votes cast in favour of the 3rd respondent and the 1st petitioner was very significant and demonstrated the resolve of the people of Kenya to exercise their free and sovereign will. In addition, the Jubilee Party had won a majority of positions in the other five elections of Governor, Senate, National Assembly, Women Representative and Members of County Assembly conducted on the same day.

598. Ms Guchu averred that, the petitioners wrote a letter to the 1st respondent on August 10, 2017, claiming to have in their possession presidential results which were different from the results being displayed in the IEBC portal at the time. Before the issuance of the said letter, Ms Guchu averred that the petitioners had made widely publicized claims stating that the results transmission system of the 2nd respondent had been hacked.

599. It was therefore, surprising that the petitioners had now abandoned that argument in favour of other averments which according to her, were never an issue when the results were being tallied, collated and verified. She further stated that she was aware of the 1st petitioners attempt to coerce candidates nominated by NASA affiliate parties to reject their positions in order to strengthen the petitioners position.

600. Ms Guchu further averred that the *Constitution* does not impose any duty on the 1st respondent to exclusively use electronic systems to transmit the results. She deponed that the only mandate imposed on the 1st respondent was to ensure that the system used is simple, accurate, verifiable, accountable and transparent. It was her testimony that section 44A of the *Elections Act* grants the 1st respondent a statutory discretion to use a complementary mechanism where technology either fails or is unable to meet the constitutional threshold of a free and fair election. She further deposed that the Streamed results were not the basis on which the winner of the election was declared. She swore that there was no legal requirement obliging the 1st Respondent to avail Form 34A to any of the presidential candidates for verification.

601. Ms Guchu asserted that upon the conclusion of voting, the counting exercise commenced in the presence of all agents present, observers, police officers and all other authorized persons. She averred that according to ELOG, an observer group which deployed one of the largest observer delegates, the petitioners had very good representation of agents and even where the

agents failed to sign the prescribed forms, such failure does not of itself invalidate the results as provided for under Regulations 62(3) and 79(6) of the *Elections (General) Regulations, 2012*. Furthermore, in accordance with regulation 79(2)(A)(a), a copy of Form 34A was affixed at the polling station.

602. She averred that once the process of counting at the polling station was concluded, the results were simultaneously sent electronically to the constituency tallying centre and the national tallying centre. She deposed that those were the results that were thereafter Streamed into the public portal at the Bomas of Kenya.

603. It was her testimony that since the 1st respondent did not own telecommunication network facilities, it relied on duly licensed service providers to provide the service. She deposed that by virtue of regulation 20 of the *Elections (Technology) Regulations, 2017*, the said service providers are under an obligation to provide and deliver services as may be requested by the 1st respondent. She averred that the 1st respondent in consultation with the service providers, was required by virtue of regulation 21 of the Technology Regulations, to identify and communicate, in a timely manner, to all stakeholders about the network service available at different polling stations and in areas where there was no telecommunication network. Aware of such complexities, MsGuchu avers that Parliament introduced section 44A in order to provide a complementary mechanism for the identification of voters and transmission of results.

604. It was her testimony that the petitioners, through their umbrella political movement had written a letter to the 1st respondent enquiring on how the IEBC intended to implement section 44A of the *Elections Act*. In response, by a letter dated 28th February, 2017, the 2nd respondent informed the Petitioners that the complementary system envisaged under section 44A of the *Elections Act* would be effected through inter alia an amendment to Regulation 69 of the draft Elections (General) Regulations that the 1st respondent was developing in consultation with stakeholders including NASA.

605. She indicated that following the Court of Appeal decision in the *Maina Kiai* case, it was confirmed that Regulation 83 would be the complementary system applicable in respect of transmission of results in the event that the technology failed. Such complementary mechanism would be effected through the physical delivery of Form 34As from the polling stations to the returning officers at the constituency tallying centre while constituency returning officers would deliver Forms 34B to the National Tallying Centre in Nairobi

606. She further averred that on August 6, 2017, the 1st respondent, by virtue of Regulation 21 of the Technology Regulationspublished a list of approximately 11,000 polling stations that lacked 3G network coverage. Consequently, the electronic transmission of results would be generally poor in those stations.

607. Regarding the irregularities set out in Dr Nyangasis affidavit, Ms Guchu responded that in an overwhelming number of cases cited therein, the evidence produced did not reveal the said irregularities as alleged. In particular she deposed that neither the *Elections Act* nor the *Election (General) Regulations* require that Form 34A bears the 1st respondents stamp. Further, the failure of an agent to sign the Forms or attend his/her duties at the counting hall did not invalidate the results.

608. In addition, she averred that Dr Nyangasi had made an expert' opinion on handwriting even though he is not a forensic document examiner. She referred to section 50 of the *Evidence Act* which provides circumstances under which the court can admit an opinion about a persons handwriting. She deposed that Dr Nyangasis opinion is of no probative value for lack of legal basis.

609. In response to allegations on discrepancies of returns in forms 34A and 34Bs, Ms Guchu stated that there were no significant discrepancies between Form 34A and Form 34B. She has produced a report, marked as Exhibit WG 13, which demonstrated that after reconciling the discrepancies in the Forms attached to Dr Nyangasis affidavit, the net effect is that the petitioners tally improves by 595 votes while that of the 3rdrespondent decreases by 1199 votes. She observed that it is incomprehensible for the petitioners to allege that the IEBC systems had been hacked and at the same time persist the argument that electronic transmission of results was the only acceptable mode of transmitting results.

610. She further deposed that contrary to Dr Nyangasis assertions, an analysis of all the 290 Form 34Bs reveals that NASA agents signed the vast majority of the said ForMs In addition, she stated that an overwhelming majority of the allegations set out in Dr Nyangasis affidavit are false, erroneous, predicated on fictitious documents and that he lacks competence to give an opinion on some of the claiMs

611. Ms Guchu acknowledged that according to Form 34C downloaded from the 1st respondents website, the rejected votes were 81,685 while the public portal on which the electronic results were posted showed that the rejected votes were 403,495.She explained that, she undertook an analysis which revealed that in 688 polling stations accounting for 229,869 out of 294,271 registered voters, the number of reported rejected votes was equal to the number of registered voters in those affected polling stations.

612. According to the MsGuchu, the presiding officers in the affected stations inserted the registered number of voters in the field reserved for rejected voters in the KIEMS kits since the slot for registered voters was already pre-filled. She averred that such an error or mistake was quite easy to make since in the physical Form 34A, the number of registered voters in a polling station was the first slot that an electoral officer fills. She deposed that this explained the discrepancy between the number of rejected votes displayed in the portal and the ones

indicated in Form 34C. It was her testimony that in any case, since the official results were declared on the basis of the 290 Form 34B which had been compiled from the physical Form 34A, the said transmission error did not occur

613. In response to the allegation of failure to include results of Nyando Constituency in the final tally, Ms Guchu averred that such failure was not fatal for the reason that even if the results declared did not include the results from Nyando constituency wherein the 1st petitioner had 60,715 votes as compared to the 3rdrespondent who had 214 votes, under Regulation 87 of the General Regulations, the 2nd respondent can declare results of the presidential election, where in the opinion of the Commission the results that have not yet been received would not make a difference in the final results.

614. Responding to the alleged disparity between presidential votes and results of the other elective posts, Ms Guchu attaches an analysis of results from 94 constituencies showing that that votes cast in one or more of the other 5 elections, were more than the votes cast for the presidential candidates. She denied the allegation that the Streamed results showed a static 11% margin between the 1st petitioner and the 3rd respondent, noting that the gap in percentage between votes cast with respect to the petitioner and the 3rdrespondent kept on shifting throughout.

615. On the allegation of undue influence and intimidation, she states that there is no provision in the *Constitution* that requires ongoing government programs to be suspended during the election period. Furthermore, article 35 guarantees the right to information hence in openness and transparency such information was made available to the members of public, through the various available channels. In addition, she stated that there are two pending cases in the High Court namely; Apollo Mboya v Attorney General & 3 Others Petition No 162 of 2017 and Jack Munialo & 12 Others v Attorney General, Petition 182 of 2017 which challenges the constitutionality of section 14 of the Election Offences Act which prohibits advertisements on government achievements during the election period. She deposed that a Bill had been introduced in the National Assembly with a view to repealing this provision to ensure conformity with article 35 of the *Constitution*.

616. In conclusion, she averred that the petitioners had consistently undermined the electoral process by way of their public utterances in various foruMs Specifically, she deponed that the 1st petitioner stated that the 3rdrespondent is a 'computer generated leader and that it does not matter who won the election. She further states that the petitioners had, by their conduct and actions, shown their resolve to compromise the fair adjudication of this petition.

617. I do not hesitate to find that this affidavit offers a complete rebuttal to the allegations made in the affidavit of Dr Nyangasi which now stands controverted.

26. Winifred Waceke Guchu Affidavit sworn on August 24, 2017, in Reply to Olga Karani

618. The deponent stated that the averments made by Ms Karani in her Affidavit were of such generalized nature that it is impossible to respond to them with any specificity. She averred that the IEBC Commissioners referred to were not identified and neither were the presiding officers named nor their polling stations identified. She swore that Ms Karani did not specify occurrences and events that allegedly happened in Migori, Homabay and Kisumu County. Moreover, she did not state the names of persons missing from the voters register. Further, she disputed Ms Karanis testimony that as at 10th August, 2017, very few Form 34As were available. On the contrary, the deponent stated that as at midnight of August 9, 2017, the information availed to political parties through IEBC Application Program Interface showed that 39,426 Forms 34As results had been received.

619. Ms Guchu concluded by testifying that she was not aware of any law that requires presidential agents to be given any roles at the National Tallying Centre.

This affidavit rebutted the affidavit evidence of Olga Karani with the effect that the claim that the petitioners were not given the Forms 34A.

27. Affidavit of Brian Gichana Omwenga in reply to the affidavit sworn by Apprielle Oichoe

620. The deponent, Mr Omwenga, in his affidavit sworn on August 24, 2017, averred that the opinion of Ms Oichoe on how the IEBCs system should have been, is purely subjective and lacked scientific basis. He stated that Ms Oichoe made generalized allegations without producing any evidence to support her assertions failed to show how, when and by whom the IEBC website was compromised as alleged. He deposed that she also failed to support with any evidence the assertion that non-authenticated and non-prescribed results through use of unknown form and format found their way into the IEBC portal.

621. On the questions raised on the voters register, Mr Omwenga testified that the IEBC complied with the *Elections Act* and the *Elections (Registration of Voters) Regulations, 2012*. With regard to allegations of non-availability of the register, Mr Omwenga responded that the IEBC issued a press statement on May 18, 2017, urging all Kenyans to inspect the voters register and confirm their biometric details.

622. It was his deposition that on June 9, 2017, 60 days before the general elections, the IEBC informed the public that it would be revising the register as guided by the findings of the verification exercise. Further that on this date, the IEBC also issued a media releasing on the audit report on the register of voters. Subsequently, the IEBC established a portal on their website which enabled voters to access and inspect the voters register at their convenience He added that the 1st respondent posted into the portal further information including an audit

report, the 2017 register of voters which included statistics per polling station, statistics per county assembly ward, statistics per constituency, diaspora statistics and prison statistics and informed members of the public to verify their registration details online or by sending an SMS to 70000 with their Identity Card Number or Passport number.

623. Mr Omwenga questioned the authenticity of the averments made by Ms Oichoe to the effect that voters at Upper Hill Primary polling station were turned away since their names were missing from the register. It was his testimony that Ms Oichoe has no capacity to make such an averment because she was neither the allegedly affected voter nor the presiding officer and hence the veracity of the said allegation cannot be validated.

624. He deposed that if indeed she was an observer in that station, she ought to have been accredited by the 1st respondent in accordance with Regulations 62 and 94 of the *Elections (General) Regulations, 2012*. Furthermore, the particulars of the voters allegedly affected were not provided by Ms Oichoe. The deponent further states that Regulation 69 of the Elections (General) Regulations stipulates how the complementary mechanism should be applied in instances where the electronic voter identification device fails to identify a voter.

625. Responding to the assertion that results were transmitted by use of a document that was not prescribed by law, Mr Omwenga stated that under Regulation 82, *Elections (General) Regulations, 2012* the Commission may direct any other manner in which the results could be transmitted. Relying on section 72 of the *Interpretation and General Provision Act*, Cap 2 Laws of Kenya, which provides,

> "...whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead. he averred that the Commission was free to prescribe any other Form through which the results could be transmitted."

626. Mr Omwenga further stated that there is no legal requirement obliging the 1st respondent to avail Form 34A to any of the presidential candidates for verification and that the role of the 2nd respondent at the National Tallying Centre was limited to collating the results recorded in the 290 Form 34Bs and in the terms proscribed by the Court of Appeal decision in the Maina Kiai case He also pointed out that Ms Oichoi had relied on a non-existent section 44B of the *Elections Act*. The deponent also attached as evidence, a certificate of extraction of the video transcripts attached to Davis Chirchirs affidavit pursuant to section 106(4)(B) of the *Evidence Act*.

It is clear that there are no express statutory requirements imposing an obligation on the 1st respondent to avail the Forms 34A and 34B to the respondents. Therefore it cannot be a basis for making a claim of non-compliance with the constitutional principles or written law.

28. Affidavit by Davis Kimutai Chirchir in response to the 2nd affidavit of Godfrey Osotsi

627. Mr Davis Kimutai Chirchir, in his affidavit dated August 24, 2017 swore this affidavit in his capacity as the 3rd respondents chief agent in response to and in opposition of the supporting affidavit of Godfrey Osotsi.

628. It was his sworn statement that the affidavit of Mr Osotsi was exaggerated, peddled with outright falsehoods and has suppressed material facts in a bid to mislead this Court. He deposed that the process of voting, collating, tallying and declaration of results was conducted in full and or substantial compliance with the provisions of the *Constitution* and all electoral laws. Further that the presidential results announced by the 2nd respondent on August 11, 2017 were accurate, verifiable and in accordance with the standards established by law.

629. He emphasised that the results were announced in a transparent and lawful manner as contemplated by article 86 of the *Constitution* and the *Elections (General) Regulations, 2012*. In support of his averments he made reference to reports by local and international observers accredited by the 1st respondent terming the election as being substantially free, fair and credible.

630. In addition, he deposed that the collation of results to Form 34C and the announcement of the presidential results were done after all Forms 34B, with the exception of Nyando Constituency, had been electronically transmitted to the National Tallying Centre. He deponed that the results for Nyando Constituency which had not been collated at the time of declaration did not affect the outcome of the results. He testified that the petitioners have a culture of disputing an election outcome whenever they lose. He further denied that the IEBC failed to produce election materials in the 2013 presidential election petition, adding that the court had held that the petitioners then had not laid basis for the demand.

631. He averred that the issue of transmission of results was conclusively settled by the High Court in the Nasa case and later affirmed by the Court of Appeal in Civil Appeal No258 of 2017 where the Court held that the 1st respondent had put in place a complimentary mechanism in terms of section 44A of the *Elections Act* 2011 and that it had, with public participation, set up regulations to operationalize section 44A. He testified that any failure of technological devices should not invalidate the results.

632. Responding to the allegation that the security of the integrated electoral management system (KIEMS) was compromised, Mr Chirchir deposed that many allegations contained in the petition and supporting affidavits were unsubstantiated since no transcripts of the alleged video clips nor the MS Excel data has been provided.

633. Mr Chirchir deposed that the 1st respondent had full control of its system at all times and that there was no evidence of it having ceded its authority to third parties. It is therefore not true that the transmission of results from 11,000 polling stations was jeopardized as none of the petitioners agents challenged the contents of Forms 34A from these polling stations. Further, he stated that it was not accurate to state that 11,000 polling stations would represent 7, 700,000 voters since the number of registered voters per polling stations varied from 1 voter per polling station to a maximum of 700 voters per station.

634. He denied that the results continued Streaming in a constant percentage of 54% and 44% for the 3rd respondent and the 1st respondent respectively with a constant difference of 11% in favour of the 3rd respondent. According to Mr Chirchir, the difference between the petitioner and the 3rd respondent oscillated between 27.06% and 9.22% in favour of the 3rd respondent. He explained that as accumulative results retain high figures, it requires a high number to dilute its percentage i.e. if 700 represent 50%, an addition of another 700 to it, will increase the percentage by 16.7% making it 66.7%. However, if 3,000,000 represent 54% an addition of 700 to it, will increase the percentage by 0.00580066% making it 54.00580066%. It would therefore require a change of 130,000 in that number and no change at all in the corresponding number to attain a 1% increase.

635. Mr Chirchir concluded by stating that this Court should protect the constitutional democracy and find that the 3rd respondent was duly elected in a free, fair, credible and valid election conducted on August 8, 2017.

636. The petitioner failed to prove that the percentages between the votes garnered by the petitioners and those of the 3rd respondents had a constant difference of 11%. This Court held in Raila 2013 that for data-specific allegations the standard of proof is beyond reasonable doubt. This the petitioner was unable to discharge hence there burden did not shift to the respondents. That notwithstanding the all the respondents have adduced evidence in rebuttal showing an analysis of the various diffences in percentages at various intervals from the time the results started Streaming into the National Tallying Centre to the time of declaration of results indicating that the difference kept varying.

637. Consequently, I find that the petitioner in most of the allegations made did not discharge the onus of proof on them. In that regard the burden did not shift to the respondent to counter the allegations since they bore reinforcement by cogent evidence. In the instances in which the petitioners did discharge the burden, the respondents sufficiently supplied cogent

evidence in rebuttal. On the other hand where the respondents admitted the allegations such as those of administrative errors credible evidence was supplied to prove that the said errors did not materially affect the results and they were not in favour of any particular candidate.

J. Orders on Access to Information

638. By a Ruling delivered on August 28, 2017, this Court considered a Notice of Motion Application dated August 25, 2017 seeking the following Orders:

1. This application be certified as extremely urgent, heard and orders given before the hearing of the substantive Petition.

2. The application be heard and determined expeditiously and in priority to the petition but in any event before August 25, 2017.

3. This honourable court be pleased to order the 1st Respondent to give access to the petitioner/applicant to the following:

    a. Direct, unfettered access to relevant persons and systems at Safran in order for the forensic information technology experts to fully understand the KIEMS system.

    b. Full and unfettered physical and remote access to each biometric electronic appliance used at each voting/polling station location used to verify voters IP voters identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data files, creation ties and dates, device IDs MAC addresses, IP.

    c. Addresses, geographic and local communications mast information.

    d. Full and unfettered physical and remote access to any local server(s) connected to the electronic device(s) used to verify voters identification against the list of registered voters at each polling station, from which a forensic image will be taken.

    e. Electronic device(s) used to capture Form 34As and Form 34Bs onto the KIEMS system and transmitted to a) the CTNs and b) the NTC.

    f. Full and unfettered access to any form of scanning device which saved images onto access to any form of scanning device which saved images onto a access local server(s) for onward transmission.

    g. Access to any scanning device which would serve to establish whether the Form 34A was captured, stored and forwarded in the expected timeframes.

h. Full and unfettered physical and remote access to any server(s) at the CTNs for storing and transmitting voting information.

i. Full and unfettered physical and remote access to any servers at the NTC for storing and transmitting voting information.

j. Addresses, source and destination IP Addresses, server details and user details.

k. Full and unfettered to access to all source codes, including all programming codes, pursuant to The Election Regulation Technology, 2017,

4. This honourable court be pleased to order the 1st Respondent to give access to all Parties, the following information and data that is in the exclusive possession;

a. The IEBC Election Technology System Network Architecture for the period of 30 days before the elections to the date of the Order of this Court comprising but not limited to:

i. All the servers used during the Elections;

ii. number of servers;

iii. location of servers;

iv firewalls;

v IP addresses;

vi. Operating systems;

vii. Software running applications

b. The IEBC Election Technology System Redundancy Plan comprising but not limited to:

i. Password policy;

ii. Password matrix;

iii. Owners of system administration password(s)

iv System users and levels of access

c. The IEBC Election Technology System Redundancy Plan comprising:

i. Business continuity plan

ii. Disaster recovery plan.

d. Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:

i. Certified copies of all reports prepared pursuant to Regulation 10 of the Elections (Technology) Regulations, 2017; and

ii. Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation Presidential Petition No1 of 2017 -7- 10(2) of the Elections (Technology) Regulations, 2017.

e. In relation to KIEMS Kits:

i. Import testing certification in relation to all KIEMS Kits;

ii. Static IP addresses of each KIEMS Kit used during the Presidential Election;

iii. Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including 05th August 2017 and 11th August 2017;

iv Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;

v Polling station allocation for each KIEMS Kit used during the Presidential Election;

vi. Audit log of what each KIEMS Kit used during the Presidential Election transmitted from Polling Stations to Constituency Tallying Centres and to IEBC National Tallying Centre; and from IEBC Result Transmission Database to Media Houses Application Protocol Interface (API)(logs of media data update). Log must also show:

aa. Time of transmission from KIEMS Kit to the IEBC Result Transmission Database; and

bb. Time of transmission from IEBC Result Transmission Database to the Media Houses API;

cc. Count of Identified Voters by each KIEMS Kit;

dd. Soft copy of Ids captured in each KIEMS Kit;

ee. Audit log of transmission of scanned Forms 34A from each of the KIEMS Kits.

f. Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

i. List of the technical partners;

ii. Kind of access they had;

iii. List APIs for exchange of data with the partners.

g. Log in for the period of 30 days before the elections to the date of the order of this court of trails of showing the trail of users and equipments into all the IEBC Servers.

h. Log in for the period of 30 days before the elections to the date of the order of this court of trails of users and trails of users and equipments into the KIEMS Database Management SysteMs

i. Administrative access log into the IEBC public portal between 5th August 2017 to date.

5. The 1st Respondent be compelled to give access to and supply to the court and to the Petitioners for scrutiny, certified photocopies of the original Forms 34As 34Bs and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

6. The 1st Respondent be compelled to give the Petitioners access Form 34As 34Bs and 34 Cs from all 40,800 polling stations.

7. This honourable court be pleased to grant leave to the Petitioner/Applicants to:

(a) Rely on and or file further affidavits in support of the petition and or the affidavits of (i)Rt. Hon Raila Amolo Odinga, Omar Yusuf Mohamed, (ii)Omar Yusuf Mohamed, (iii) Dr Edga Ouko Otumbo, Nyangusi Oduwo and (iv) Norman Magaya dated 24/8/2017 be admitted on record and or be deemed to have been properly filed.

(b) File such other affidavits in response to or reply to any responses filed by the respondents

8. This Honourable Court be pleased to grant any other reliefs that become just and fit to grant.

639. The anchor of the Application was that the electronic system of transmission had been deliberately compromised in a manner not intended by law so as to interfere with and affect the result of the Presidential election. It was also contended that the election results from individual polling stations were not verifiable. Further, that 395,510 rejected/spoilt votes were unaccounted for and that the KIEMS system was designed to only transmit the results if the data entered was accompanied by an image of the prescribed form. This allegation was satisfactorily controverted by the 1st and 2nd respondents who explained that because of the size of the image, in certain polling stations out of 3G or 4G network range, the data was sent before the image of the prescribed Form could also be sent.

640. In the analysis the Court summarized the prayers sought by the Petitioner in the Application in the following three limbs:

i. Access to information relating to the hardware and software used in the conduct of the Presidential Election and particularly, transmission of results;

ii. Access to and scrutiny of certified copied of Forms 34A, 34B and 34C

iii. Leave to file further Affidavits.

641. Regarding prayer (ii), having set out the law and jurisprudence regarding scrutiny, the Court determined that the Petitioners had signaled their intention to seek scrutiny of (a) all rejected and spoilt votes (sic), the returns of the Presidential Election Results including but not limited to Forms 34A, 34B and 34C and the KIEMS kit, the servers and website/portal.

642. The 1st and 2nd respondent, in response, particularly registered their concern regarding the practicality of some of the Orders being sought, such as access to the KIEMS kits, the security of the system of transmission and the necessity to set up appropriate back up mechanism in case the Orders were granted, which process, they stated would take upto at least 3 weeks.

643. The Court was cognizant of the security system concerns raised by the 1st and 2nd respondents , particularly, the absolute confidentiality of passwords and usernames, locations of servers, identity of password holders, IP addresses and software running applications, among others. Therefore none of the requests relating to these specifics were granted.

644. The Court disallowed prayer 3(a) in which the Petitioners were seeking direct, unfettered access to relevant persons and systems at Safran, being cognizant of the jurisdictional difficulties of granting access to an entity based in France that was also not party to these proceedings.

645. Having evaluated the evidence and analysed the arguments by counsel, the Court made the following orders, distinct and modified from the prayers originally sought by the Petitioners in the Application:

[72] Having so held, the final Orders we make are that the Petitioners as well as the 3rdRespondent shall be granted a read only access, which includes copying (if necessary) to –

a. Information relating to the number of servers in the exclusive possession of the 1st Respondent.

b. Firewalls without disclosure of the software version.

c. Operating systems without releasing the software version.

d. Password policy.

e. Password matrix.

f. System user types and levels of access.

g. The IEBC Election Technology System Redundancy Plan comprising of its business continuity plan and disaster recovery plan.

h. Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:

(i) Certified copies of all reports prepared pursuant to Regulation 10 of the Elections (Technology) Regulations , 2017; and

(ii) Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation 10(2) of the Elections (Technology) Regulations, 2017

i. Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including 5th August, 2017 and 11th August, 2017

j. Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;

k. Polling station allocation for each KIEMS Kit used during the Presidential Election;

l. Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

   a. List of the technical partners;

   b. Kind of access they had; and

   c. List of APIs for exchange of data with the partners

m. Log in trail of users and equipments into the IEBC Servers.

n. Log in trails of users and equipments into the KIEMS Database Management SysteMs

o. Administrative access log into the IEBC public portal between 5th August 2017 to date.

p. The information listed in (m), (n) and (o) above shall be issued in soft copy to the petitioners and 3rdrespondent.

q. Certified photocopies of the original Forms 34As 34Bs and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

r. Forms 34A 34B and 34 C from all 40,800 polling stations.

s. Scanned and transmitted copies of all Forms 34A and 34B.

[73] Consequent upon the said Orders, we hereby make the following further Orders:

i. The Registrar of this court assisted by a number of judicial officers and staff as she may determine shall supervise access to the certified copies of original Forms 34A and Forms 34B by the petitioners and 3rdRespondents at such a venue as she shall determine in consultation with the parties. A report on that exercise and related issues shall be filed by the Registrar by Tuesday, August 29, 2017 at 5.00 pm. and parties are at liberty to submit on it at the end of the hearing.

ii. In the exercise set out in (a) – (p) above, priority shall be given to the;

   1. 292 Polling stations as deponed to at paragraph 12 of Norman Magaya Affidavit sworn on 23rdof August 2017;

2. 688 polling stations as deponed to at paragraph 15 of Omar Yusuf Mohammed affidavit sworn on 24th August 2017;

3. 14,078 polling stations as deponed at paragraph 70 of Dr Nyangasi Oduwos affidavit dated 18th August 2017

iii. An ICT officer designated by this court from among its ICT staff and two independent IT experts appointed by the court shall supervise access to the technology in paragraph 72 above at such a venue as they may determine in consultation with the parties. A report on that exercise and related issues shall be filed by the said officer and experts by 5.00 pm. on Tuesday, August 29, 2017 and parties are at liberty to submit on it at the end of the hearing.

iv. The parties to the petition are entitled to have a maximum of two agents/ experts in each of the exercises above. The agents shall at all times comply with the directions of the Registrar and the ICT officer to ensure expeditious conclusion of the above exercise.

v. There shall be no order as to costs.

vi. It is so ordered.

646. The Court then set the parameters for the exercise and mandated the Registrar to supervise access to the certified copies of the Original Forms 34A and Forms 34B by the Petitioners and 3rdRespondent and due to the constraints of time, to file a Report on that exercise by Tuesday August 29, 2017 at 5.00pm. In addition, an ICT officer designated by the Court from among its ICT Officers and two independent IT experts appointed by the Court were tasked to supervise access to Orders on Technology and to file a report on that exercise at the same time as the Registrar. Each party to the Petition was allowed a maximum of two agents in each of the Forms and ICT exercises.

Submissions by the Parties

647. At the end of this exercise, the parties were each allowed to submit on the reports filed by the ICT experts and the Registrar.

648. Counsel for the Petitioner, Mr Orengo referred the Court to paragraph 13 of the Report where the number of Forms 34A, 34B and 34C availed by the 1st Respondent had been indicated. One (1) Form 34C, 292 Forms 34B and 41,451 Forms 34A. Counsel pointed out some of the remarks that had been made by the Registrar on the process:

(a) Forms 34A for Mandera West were not among the forms submitted

(b) There were illegible Forms

(c) Certain Forms 34A appeared to have been duplicates

(d) Certain Forms 34A and 34B appeared to have been carbon copies

(e) Certain Forms 34A and 34B appeared to have been photocopies

(f) Some of the Forms were neither stamped nor signed.

649. Counsel took issue with Forms that did not bear any security features or serialization. Counsel also cautioned that certain Forms 34B were neither signed by the Returning Officer nor by the Agents, 56 Forms did not have a watermark and 31 Forms did not have serial numbers, 32 Forms were not signed by the Agents and 189 where the handover notes had not been filled. Counsel also expressed dissatisfaction with non-compliance with a segment of the Orders of the Court on ICT access. He also contended that most of the Forms were not in the standardized format.

650. Mr Muite, Counsel for the 1st Respondent commenced by urging the Court to compare the contents of the Registrars Report using the Forms that were deposited in Court pursuant to section 12 of the *Supreme Court Act*. Counsel also urged that contrary to the allegations by counsel for the Petitioners, the statutory Forms matched with the format in the Regulations (Reg 79 and 83). He stated that although security features were not a legal requirement of the Forms, the Commission, out of abundance of caution, designed security features for the

651. ForMs Counsel also submitted that the 1st Respondent had complied with all the Orders of the Court, including availing soft-copy access of the logs to the Petitioners who declined to accept them. This is also indicated in the Experts Report. The Petitioners wanted to have the log in trails loaded from the servers as they observed. It was Counsels submission that with regard to some of the Orders, the limited time available to conduct the exercise precluded its completion because of the time difference between Europe and the United States where the Principal service Provider (Safron) and the company subcontracted by Saffron, resided.

652. Counsel revisited the entire issue of transmission and clarified the difference between the data that was being broadcast on screen and the results in the portal. He elaborated that following the decision of the Court of Appeal in the *Maina Kiai* case on the eve of the elections, the 1st Respondent had to reconfigure the way it displayed information being sent from the Constituency and Polling centres. He explained that sometimes, the data arrived without the accompanying image of the statutory Form, hence the discrepancy. Counsel however urged that the 1st Respondent took every measure to align its processes to the directions of the Court of Appeal which directions came literally, on the eve of the elections.

653. Justice Lenaola, SCJ, queried the lack of a serial number on the statutory Form 34B used to declare the results of Nyali Constituency, Mombasa County.

654. Mr Ngatia, counsel for the 3rdRespondent commenced his submissions with reference to Kisauni Constituency. He noted that although it had been indicated that the Form 34B was not signed by the Returning Officer, the Form in his possession, which was supplied by the 1st Respondent indicated that the same was indeed signed. Counsel also urged the Court to compare the Report on Nyali Constituency with the Form 34B deposited in Court.

655. Counsel indicated that in some areas, lapses were occasioned by difficulties such as broken down printers as was the case in Isiolo South. Overall, counsel submitted that the numbers in these Forms were not challenged and there was no discrepancy between the entry in Forms 34A and 34B.

656. After the bench retired to assess the evidence and make findings on this exercise supervised by the Registrar, I undertook a comparison of the complaints and allegations made by the Petitioner in both reports - with the Forms 34A, and 34Bs that had been submitted to this Court under section 12 of the *Supreme Court Act*. In doing so I have made a number of findings:

1. On the query raised by Justice Lenaola, SCJ, on the lack of a serial number on the statutory Form 34B used to declare the results of Nyali Constituency, Mombasa County, I pulled the Form out of the bundle of certified Forms provided to the Court by the 1st Respondent and noted the following:

    i) The Form has 4 pages that bears serial numbers - PR001004-5, PR001004-6, PR001004-7, PR001004-8

    ii) It is stamped;

    iii) The name and Identity number of the Constituency Returning Officer is indicated;

    iv) It is signed by the Returning Officer;

    v) It is also signed by Agents for Uhuru Kenyatta and Raila Odinga;

    vi) The Statutory Form was printed in landscape as opposed to portrait format as most of the forms are. The serial number therefore was at the bottom left corner of the paper.

2. As regards the complaint regarding Kisauni, once again, I took the liberty to retrieve this Form from the evidence deposited in Court by the 1st Respondent and note:

i) The Form has 4 pages that bears serial numbers PR001003-7, PR001003-8, PR001003-9, PR001003-10.

ii) The Form 34B is signed by the Returning Officer;It is stamped;

iii) Signed by 6 agents;

vi) The handing over section has also been duly filled.

Regarding Likoni, which was also flagged by counsel as being marked as unsigned, I examined the certified copy of the Form 34B and noted:

1. It is signed by the Returning Officer whose name and ID number are indicated;

2. It bears a serial number;

3. It has an anti-copying feature;

4. It is stamped and was signed by 8 Agents;

Thus I was able as a Judge sitting on an election cause to verify the issue in question.

657. Regarding the ICT Report, counsel submitted that the 3rdRespondent accepted the pre-downloaded log trails as compliance with the Orders of the Court. It was submitted that according to the Conclusion in the ICT Report, the 3rdRespondent submitted that the 1st Respondent indicated that the read-only access would be available at 11am on August 29, 2017. However, the Petitioners asked for administrator rights which were beyond the purview of the Order of the Court.

In summary, and according to the ICT Report:

1. Information relating to the number of servers in possession of the 1st Respondent was provided;

2. Information regarding Firewalls without disclosure of software version was not fully provided because disclosing the internal and external firewall configurations would affect the security of the systeMs However, schematic diagram and hardware models were provided;

3. Operating systems without the software version was supplied;

4. Password policy was provided; 5.Password Matrix was provided;

6. System user types and levels of access was also provided;

7. The Disaster recovery plan was also provided;

8. Certified copies of Penetration Tests conducted on the IEBC Election Technology System prior to and during the elections were provided, together with the certificates;

8. GPS locations for the polling stations were provided. The Specific GPRS Locations for each KIEMS kit was not provided;

8. Certified list of all KIEMS kits procured, provided;

11. Polling Station allocation for each KIEMS kit provided;

12. Technical Partnership Agreement(s) for the IEBC Election Technology System provided;

13. Pre-downloaded Log-Trails provided, but rejected by the Petitioners;

14. In conclusion the Report indicated that the 1st Respondent faced a number of challenges in complying with the server Read only access order including:

    a. Set up of the VPN Tunnel to the server

    b. Connectivity challenges when accessing the cloud

    c. Security protection measures that need to be upheld for elections.

658. I am satisfied that the terms of the Courts Orders were met to the best extent possible. Although the parties seem to have differed on the interpretation of the Orders, I find that they were very clear and free from misconstruction. The Orders were of Access to Information and read-only access which included copying (if necessary). The Courts Orders were very clear. They were also very distinct from the prayers originally sought in the Application. The Court took the concerns of all the parties into consideration before making a determination on the Application. Any inference into the intent or assumed Order of the Court cannot therefore be left to flourish. For avoidance of doubt, I am in agreement with the constitutional Court of South Africa in *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) at 304 D-F on the interpretation of Court Orders:

(33) On interpreting court orders, authority tells us:

> -The basic principles applicable to construing documents also apply to the construction of a courts judgment or order: the courts intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. [A]s in the case of a document, the judgment or order and the courts reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a

reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it.[Emphasis added]

659. On this, the 1st Respondent expressed real threats with regard to exposing the inner workings of their technology to external supervision or influence owing to numerous considerations of a public nature. We must acknowledge that the Commission is an independent Constitutional body with the powers to regulate vital procedures such as the deployment of technology in elections. Although the Petitioners prayed for unfettered access into the servers, the Court, in consideration of the security concerns and in line with principles of justice and equity did not grant this but granted only specific limited orders to information, which in my opinion were met. For the avoidance of doubt, this court did not give orders for the Petitioner to access the Servers of the 1st Respondent, what was given was access to particular read only information. The location of servers, the entry and penetration into the servers, were not part of the orders given. It would be dangerous to expose the Commission to any administrative incapacity in the future. The court has a responsibility to preserve the working systems of the IEBC for future elections. I acknowledge and approve the following reasoning by the constitutional Court of South Africa in *Electoral Commission v Mhlope and Others* (CCT55/16) [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC). In this case, the constitutional Electoral commission of South Africa approached the constitutional Court with prayers to condone certain shortcomings it had in the face of an approaching by-election. the constitutional Court considered the remedies available stating:

[84]. I have spelt out the difficult position in which the IEC finds itself. Ordinarily, it would be easy to dismiss its request on the basis that the situation in which it finds itself is of its own making. But the reality is that – unlike litigation between private individuals where a partys fault would affect it and it alone – here if something were to go wrong, the implications are serious and likely consequences dire. To put it bluntly, the IEC would not be able to certify the voters roll for want of the 12.2 million addresses. Without a certified voters roll, there can be no elections. In terms of section 159(2) of the *Constitution* it is obligatory that the elections must take place, and must do so not later than 16 August 2016. Indeed, the need for the regularity of elections in the *Constitution*s founding values underscores the importance of this obligation. Unsurprisingly, section 19(2) provides that -[e]very Citizen has the right to free, fair and regular elections for any legislative body established in terms of the *Constitution*.

[85]. A threat of a possibility of the elections not taking place is a threat to our democracy itself. An order that does not extricate the IEC from the impossible situation it is in

may create a constitutional crisis affecting the rights to vote and stand for political office protected by section 19 of the Bill of Rights. As we are also bound by the Bill of Rights, we must be careful – as far as possible – to prevent that from happening. We cannot – in a Pilatian manner – throw our hands up in the air and say, If the crisis happens, so be it; the root cause is the IEC, not us. The reality is facing us. What may we do, if anything

660. Consequently, I do not find the 1st and 2nd respondents in contempt of this Courts Orders and also find no basis to nullify the presidential election on the basis of any information revealed or otherwise in the Report. I find that the allegations of inconsistency in Forms 34A and 34B is verifiable using the existing paper-trail which was also in the possession of the Petitioner having requested the Court vide a letter dated August 23, 2017 and the entire set of primary records provided in scanned form on August 24, 2017.

661. Regarding lack of security features on the Forms 34A and B, it is imperative to first contextualize the exercise that gave rise to these conclusions:

i. It was a party-led process not a court-led process

ii. It was a technical process that is usually the preserve of an election Court. As was elaborated by the Court in its Ruling on access to information, scrutiny encompasses an examination of the entire electoral material related to the election in a disputed polling station. This was not the case in this instance.

iii. Some of the findings are negated by reference to the statutory Forms deposited in Court pursuant to section 12 of the *Supreme Court Act*.

iv It was submitted that the presence of one security feature is sufficient to insulate the statutory Form from unauthorized reproduction. I find that this is a sufficient measure in the general scheme of other tools of verification guaranteed by the *Constitution* and electoral law, including ballots and other election materials.

v The presence of security features is neither statutory nor legal. It is administrative and therefore one of the components of verification in the electoral process. (I have earlier in this Judgment addressed the entire verification process in depth).

662. The Majority admits that security features are not provided for under any legal provision. The basis of their determination is that there was no plausible explanation when Immaculate Kassait had indicated that all Forms 34A and 34B bore these features. The Court however had the option to personally examine the original Forms deposited in the Registry; the majority did not do so.

663. As such an Order for nullification based on this exercise that was merely based on controvertible and speculative grounds, and is well below the standards set for nullifying an election, especially, where other remedies, such as inspection of ballots, exist. The Majority, did not address themselves to any other evidence in arriving at their determination. Had they systematically analysed the evidence, they would not have determined the election on a tangential issue whose determination could easily have been settled through reference, by the Court itself, to the evidence deposited by the 1st Respondent 48 hours after filing the Petition.

664. It is important to appreciate the circumstances under which the 1st Respondent was operating immediately before the elections where they were dogged with Court cases which slowed down their operations and their normal cohesive preparedness to conduct the elections was hindered. Elections are public in nature. The actors and stakeholders involved in the electoral process ought to fully support the 1st Respondent in the execution of its mandate. In instances of lapse, how is the Court to apportion blame particularly in instances of active distraction from duty, by other actors and stakeholders

K. Evidence Submitted under section 12 of the *Supreme Court Act*

665. The material deposited by the Commission pursuant to section 12 (2) of the *Supreme Court Act, 2011* enable the essence of the Supreme Court to discharge its mandate as the final election verifying avenue. It is imperative to mention that the Commission fully complied with this imperative. At the time of determining this matter, all the material use to declare the results of the presidential election, including Forms 34A and 34B had been deposited at the Supreme Court Registry by the Commission. In furtherance of my duty as a Judge hearing a matter falling under the exclusive original jurisdiction of this Court, I have considered all the allegations in the pleadings and supported evidence and responses thereof, against this material.

666. Following the exercise Ordered by the Court on production of Forms 34A and 34B after which the parties undertook a partial scrutiny of the Forms, Counsel for the Respondents urged the Court to consider the Report in light of the Forms 34A and 34B that had been deposited in Court by the Respondents as part of the mandatory discovery under section 12 of the Supreme Court. I have already analysed the Report based on the contents provided by the Registrar and the ICT experts in a foregoing section. This section however follows the determination that an election Court, as the final verifying agency must employ the tools granted by the *Constitution* and Electoral law to enjoy that the ends of justice are met and that the right of the electorate to vote and the candidates to vie for any position is protected from illegal, or irregular practice, and electoral offence on the one hand or unfair exclusion of votes on the other.

667. In the Registrars Report, it was noted that five (5) Constituencies were in serious contention for want of Form. The report indicated:

i. That Forms 34B in Kisauni, Nyali, Likoni, Mandera South and Isiolo South Constituencies were not signed by the Returning Officer.

ii. That Nyali Constituency Form 34B lacked a water mark.

iii. That Form 34B in Isiolo South was not signed by the party agents.

668. The evidence deposited in Court by the 1st and 2nd respondents revealed that the disputed Forms were proper in Form and bore all the relevant features. The observations are summarized hereunder:

Constituency	No. of Pages	Serial No.	Signed by the Returning Officer	Official IEBC Stamp	Signed by the Party Agents
Kisauni	4	PR001003-7 PR001003-8 PR001003-9 PR001003-10	Signed	Stamped	Signed
Nyali	4	PR001004-5 PR001004-6 PR001004-7 PR001004-8	Signed	Stamped	Signed
Likoni	3	PR001005-8 PR001005-9 PR001005-10	Signed	Stamped	Signed
Mandera South	2	PR009042-3 Not legible	Signed	Stamped	Signed
Isiolo South	2	PR011050-8 PR011050-10	Signed	Stamped	Signed

669. The legality of Forms 34A and 34B was heavily contested by the Petitioners and evidence adduced on the same. In the interest of justice, I set out to examine each of the Forms that had been disputed (with particularity) in the detailed Affidavit of Dr Nyangasi Oduwo in support of the Petitionand examined whether the Forms met the test of verification set out on this Judgement.

Preliminary Observations;

i. 1640 Forms 34A and 34B in total were disputed with particularity ii.1349 Forms 34A were disputed, with particularity

iii. All 291 Forms 34B were also disputed

iii. Having looked at all the Forms 34A and 34B (290 constituencies, 1 diaspora), I am satisfied that all the Forms met the required threshold in Form and content. The findings are summarized below:

See Annexure 1 on the analysis of all Forms 34B

L. Compliance

670. section 83 of the *Elections Act, 2011* stipulates:

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

671. Before this Court settled the meaning of section 83 of the *Elections Act* in 2014, the Court of Appeal had dealt with its interpretation in several cases:

i. *Dr Thuo Mathenge & another v Nderitu Gachagua & 2 others* Civil Appeal 29 of 2013; [2013] eKLR

> In this case, the irregularity was with regard to misprinting the name of the running mate to the 1st appellant. The name of the running mate was misprinted as Geoffrey Kamau Kibui instead of Geoffrey Gitonga Ndegwa. As a result of this, the Appellants alleged that the supporters of the 1st appellant voted against him because they felt that they had been misled. The Court of Appeal concurred with the trial Courts finding and declined to nullify the elections. The Court held that the elections were substantially in conformity with the law and the error on the ballot papers did not affect the gubernatorial election results. The Court of Appeal

> reiterated that the election could not be nullified as section 83 of the *Elections Act* prohibits an election from being declared a nullity on the grounds of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the law; or if there is non- compliance, the same did not affect the results.

ii. *James Omingo Magara v Manson Onyongo Nyamweya & 2 others*, Civil Appeal No 8 of 2010, (Omolo, Tunoi, Githinji JJA) the Court of Appeal reaffirmed that Courts can preserve an election conducted in accordance with the law. In this case, it was held:

> -The courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, provided the results of the election was unaffected.
>
> In its conclusion, the Court of Appeal referred to the binding decision of the Supreme Court in the Raila 2013 case in which the Court held that since the election results reflected the electoral intent of the people, the Court had a duty to uphold the same.

iii. *Peter Gichuki Kingara v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal No 31 of 2013; [2014] eKLR-(Re-considered by the Supreme Court and proceedings set aside for breach of time)

> The Court of Appeal analysed the evidence regarding errors that were admitted by the respondents in their pleadings and the 2nd respondents during cross-examination. Based on these reasons, the Court of Appeal held that the totality of these irregularities, which were unverifiable most probably affected the result and the ultimate will of the Othaya constituents. Consequently, the Court nullified the election.

iv. *Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others* Civil Appeal No 38 of 2013; [2014] eKLR (Overturned by the Supreme Court for deviation from the materiality test (S. 83)

In this case, the vote margin between the appellant and the 1st respondent was 3,436 votes. This according to the Court of Appeal translated to a 0.819 per cent margin of the total votes cast (423, 247). The crux of this appeal was whether the errors and irregularities disclosed by the evidence on record materially affected the quantitative margin and the qualitative aspects of the Meru gubernatorial election. Counsel for the appellant provided extensive arguments

on the application of the principles in the case Morgan v Simpson. The Court of Appeal also held as follows [at paras. 91 and 92]:

> -.....The margin between the winning and losing candidate is a factor in determining whether the irregularity affected the results of the election. In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. If a court is satisfied that, because of irregularities, the winner is in doubt, it would be unreasonable for the court not to annul the election. Before annulling an election based on irregularity, the magic number test has to be considered. This means that the contested or irregular votes casts when set aside must exceed the margin between the winner and the runner up.
>
> [92] ...If after an arithmetical calculation has been made and the returned candidate still maintains a lead over his nearest rival, the results of the election has not been materially affected... (Emphasis added)

Additionally, the Court of Appeal analysed the qualitative and quantitative tests in order to determine whether the non-compliance affected the result. It referred to two cases in which the Court in Uganda and the Supreme Court in Kenya referred to the qualitative and quantitative tests. In the Ugandan case of Winnie Babihuga v Masiko Winnie Komuhangi & Others HCT-00-CV-EP.0004-2001, it was stated that the quantitative test is the most relevant where the numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair.

This principle was reiterated here in the Supreme Court in the case of *Ali Hassan Joho & another v Suleiman Said Shahbal & 2 Others*, Supreme Court Petition No 10 of 2013, in which the Court held:

> -Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause. It must also be ascertainable who the winner, and the loser (s) in an election, are.(Emphasis added)

672. From the foregoing, the Court of Appeal held that the trial Judge erred and misdirected himself in finding that a margin of 0.819 per cent which is less than 1 per cent could be described as wide. The Court of Appeal held that the margin of 3,436 votes between the winner and runner up was statistically small and that if the trial judge adjustment due to the

proved errors and irregularities as disclosed in the evidence of DW 10, the margin between the returned candidate and the runner up would be significantly impacted and the election result materially affected.

In *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* Civil Appeal 43 of 2013; [2014] eKLR

In this case the Appellant was declared the winner of the election after garnering 154, 469 votes whereas the runner up, the 1st respondent, garnered 125, 853 votes. The trial Court nullified the election on the ground that the irregularities allegedly committed in the conduct of the elections affected the results of the election. The Court of Appeal relied on the Raila 2013 case to the extent that a petition must prove that the non-compliance with the election law impugned the integrity of that election.

The Court of Appeal also cited the three principles of *Morgan v Simpson* and held that the principle that section 83 of the *Elections Act* did not protect any election not conducted substantially in accordance with the electoral law of that election and the same, would be null and void.

The finding of the Majority mirrors that of the Court of Appeal in this case. The conclusion is that, an election that is not conducted substantially in accordance with the law relating to that election is null and void regardless of the effect of that irregularity on the result of the election. The Court of Appeal held that according to section 83 of the *Elections Act, 2011* the term used to demarcate the governing principles in that provision was or not and which means that theviolation of either and not the two aspects, together, would void anelection.

673. Interpretation of section 83 of the *Elections Act* is not a new matter to this Court. In the Raila 2013 case, this Court engaged the import of this section in determining the principles of the Burden of proof. Four impetrative principles emerged:

i. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections.

ii. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly-This finding is similar to that by Justice Kimondo in *Steven Kariuki v George Mike Wanjohi & others* Nairobi Election Petition No 2 of 2013, in which he held that: section 83 of the *Elections Act* is coached in the negative language introducing a rebuttable presumption in favour of the respondents, that the election was conducted properly and in accordance with the law.

iii. So, the petitioner must set out by raising firm and credible evidence of the public authoritys departures from the prescriptions of the law.

674. Consequently, following a successful Appeal by Hon Peter Munya [*Munya 2*], to reconsider the vitiation of his Gubernatorial election by the Appellate Court following the 2013 General elections, we considered the application of section 83 of the *Elections Act* in determining election causes. By a unanimous decision of the Court, we cited with approval Lord Dennings dictum in *Morgan v Simpson* (1975) 1 Q.B 151, and held as follows:

[210B] In this case, as in other election matters coming up before the Courts, the question as to the nature or extent of electoral irregularities, and as to their legal effect, repeatedly arises. The crisp issue is: how do irregularities and related malfunctions affect the integrity of an election

[211] In *Morgan v Simpson* (1975) 1 Q.B 151, Lord Denning evaluated cases that had been cited by counsel and that had impacted upon the duty of Courts in making declarations upon hearing election petitions. He summarized the law in three propositions:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. This proposition came out of a case where 2 out of 19 polling stations were closed all day thereby disenfranchising more than 5000 voters (re Hackney Election Petition, Gill v Reed (1874) 2 OM & H.77)

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the results of the election.

3. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls-and it did affect the result-then the election is vitiated.

675. Although the Majority claims the maiden privilege of interpreting the provisions of section 83 of the *Elections Act*, this Court in the Munya case had already settled this issue in 2014. The ultimate decision of this Court in the *Peter Munya* (2B) Case was summarized in four paragraphs:

(213) The Court observed that the practical realities of election administration are such that imperfections in the electoral process are inevitable; and on this account,

elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing.

(216) It is clear to us that an election should be conducted substantially in accordance with the principles of the *Constitution*, as set out in article 81 (e). Voting is to be conducted in accordance with the principles set out in article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

(217) If it should be shown that an election was conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on ground of irregularities.

(218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.

676. This interpretation was upheld in subsequent consistent decisions of the Supreme Court thus:

> In *Nathif Jama Adam v Abdikhan Osman Mohamed & 3 others*, Supreme Court Petition No 13 of 2014,
>
> (85) Section 83 of the *Elections Act* is the definitive statement of the standard that an election Court must apply, in verifying the election results. That section is, at the same time, a statement of the burden of proof resting upon the petitioner, in an election petition.
>
> (87) As to the effect of irregularities, and the point at which a Court should overturn an election, we stated that Courts must only act on ascertained facts, not conjecture, and must demonstrate how the final statistical outcome has been compromised.

677. In my concurring opinion in *Evans Odhiambo Kidero v Ferdinand Waititu & 4 others*, Pet. No 18 of 2014:

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

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

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

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

678. The Supreme Court has consistently applied the test in section 83 with the result of the election in mind. The qualitative component (the result of an election) is an integral element of election causes. In a Presidential election Petition, the Petitioner challenges the election of the President-elect (Art. 140(1). The result of the election of the President by Constitutional requirement is only ascertained when the formula under Art. 138(4) of the *Constitution* has been met. Anyone challenging an election must therefore challenge both the quantitative and qualitative aspects of the election.

679. Unlike the situation in *Morgan v Simpson* (which was a municipal election) or a Gubernatorial election (as was the case in the *Peter Munya* (2B) case, the constitutional threshold in a Presidential election is anchored on the numbers, the formula. The drafters of the *Constitution* were very clear that Kenyans ought to elect, as President, a person who was acceptable to more than half of the voters in Kenya and one supported by at least 25% of the votes cast in each of more than half the Counties. It is only such a person who has garnered that percentage threshold in terms of popular support that is to be declared elected as President. This was one of the irreducible minimums for a transformative change in Kenyas electoral architecture. There was a purpose to this formula, the need for national cohesion, a unifying personality and a nationally popular individual. In a petition relating to such an election, an election Court must therefore ascertain that any question as to the quality of the election has affected the constitutional quantitative threshold.

680. Let us put this in context in a hypothetical situation: assuming there is a Constituency with 55,000 registered voters. On Election Day, two candidates supporters in that Constituency create a violent atmosphere where voters are intimidated, pulled out from stations, agents vehicles torched and election officials harassed. The situation is such that there can be no elections in that constituency. But in all other Constituencies nationwide, the election has proceeded properly, with the fore-running presidential candidate obtaining more than half of all the votes cast in the election and at least twenty- five of the votes cast in each of more than half of the Counties. The votes from that Constituency, even if cast, would not affect

the constitutional threshold necessary to declare the results of the election. Can we nullify that entire election because there was violence, intimidation and voters in that Constituency did not vote That is the test the Court should apply and it would consider the following questions:

i. Did the irregularities or illegalities affect the result? Would the results of the election have reduced from more than half of the votes cast in the election? Would it have affected at least twenty five per cent of the votes cast in each of more than half of the Counties?

ii. Should the Court assess this test in the affirmative, then it should nullify the election. However, if the constitutional mathematical threshold is not affected, nullifying the entire election would have the effect of disenfranchising voters who did not vote in that constituency. What ought the court do?

681. According to Barry H. Weinberg in his book *The Resolution of Election Disputes: Legal Principles that Control Election Challenges*, 2nd Edition, pg. 103, the legal position is that election results will be upheld unless it has been proved in Court that the irregularities or illegalities changed the result of an election or made it impossible to determine the will of the electorate. He observes:

> -Where the courts can determine which ballots were illegal but had been counted, those ballots are subtracted from the candidates totals. Where the courts can determine which ballots were legal but had not been counted, those ballots were added to the candidates totals. After the illegal votes have been subtracted from the candidates totals and the legal votes have been added, the candidates with the most votes will be the victor.

682. The upshot is that the alleged illegalities or irregularities ought to have a nexus with the declared result.

M. Preserving KenyaS Electoral Jurisprudence: Construing the Principle of Precedent in Electoral Matters

683. Having set out my reasons for dissenting with the decision of the Majority, and having espoused an interpretation of section 83 of the *Elections Act* in line with the standards laid out in the Raila 2013 case, with the conclusion that any deviation from written law must be evaluated in terms of the *Constitution* due to the sui generis and rights-centric nature of election causes, I note, with great concern the disregard by the Majority of clear-set and settled principles of electoral dispute resolution in the following terms:

a. The majority has reversed the interpretation of section 83 laid out in the Peter Munya (2B) case and affirmed by the Supreme Court in numerous cases by setting a standard for the conduct of elections that is impossible to meet and that completely exposes the rights of the voter to judicial trump. The will of the little man, walking to the little booth, marking his ballot with a little mark, in secret and in free and fair elections has now been burdened with a standard that does not take into account the existing environment within which elections are conducted globally. The practice has been to check any errors (which are to be expected) against their effect on the declared result of the elections.

   i. the *Constitution* itself makes it imperative for the quantitative and qualitative elements of declaration to be pleaded and proved to the required burden and standard before an election can be set aside. Article 138(4) of the elections provides the numerical consideration that must be satisfied before one can be declared to have been elected as president.

   ii. This numerical standard, ought to be checked against the terms of article 38-did every person have the freedom to vote article 81(e)-were the elections free and fair article 83- did every person have an opportunity to be registered as a voter article 86, was the voting method used simple, accurate, verifiable, secure, accountable and transparent Did the counting, tabulation and collation of votes announced promptly by the presiding and returning officers? Were there mechanisms to eliminate electoral malpractice and was the election material safely stored? Article 88, were the elections conducted by an independent electoral body and article 82, was the conduct of the election in line with legislation on elections-as read with the *Constitution*?

684. I now turn to examine the effect of reversing the electoral jurisprudence already settled by the Court and applied across the country at all levels of Kenyas Judicial system. I shall address the following questions in my analysis:

   i. When can or should this Court depart or reverse itself from any of its previous decisions?

   ii. What is the effect of wholesale reversal of electoral jurisprudence by the Supreme Court?

   iii. What avenues exist for lower Courts?

685. This Court can depart from its previous decisions. Article 163(7) of the *Constitution of Kenya, 2010* thus stipulates:

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

686. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Supreme Court Petition No 4 of 2012, this Court had the occasion to consider instances when it can depart from its previous decisions. Several principles to guide this matter emerged. This Court can depart from its previous decisions:

i. In special circumstances

At Paragraph 40, the Court held:

> .....As a matter of consistent practice, the decisions of the higher Courts are to be maintained as precedent; and the foundation laid by such Courts is in principle, to be sustained. This, of course, leaves an opening for the special circumstances which may occasionally dictate a departure from previous decisions.

ii. For good cause after taking into account legal considerations of significant weight:

At paragraph 43, the Court held:

> In principle therefore, it follows that this Court, an apex Court, can indeed depart from its previous decision, for good cause, and after taking into account legal considerations of significant weight.

iii. Where the impugned decision was obiter dictum (side-remark)

iv Where the impugned decision was given per incuriam

At paragraphs 50 and 51, the Court held:

> For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision was an obiter dictum (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement obiter dictum is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the

> case. And a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law.
>
> "the test of per incuriam is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority."

[8] The consideration in this case in light of the Petitioners claim is: was the Judgement by this Court in the Peter Munya (2B) case obiter dictum or delivered per incuriam The issue of section 83 was settled as follows in that case, at paragraphs 216-218:

216. It is clear to us that an election should be conducted substantially in accordance with the principles of the *Constitution*, as set out in article 81(e). Voting is to be conducted in accordance with the principles set out in article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

217. If it should be shown that an election was conducted substantially in accordance with the principles of the *Constitution* and the *Elections Act*, then such election is not to be invalidated only on ground of irregularities.

218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election

This determination proceeded on a full evaluation of pleadings, submissions and legal analysis. In essence, it was not a side-remark. The analysis by the Court took into account all the applicable laws, instruments and rules.

688. Have the circumstances in which the decision in Supreme Court Petition No 5 of 2013 changed so as to warrant departure on the basis of special circumstances? It is important to note that the decisions of this Court trigger various processes in legal reform or the constitutional performance of institutional mandate. Therefore, a critical aspect of precedent is to preserve the certainty and predictability of the law. In the *Practice Statement (Judicial Precedent)* [1966] 1WLR 1234 (HL) (Practice Statement) (cited in *George Mike Wanjohi v Steven Kariuki & 2 Others*, Supreme Court Petition No 2A of 2014 (The George Mike Wanjohi case), the Lord Chancellor extolled the virtues of precedent-law, thus:

> " Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides

at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules."

[10] The circumstances that triggered this question in the Peter Munya (2B) case were that the Court of Appeal had upset an election on the basis of extrapolation of possible numerical errors in the conduct of the Meru Gubernatorial elections. On Appeal, this Court reversed the Appellate Court on the following basis:

[205] The appellate Court had been content to conclude that the statistically small margin would have been significantly impacted, but without taking into account the numerical alignment of votes. It would have been necessary for the appellate Court to demonstrate how a figure of 3,436 win-votes would have so diminished as to reverse the victory-outcome in favour of the petitioner. Without such a demonstration, the scenario is one in which an election was annulled on the ground of what might have been and not necessarily, what was. This, in truth, amounts to invalidating an election on speculative grounds, rather than proven facts.

[205A] We would state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic theme of the *Constitution*, which safeguards for citizens the freedom to make political choices [article 38 (1)]. [Emphasis Added]

689. This decision has guided the execution of the mandate entrusted by the *Constitution* onto the 1st and 2nd respondents .

Are the circumstances in this instance different?

690. Although the doctrine of precedent does not stand in the way of progressive interpretation of the law, this power must be used in a sparing and cautious manner to guarantee continuity, certainty and adaptability. These three aspects must however be balanced with the requirement that justice be done. Judicial guidance is an integral part of directing peoples relations. It follows that this critical aspect is wasted if it becomes impossible to direct actions appropriately when similar facts and circumstances are subjected to different standards of the law.

In the *Mike Wanjohi* case, this Court expounded on this question thus: At paragraph 83:

> Different sets of facts present themselves in the adjudication of disputes before the Courts. These varying facts fall for evaluation, interpretation and analysis, outcomes of which are then weighed, in a process of judicial reasoning, against some defined principles of law, so as to determine the respective rights of parties. Indubitably, the differing fact- situations make every given case peculiar, and quite apart from the other. Bearing in mind that ascertained legal principles of binding precedent are applied to ascertained factual situations, regard should be had, in the course of identifying an applicable rule, to the principle that similar fact-situations should be treated in a similar fashion. Where facts are materially dissimilar, or the case is not analogous to the previous decision, this Court will always distinguish the rule and may, in the interest of justice, choose not to apply its previous decision. This is the guiding principle to be applied by this Court in distinguishing its decisions. [Emphasis Added]

It follows that:

i. The facts in this case are not materially dissimilar to those in the Peter Munya (2B) case, on this question save on the consideration of percentages in the declaration of presidential election results. This distinction, only on purport of the numerical threshold and not the effect of irregularities and illegalities in the conduct of an election and the effect of this on the final outcome of the result is evident at paragraphs 201 and 202 the Judgement thus:

> 201. It is clear that the *Constitution* requires that for one to be declared a winner in a gubernatorial election, he or she needs to garner a majority of the votes.
>
> This is the logical meaning to be attributed to the words greatest number of votes. It matters not how wide or small the margin of victory is. Indeed, this is the requirement in all the elections other than a Presidential election, where specific percentages are prescribed by the *Constitution*.
>
> 202. The issue of margins in an election other than a Presidential election, can bear only transient relevance and only where it is alleged that there were counting, and tallying errors or other irregularities that affected the final result. A narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations. Where a re-count, re-tally or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is

immaterial as a factor in the proper election-outcome. To nullify an election in such a context would fly in the face of article 180 (4) of the *Constitution*.

ii. Similar fact situations ought to be treated in a similar fashion.

iii. This Court cannot therefore reverse, or distinguish its decision in *Peter Munya (2B)* on material effect to the result of the election on the basis of special circumstances.

691. Recognizable political rights have vested in the parties concerned in this petition, and in the electorate. The Petitioners would have to show that new circumstances, so grave and critical now exist to warrant a departure from previous decisions of this Court displacing those political rights and public-interest expectations on the part of the electorate. (See *Mable Muruli v Wycliffe Oparanya*, Supreme Court Petition No 11 of 2014).

692. In the *Kidero* case, I held, in a concurring opinion, and in line with the consistent thread of authorities set by this Court, set several distinctive principles on the critical place of precedent in our jurisdiction: at paragraphs 236, 240 and 242:

(236) The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Courts vital essence and the decisions of this Court protect settled anticipations by ensuring that the *Constitution* is upheld and enforced and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized.....

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

(242) In applying case-law, one must consider the material conditions of the issue in question. One must then assign the question to its proper class or consideration and observe the right points of likeliness in the cases under consideration .....

(15) Have the Petitioners adduced legal reasons of significant weight as to persuade this Court to depart from its previous electoral jurisprudence?

693. Section 3 of the *Supreme Court Act* and the body of jurisprudence from this Court is central on the preservation, protection and affirmation of the *Constitution*. The framers of the *Constitution* were fully aware that this is the only Court that can reverse itself as it is not bound by its own decisions. However, considerations for reversal or departure must be carefully weighed against various considerations. Departure from electoral jurisprudence is in my view inviting of an even firmer and higher restraint from departure of well-settled principles. The Judiciary is one of several critical institutions that act as anchors to the *Constitution*. The others are: the People, the Executive, the Legislature, Independent Commissions, State Offices and Officers. All these institutions interact with the law and with each other in a manner that is clear, certain, stable and predictable. A different approach would threaten the fabric of institutional legal interaction. The law is a primary limb of the body politic.

694. I am persuaded by the opinion of Justice Aharon Barak, Former Chief Justice and President of the Israeli Supreme Court in his book, The Judiciary in A Democracy, Princeton University Press, at page 158 that on the full scope of precedent and the need to balance the interests of justice by following precedent or by deviating from it :

> "A judge stands before a dilemma: to follow precedent previously determined by his Court, or deviate from it? The Judge must use his discretion reasonably. What should the Judge do? The reasonableness test requires the Judge to consider on the one hand all considerations supporting the honouring and following of the precedent. On the other hand, the judge must consider the full scope of considerations pointing toward deviation from precedent and choosing new law. The Judge must assign each one of these systems of considerations its proper weight. Having done that, the judge must place both on the scale. The Judge must choose the prevailing ruling; the judge must choose the Ruling whose utility is greater than the damage caused by it. The guiding principle should be this: it is appropriate to deviate from a previous precedent if the new precedents contribution to the bridging of the gap between law and society and to the protection of the *Constitution* and its values after setting off the damage caused by the change, is greater than the contribution of the previous precedent to the realisation of those goals.
>
> Deviation from precedent, particularly precedent of the highest Court is a serious matter, great sensitivity is needed to weigh all the considerations. [Emphasis added]

695. The doctrine of stare decisis is a critical element of our legal system, providing certainty and predictability in the law as consistently guided by this Court. Aptly put in the case of *Peter Gatirau Munya v IEBC & 2 Others*, Supreme Court Petition No2B of 2014. in a concurring opinion by Mutunga CJ (as he was then) at (paragraph 228):

> "Under article 163(7) of the *Constitution*, all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. Thus, the adopted theory of interpretation of the *Constitution* will bind all Courts, other than the Supreme Court. It will also undergird various Streams and strands of our jurisprudence that represent the holistic interpretation of the *Constitution*."

696. Although this Court is not bound by its decisions and can review or depart from them, such considerations only ought to be in the clearest of cases, and distinguishable in fact, circumstances and relevance as elaborated in the foregoing paragraphs. The majority has failed this critical test. I must add that the value of their deviation from precedent damages more than it offers utility. It will cause damage to the legal system because it turns the entire electoral jurisprudence on its head.

697. Every arm of Government has the unique role of defending the *Constitution*, the Bill or Rights and the Sovereignty of the people. The essence of a system of checks and balances is to ensure that when one constitutional branch threatens the entire schematic ordering of the *Constitution* and the State, the other is ready to check these actions. Having been part of the inaugural Supreme Court and having steadily and consistently settled the law on elections, the interpretation of section 83 by the Majority will unleash jurisprudential confusion never before witnessed. Unfortunately, we are part of the common law system, encumbered by rules requiring lower Courts to pay due deference to the Courts above. Parliament must therefore untie the hands of Courts below by clarifying the meaning of section 83 of the *Elections Act*. That is the only way that we can avert a crisis of jurisprudence in such a sensitive area of law, as elections.

697A. However, in the meantime, lower Courts are not without an option. The decision by the Majority is one given in a presidential election and which does not usurp the jurisdiction of the lower Courts in electoral disputes. At paragraph 207 of the *Raila* 2013 case, we held:

> [207] The Supreme Court cannot roll over the defined range of the electoral process like a colossus. The Court must take care not to usurp the jurisdiction of the lower Courts in electoral disputes. It follows that the annulment of a Presidential election will not necessarily vitiate the entire general election. And the annulment of a Presidential election need not occasion a constitutional crisis, as the authority to

declare a Presidential election invalid is granted by the *Constitution* itself. [Emphasis added]

N. Conclusion

698. Having now looked at the full reasons of the majority judgment, I briefly make the following initial observations:

I. The Petition contained numerous allegations of irregularity, illegality and electoral offences, enough, if proved to the required burden and standard, and if it affected the result, to void the Presidential election. The allegations were however not proved and where evidence was adduced, there was sufficient evidence to rebut the allegations. [Paragraph 42 of this dissenting judgment sets out those allegations]

II. According to the Majority, the determination of nullity turns only on one limb:

verification. The Majority espouses the following conclusions:

i. That the election declaration path set by the *Constitution* and the electoral law was not verifiable.

ii. There was lack of security features on the Statutory Forms 34A and 34B sampled by the parties during the Access to Information Exercise supervised by the Registrar of this Court.

iii. There was failure by the 1st Respondent to comply with the Orders of the Court as commanded in the Ruling dated August 28, 2017 on the Notice of Motion dated August 25, 2017. The Majority in fact acquiesces to the Petitioners allegations that the Information Technology system was infiltrated and compromised solely on a misplaced notion that the 1st Respondent withheld the information required. Reference to the ICT experts Report will however show that the information was provided in soft copy but rejected by the Petitioners who demanded physical witnessing of log-trail harvesting.

iv The Majority also makes an assumption, that the votes cast for the President were different (by a small margin I might add) from those cast in favour of Governors and Members of Parliament. They disregard the perfect choice of a voter to only cast preferred ballots and turn in unused ballots as spoilt (and which in turn are stored in tamper proof packets). It appears that the Majority expected that the voters were obliged to cast all six ballots provided.

vi. The Majority focused on a narrow inference of verification and placed this obligation solely at the door of the 1st Respondent ignoring the agents, candidates and other agents of verification present, including the Court itself as the final verifying agency. Nothing would have been easier than to call for the election material, which is available and not tampered with, to ascertain the number of spoilt ballots to explain the discrepancy between the votes cast for the President and other candidates. Was this unknown and dangerous standard to be applied elsewhere, some of the candidates who garnered more votes than the President in their electoral units would suffer the same fate.

vi. The grave allegations made were not considered deeply or at all. The Majority went straight for the technical/formalistic issues and reversed the precedent in Munya 2 on section 83 to justify their conclusion.

699. Election causes ought to be determined in light of the highest consideration of the right of the electorate to vote in free and fair elections.

700. This Court must never abdicate its duty as an election Court exercising exclusive original jurisdiction to hear and determine disputes relating to the elections relating to the elections to the office of president arising under article 140 of the *Constitution*. As an election Court, the Court must not narrow the scope of its remedies nor delegate its powers to the parties. The zeal of the voter to participate in elections and the overwhelming responsibility of every State Organ and stakeholders to conduct free, fair and peaceful elections must be matched by equal zeal from the Court. The Majority nullified the conduct of the Presidential elections solely on the basis that some Forms 34A and 34B lacked security features which are elected by the Commission and spread in different versions across most ForMs The Majority, in the aftermath of the Registrars report did not even attempt to peruse the enormous evidence deposited by the 1st and 2nd respondents bearing certified copies of Forms 34A and 34B of the *Constitution* and against which they ought to have checked the alleged irregularities. By subjecting the integrity of the election to considerations of design, that are neither statutory nor regulatory, the Majority has not only threatened the peoples belief in the electoral system, it has overburdened and in fact, negated the electorates right to franchise.

701. Mr Slobodan Milacic a Professor Emeritus at Montesquieu University, in "Justice Coming face to face with electoral norms" a Chapter in the Book, *The Cancellation of Election results The Science and Technique of Democracy* No 46; (2010) Council of Europe pages 25-67, states that the will of the electorate is ultimately the core of any electoral process and it should

be jealously guarded by the Courts in order to maintain public confidence in the electoral process. In that regard he makes the following remarks, which I cite with approval:

> "The importance, in a democracy, of a transparent and fair electoral process for both individual and collective rights to be respected immediately takes on real shape if one but thinks of electoral crises. The guiding principle in the exercise of a constitutional jurisdiction is that the function of the court is ultimately to ensure the prevalence of the will of the electorate. If this were not so, public confidence in the election process would be heavily compromised. It is important that the public perception remains throughout that it is the decision of the electorate that has prevailed." [Emphasis added]

702. In election causes, the Majority ought to have to disengaged the mechanical gear of Appellate Jurisdiction and fully considered the evidence against the dictates of burden and standard of proof. The absence of time is not a sufficient excuse. The Court has a competent institution of research and is well facilitated to be able to perform the role of an election Court as a final verifying agent in cases of monumental importance such as the present Petition.

703. I wish to make a short observation on the following paragraph in the conclusion in the decision of the Majority, where they said:

> "Let this Judgement then be read in its proper context; the electoral system in Kenya today was designed to be simple and verifiable. Between August 8, 2017 and August 11, 2017, it cannot be said to have been so. The petition before us was however simple and to the point. It was obvious to us, that IEBC misunderstood it, hence its jumbled-up responses and submissions. Our Judgement is also simple, and in our view clear and understandable. It ought to lead IEBC to a soul-searching and to go back to the drawing board. If not, this Court, whenever called upon to adjudicate on a similar dispute will reach the same decision if the anomalies remain the same, irrespective of who the aspirants may be. Consistency and fidelity to the *Constitution* is a non- wavering commitment this Court makes.

704. This paragraph, to my mind is unfortunate – it is injudicious and imprudent. I reiterate, in the strongest terms, the following observation obtaining from my dissenting Judgement in *Speaker of the Senate & another v Attorney-General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR

> (249) Just as Parliament is expected to operate within its constitutional powers as an arm of government so must the Judiciary. The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of government

is infallible and all are equally vulnerable to the dangers of acting ultra vires the *Constitution*. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of government must be therefore clearly delineated, limits acknowledged and restraint fully exercised. It is only through practice of such cautionary measures that the remotest possibility of judicial tyranny can be avoided.

705. Having evaluated the entire bundles of evidence submitted by the parties, and having checked the allegations made by the Petitioner against that evidence, it is clear to me that, had the Majority been engaged in the mode of a Court of exclusive original jurisdiction, it would have found that each and every allegation in the Petition was addressed to a satisfactory standard and where and if, the burden of proof shifted, the Commission discharged it satisfactorily.

706. In light of the foregoing, had I been in command of the Majority (and I am not), this would have been my determination:

O. Determination :

707. Having analysed the various sections laid out in the Rubric, having disagreed with the decision of the Majority and having consistently interpreted the *Constitution* to reflect the call in the *Constitutions* preambular paragraph: the people of Kenya, exercising their sovereign and inalienable right to determine the form of governance of our country, I hereby set down the Orders that flow from the ratio:

1. As to whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the *Constitution* and the law relating to elections, I find it was so properly conducted and in particular with reference to Articles 1 and 38 of the *Constitution of Kenya*, and supported by Articles 2, 10, 81, 82, 83, 86 and 138.

2. As to whether there were illegalities committed in the conduct of the said election, I am satisfied that there was no instance of fraud or illegality found or proven.

3. As to whether there were irregularities committed in the conduct of the said election, I am satisfied that any irregularities that were found did not favour any particular candidate and could not have impacted in any way, on the result of the election.

4. As to whether the election was properly conducted by the 1st Respondent in accordance with the *Constitution* and the laws relating to elections, I am satisfied that with all the attendant challenges of conducing a national election, that it was so properly conducted.

5. As to whether the 2nd respondent properly declared the 3rdRespondent as President-elect in accordance with article 138(4) and 138(10) the *Constitution*, I am satisfied that indeed he did so.

6. As to whether the 3rdRespondent was validly and properly elected to the office of President of the Republic of Kenya, I am satisfied from all the evidence assessed that he indeed was.

7. Petition No 1 of 2017 is hereby dismissed.

8. Each party shall bear their own costs.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Election Petition 1 of 2017) [2017] KESC 31 (KLR) (Election Petitions) (28 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 31 (KLR)

Election Law *- election petition - scrutiny and recount of votes – where the petitioner applied for scrutiny of votes of the presidential election - whether the Supreme Court could order for a scrutiny of votes and other election materials - considerations to be made when parties to a petition applied for scrutiny and access to electoral systems - Elections Act, 2011, sections 80 (3) and 82; Elections (Parliamentary and County Elections) Petition Rules, 2013, rules 14 and 33; Elections (Parliamentary and County Elections) Petition Rules 2017, rule 29.*

Election Law *– scrutiny of votes – orders for scrutiny of votes on application by any party to the petition – petitioners' allegation of election malpractices and irregularities – whether the 1st respondent had conducted the election in an impartial, neutral, efficient, accurate and accountable manner - Elections Act (No 24 of 2011), section 82(1); Elections (Parliamentary and County Elections) Petition Rules, 2017, rule 29.*

Constitutional Law *– fundamental rights and freedoms – right to access to information – duty of public entities to provide information to citizens - whether a public entity had a constitutional obligation under the Constitution to provide information to citizens – whether the petitioners were entitled to access information relating to the hardware and software used in the conduct of the 2017 Presidential Election –- Constitution of Kenya, 2010, articles 10(2) and 35.*

Brief facts

The petitioners contended that the Elections Technology System was penetrated and deliberately compromised and used in a manner not intended by law so as to interfere with and affect the result of the 2017 Presidential Election.

They asserted that the IEBC electoral system was designed in a manner that ensured that text results could not be transmitted without images on the prescribed form embodying the totality of election results in every polling station. The petitioners stated that the end result was that the evidence adduced, pointed to indicators of interference with the systems, fraud in the filing of Forms 34A, 34B and 34C and the systems were not secured as required by law. They further claimed that the system was breached and deliberately compromised and used in a manner not intended in law.

They therefore sought access and scrutiny of the IEBC System and logs arguing that the presidential election results were made in absolute breach of and non-compliance with the mandatory provisions of sections 39(1C) and 44 of the Elections Act as well as the Elections (Technology) Regulations, 2017.

Issues

i. Whether an election court could, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out.

ii. What considerations would be made when parties to a petition applied for scrutiny and access to the electoral systems?

iii. To what extent were the petitioners entitled to access information relating to the hardware and software used in the conduct of the 2017 presidential election and particularly in transmission of results?

iv. Whether the petitioners were entitled to leave to file further affidavits after being granted access to the electoral system.

Relevant provisions of the Law

Elections Act, 2011 (Act No 24 of 2011)

Section 82 -Scrutiny of votes

1. *An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.*
2. *Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—*
    a. *the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;*
    b. *the vote of a person whose vote was procured by bribery, treating or undue influence;*
    c. *the vote of a person who committed or procured the commission of personation at the election;*
    d. *the vote of a person proved to have voted in more than one constituency;*
    e. *the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or*
    f. *the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.*
3. *The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.*

Elections (Parliamentary and County Elections) Petition Rules, 2013 (Act 24 of 2011 Sub Leg)

Rule 33 - Scrutiny of votes

1. *The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.*
2. *Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.*
3. *The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.*
4. *Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—*
    a. *the written statements made by the presiding officers under the provisions of the Act;*
    b. *the copy of the register used during the elections;*
    c. *the copies of the results of each polling station in which the results of the election are in dispute;*
    d. *the written complaints of the candidates and their representatives;*
    e. *the packets of spoilt papers;*
    f. *the marked copy register;*
    g. *the packets of counterfoils of used ballot papers;*
    h. *the packets of counted ballot papers;*
    i. *the packets of rejected ballot papers; and*
    j. *the statements showing the number of rejected ballot papers.*

Elections (Parliamentary and County Elections) Petitions Rules, 2017 (Act 24 of 2011 Sub Leg)

Rule 29 - Scrutiny of votes

1. *The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.*
2. *On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.*
3. *The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.*

4. *The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of-*
   a. *the written statements made by the returning officers under the Act;*
   b. *the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;*
   c. *the copies of the results of each polling station in which the results of the election are in dispute;*
   d. *the written complaints of the candidates and their representatives;*
   e. *the packets of spoilt ballots;*
   f. *the marked copy register;*
   g. *the packets of counterfoils of used ballot papers;*
   h. *the packets of counted ballot papers;*
   i. *the packets of rejected ballot papers;*
   j. *the polling day diary; and*
   k. *the statements showing the number of rejected ballot papers.*

Access to Information Act, 2016 (Act No 31 of 2016)

Section 4 - Right to information

1. *Subject to this Act and any other written law, every citizen has the right of access to information held by—*
   a. *the State; and*
   b. *another person and where that information is required for the exercise or protection of any right or fundamental freedom.*
2. *Subject to this Act, every citizen's right to access information is not affected by—*
   a. *any reason the person gives for seeking access; or*
   b. *the public entity's belief as to what are the person's reasons for seeking access.*
3. *Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.*
4. *This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.*
5. *Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.*

Section 27 - Reports by public entities

On or before the 30th day of June of each year, every public entity shall submit to the Commission a report covering the preceding year, which shall include—

1. *the number of requests for information received by the entity and the number of requests processed;*
2. *the number of determinations made by the authority not to comply with the requests for information under section 8, and the main grounds for such determinations;*

3. *the average number of days taken by the entity to process different types of requests;*
4. *the total amount of fees collected by the public entity while processing requests; and*
5. *the number of full-time staff of the public entity devoted to processing requests for information and the total amount expended by the entity for processing such requests.*

Held

1. An election court could, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court would determine in accordance to section 82 of Elections Act.
2. There was no reason to deny the prayers for scrutiny of all the documents and equipment; especially when the 1st respondent had assured the court that any report on the access to and scrutiny of the Form 34A and 34B would be filed within 48 hours of any such order by the court.
3. On the technological aspects of the election, the criteria for considering that aspect would be the limited time the court had to hear and determine the petition challenging the presidential election and the need to ensure that only those orders that were practicable, reasonable and helpful in reaching a just and fair determination of the petition were granted.
4. With regard to the direct and unfettered access to all persons and the electoral technological system; some of the actions for which access was sought had the potential of compromising the integrity and security of the 1st respondent's electoral technological system and of individual persons. If granted, it was likely that the future use of the system would be compromised. Therefore, it was important to ensure that there was absolute confidentiality of passwords and usernames, locations of servers, identity of password holders, IP addresses and software running applications, *inter alia*.
5. The access and supply of a large number of software and hardware could occasion possible security and software integrity issues that could militate against a blanket grant of all the orders sought. Some of the orders sought were outside the relevance and purview of the petitioners' case. Consequently, any order granted with respect to that prayer had to be practical, timeous and relevant to the issues in contest. Hence, orders of access and supply of information that met the above criteria would be granted at the end of the ruling. The information would also assist the court reach a fair decision in the petition and without jeopardizing or compromising any party's stated position in it.
6. Prayers for the direct, unfettered access to relevant persons and systems at Safran in order for the forensic information technology experts to fully understand the KIEMS system (Kenya Integrated Election Management System) was impractical and difficult to grant because Safran Identity and Security (a French multinational company, specialized in security and identity solutions) was a software company based in France and was not party to the proceedings. To demand that "persons and systems" related to it should be accessed by the

petitioners was impractical and would unnecessarily delay the hearing and determination of the petition.

7. The prayer for filing of further affidavits arising from the information requested being obtained, noting the time left for hearing and determination of the petition (less than 4 days), could not be allowed as such an order would only delay the proceedings and cause prejudice if the respondents were unable to respond to the issues raised therein.

8. The 1st respondent was under an obligation to supply to the petitioner and 3rd respondent for their scrutiny, scanned and transmitted copies of Form 34A and 34B.

Application partly allowed.

Orders

i. *Petitioners as well as the 3rd respondent acquired a read only access, that included copying (if necessary) of –*

   a. *Information relating to the number of servers in the exclusive possession of the 1st respondent.*
   b. *Firewalls without disclosure of the software version.*
   c. *Operating systems without releasing the software version.*
   d. *Password policy.*
   e. *Password matrix.*
   f. *System user types and levels of access.*
   g. *The IEBC Election Technology System Redundancy Plan comprising of its business continuity plan and disaster recovery plan.*
   h. *Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 general and presidential election including:*
      1. *Certified copies of all reports prepared pursuant to regulation 10 of the Elections (Technology) Regulations, 2017; and*
      2. *Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation 10(2) of the Elections (Technology) Regulations, 2017*
   i. *Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including August 5, 2017 and August 11, 2017.*
   j. *Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;*
   k. *Polling station allocation for each KIEMS Kit used during the Presidential Election;*
   l. *Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:*
      1. *List of the technical partners;*
      2. *Kind of access they had; and*
      3. *List of APIs for exchange of data with the partners*
   m. *Log in trail of users and equipment into the IEBC Servers.*
   n. *Log in trails of users and equipment into the KIEMS Database Management Systems.*
   o. *Administrative access log into the IEBC public portal.*
   p. *The information listed in (m), (n) and (o) above shall be issued in soft copy to the petitioners and 3rd respondent.*
   q. *Certified photocopies of the original Forms 34A's 34B's and 34C's prepared at and obtained from the polling stations by presiding officers and used to generate the final tally of the presidential election, and pursuant to such production leave be granted for*

the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

r. *Forms 34A 34B and 34 C from all 40,800 polling stations.*

s. *Scanned and transmitted copies of all Forms 34A and 34B.*

ii. The Registrar of the Supreme Court was to be assisted by a number of judicial officers and staff as she determined and supervised access to the certified copies of original Forms 34A and Forms 34B by the petitioners and 3rd respondents at such a venue that she determined in consultation with the parties. A report on that exercise and related issues was to be filed by the Registrar August 29, 2017 at 5:00p.m. The parties were at liberty to submit on the report at the end of the hearing.

iii. In the exercise set out order (i)(a –p)above, priority was to be given to the;

a. *292 polling stations as deponed to at paragraph 12 of Norman Magaya affidavit sworn on August 23, 2017;*

b. *688 polling stations as deponed to at paragraph 15 of Omar Yusuf Mohammed affidavit sworn on August 24, 2017;*

c. *14,078 polling stations as deponed at paragraph 70 of Dr. Nyangasi Oduwo's affidavit dated August18, 2017.*

iv. An ICT officer designated by the Supreme Court from among its ICT staff and two independent IT experts appointed by the court was to supervise access to the technology at such a venue as they could determine in consultation with the parties. A report on that exercise and related issues was to be filed by the ICT officer and experts by 5:00 pm on August 29, 2017. The parties were at liberty to submit on the report at the end of the hearing.

v. The parties to the petition were entitled to have a maximum of two agents/experts in each of the exercises above. The agents were at all times to comply with the directions of the Registrar and the ICT officer to ensure expeditious conclusion of the above exercise.

vi. No order of costs.

Citations

Cases

Kenya

1. *Adam, Nathif Jama v Abdikhaim Osman Mohamed & 3 others* Petition 13 of 2014; [2014] eKLR - (Explained)
2. *Amana, Rishad Hamid Ahmed v Independent Electoral And Boundaries Commission & 2 others* Election Petition 6 of 2013; [2013] KEHC 3102 (KLR) - (Explained)
3. *Githinji, Dickson Mwenda v Gatirau Peter Munya & 2 others* Civil Appeal 38 of 2013; [2014] eKLR - (Explained)

4. *Hassan, Mohamed Hassan & another v Independent Electoral & Boundaries Commission & 2 others* Election Petition 6 of 2013; [2013] KEHC 2317 (KLR) - (Explained)
5. *Independent Electoral & Boundaries Commission v Kiai & 4 others* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR); [2017] 2 KLR 1136 - (Explained)
6. *Kuria & 5 others v Hassan & 4 others* Petition 3, 4 & 5 of 2013 (Consolidated); [2013] KESC 15 (KLR) - (Explained)
7. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR - (Explained)
8. *Mwirigi Muthuri, Jacob v John Mbaabu Murithi & 2 others* Election Petition 2 of 2013; [2013] KEHC 2639 (KLR) - (Explained)
9. *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others* Petition 328 of 2017; [2017] KEHC 4466 (KLR) - (Explained)
10. *Ogutu, Philip Osore v Michael Aringo & 2 others* Petition 1 of 2013; [2013] KEHC 5994 (KLR) - (Explained)
11. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Civil Appeal 228 of 2013; [2014] KECA 782 (KLR) - (Explained)
12. *Salat, Nicholas Kiptoo Arap v Independent Electoral and Boundaries Commission & 7 others* Petition 23 of 2014; [2015] eKLR - (Explained)
13. *Wasike, Philip Mukwe v James Lusweti Mukwe & 2 others* Petition 5 of 2013; [2013] KEHC 5993 (KLR) - (Explained)

India

Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr [2014] 2 SCR 291 - (Explained)

Statutes

Kenya

1. Access to Information Act, 2016 (Act No 31 of 2016) sections 2, 4- (Interpreted)
2. Constitution of Kenya, 2010 articles 19, 20, 22, 23(3), 35, 50, 81, 86, 140, 159, 258, 259- (Interpreted)
3. Elections (Parliamentary and County Elections) Petition Rules, 2013 (Act No 24 of 2011 Sub Leg) rule 33- (Interpreted)
4. Elections (Parliamentary and County Elections) Petition Rules, 2017 (Act No 24 of 2011 Sub Leg) rule 29- (Interpreted)
5. Elections (Technology) Regulations, 2017 (Act No 7 of 2011 Sub Leg) regulations 10, 15, 20, 21, 24- (Interpreted)
6. Elections Act, 2011 (Act No 24 of 2011) sections 39, 44, 44A, 82 - (Interpreted)
7. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) section 27- (Interpreted)
8. Public Archives and Documentation Service Act (cap 19) In general - (Cited)

9. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 18- (Interpreted)
10. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) In general - (Cited)
11. Supreme Court Act, 2011 (Act No 7 of 2011) sections 12, 23, 36 - (Interpreted)

Advocates

None mentioned

August 28, 2017, the Court delivered the following Ruling:

Order of the Court dated 11th Day of September, 2017

1. This court gave its ruling on August 28, 2017, partially allowing the petitioners notice of motion application dated August 25, 2017, which sought scrutiny of votes and technological materials. At paragraph [32] and [34] of the ruling, the court made reference to rule 33 of the *Elections (Parliamentary and County Elections) Petition Rules, 2013*, which have since been revoked.

2. We have noted that we inadvertently cited the repealed rules of 2013 instead of the *Elections (Parliamentary and County Elections) Petition Rules, 2017*. In that regard, and in exercise of the powers conferred to this court by section 21(4) of the *Supreme Court Act* (Act No 7 of 2011), we hereby correct the error on record and order a deletion of the reference to rule 33 of the *Elections (Parliamentary and County Elections)* Petition Rules, 2013 and replace it with rule 29 of the *Elections (Parliamentary and County Elections) Petition Rules, 2017*.

3. Consequently, paragraph 32 shall henceforth read as follows:

> " We shall in the above regard begin by addressing the law regarding scrutiny and in that regard, the right to scrutiny of votes and specifically and generally as well as and recount of votes in an election petition is anchored on section 82(1) of the *Elections Act* (Act No 24 of 2011) and rule 29 of the *Elections (Parliamentary and County Elections) Petition Rules, 2017*. The Presidential Election Petition Rules, 2017 are however silent on the issue of scrutiny."

4. On the same breadth, paragraph 34 shall read as follows:

> " On the other hand and by way of comparison only, rule 29 of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* provides:
>
> "Scrutiny of votes.

(1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

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

(3) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.

(4) The Scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of—

(a) the written statements made by the returning officers under the Act;

(b) the printed copy of the register of voters used during the elections sealed in a tamper proof envelope;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt ballots;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers;

(j) the polling day diary; and

(k) the statements showing the number of rejected ballot papers."

(5) .....

5. By virtue of this order, the ruling dated August 28, 2017, is accordingly amended and this correction shall constitute part of the ruling of the court.

A. Introduction

1. The present petition was filed on August 18, 2017. At paragraph 27 thereof, the petitioners contend that

> " upon scrutiny of the total rejected and spoilt votes, this honourable court will confirm that a total of 395,510 votes were unlawfully deducted from the 1st petitioner and added to the 3rd respondent".

2. At paragraph 28, they further contend that

> " the discrepancy in rejected and spoilt votes as shown in the 1st respondent's forms 34B and its public portal, with the latter showing a significantly higher number".

3. At paragraphs 21.2.1 they also claim that the data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS kit at the individual polling stations and specifically that in

> " more than 10,000 polling stations, the data entered into the KIEMS Kits was not consistent with the information and data from the respective Forms 34A."

4. As regards Forms 34B, it is the petitioners' contention that the results declared in those forms were inconsistent with the results in Forms 34A which were the primary documents from which the former are required by law to be created. They plead in that regard that

> " in excess of 14,000 fatally defective returns from polling stations representing in excess of 7 Million votes"

were allowed into the vote tally without verification at all.

5. It is therefore their prayer in the petition in the above context, that the following orders ought to be granted and relevant to the present ruling, namely:

> " (a) ...
>
> (b) ...
>
> (c) A specific order for scrutiny of the rejected and spoilt votes;
>
> (d) ...

(e) An order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C;

(f) An order for scrutiny and audit of the system and technology used by the 1st respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/portal".

(g) ..."

6. Subsequent to the filing of the petition they filed a notice of motion dated August 25, 2017 and premised on articles 19, 20, 22, 23(3), 35, 81, 86, 140, 159 and 258 of the *Constitution*, section 39 and 44 of the *Elections Act*, section 27 of the *Independent Electoral and Boundaries Commission Act*, sections 12, 23 and 26 of the *Supreme Court Act*, rule 18 of the *Supreme Court (Presidential Election Petition) Rules*, *Access to Information Act* and the *Elections (Technology) Regulations*. In the said motion they seek the following orders:

" 1. This application be certified as extremely urgent, heard and orders given before the hearing of the substantive Petition.

2. The application be heard and determined expeditiously and in priority to the petition but in any event before August 25, 2017.

3. This honourable court be pleased to order the 1st respondent to give access to the petitioner/applicant to the following:

a. Direct, unfettered access to relevant persons and systems at Safran in order for the forensic information technology experts to fully understand the KIEMS system.

b. Full and unfettered physical and remote access to each biometric electronic appliance used at each voting/ polling station location used to verify voters IP voters' identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data files, creation ties and dates, device IDs MAC addresses, IP.

c. Addresses, geographic and local communications mast information.

d. Full and unfettered physical and remote access to any local server(s) connected to the electronic device(s)

used to verify voters' identification against the list of registered voters at each polling station, from which a forensic image will be taken.

e. Electronic device(s) used to capture Form 34A's and Form 34B's onto the KIEMS system and transmitted to a) the CTNs and b) the NTC.

f. Full and unfettered access to any form of scanning device which saved images onto access to any form of scanning device which saved images onto a access local server(s) for onward transmission.

g. Access to any scanning device which would serve to establish whether the Form 34A was captured, stored and forwarded in the expected timeframes.

h. Full and unfettered physical and remote access to any server(s) at the CTNs for storing and transmitting voting information.

i. Full and unfettered physical and remote access to any servers at the NTC for storing and transmitting voting information.

j. Addresses, source and destination IP Addresses, server details and user details.

k. Full and unfettered to access to all source codes, including all programming codes, pursuant to The Election Regulation Technology, 2017,

4. This honourable court be pleased to order the 1st respondent to give access to all parties, the following information and data that is in the exclusive possession;

a. The IEBC Election Technology System Network Architecture for the period of 30 days before the elections to the date of the order of this court comprising but not limited to:

i. All the servers used during the elections;

ii. number of servers;

iii. location of servers;

iv firewalls;

v IP addresses;

vi. Operating systems;

vii. Software running applications

b. The IEBC Election Technology System Redundancy Plan comprising but not limited to:

i. Password policy;

ii. Password matrix;

iii. Owners of system administration password(s)

iv System users and levels of access

c. The IEBC Election Technology System Redundancy Plan comprising:

i. Business continuity plan;

ii. Disaster recovery plan.

d. Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:

i. Certified copies of all reports prepared pursuant to regulation 10 of the *Elections (Technology) Regulations, 2017*; and

ii. Certified copies of certificate(s) by a professional(s) prepared pursuant to regulation 10(2) of the *Elections (Technology) Regulations, 2017*.

e. In relation to KIEMS Kits:

i. Import testing certification in relation to all KIEMS Kits;

ii. Static IP addresses of each KIEMS Kit used during the Presidential Election;

iii. Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including August 5, 2017 and August 11, 2017;

iv Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;

v Polling station allocation for each KIEMS Kit used during the Presidential Election;

vi. Audit log of what each KIEMS Kit used during the Presidential Election transmitted from Polling Stations to Constituency Tallying Centres and to IEBC National Tallying Centre; and from IEBC Result Transmission Database to Media Houses Application Protocol Interface (API)(logs of media data update). Log must also show:

a. Time of transmission from KIEMS Kit to the IEBC Result Transmission Database; and

b. Time of transmission from IEBC Result Transmission Database to the Media Houses API;

c. Count of Identified Voters by each KIEMS Kit;

d. Soft copy of Ids captured in each KIEMS Kit;

e. Audit log of transmission of scanned Forms 34A from each of the KIEMS Kits.

f. Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

   i. List of the technical partners;

   ii. Kind of access they had;

   iii. List APIs for exchange of data with the partners.

g. Log in for the period of 30 days before the elections to the date of the order of this court of trails of showing the trail of users and equipments into all the IEBC Servers.

h. Log in for the period of 30 days before the elections to the date of the order of this court of trails of users and trails of users and equipments into the KIEMS Database Management Systems.

i. Administrative access log into the IEBC public portal between August 5, 2017 to date.

5. The 1st respondent be compelled to give access to and supply to the court and to the petitioners for scrutiny, certified photocopies of the original Forms 34A's 34B's and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential Election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

6. The 1st respondent be compelled to give the petitioners access Form 34A's 34B's and 34 C's from all 40,800 polling stations.

7. This honourable court be pleased to grant leave to the petitioner/ applicants to:

   a. Rely on and or file further affidavits in support of the petition and or the affidavits of

      (i) Rt Hon Raila Amolo Odinga, Omar Yusuf Mohamed,

      (ii) Omar Yusuf Mohamed,

      (iii) Dr Edga Ouko Otumbo, Nyangusi Oduwo and

      (iv) Norman Norman Magaya dated August 24, 2017 be admitted on record and or be deemed to have been properly filed.

   b. File such other affidavits in response to or reply to any responses filed by the respondents

8. This honourable court be pleased to grant any other reliefs that become just and fit to grant."

The Petitioner's case

7. The motion before us is supported by the affidavits of Raila Amolo Odinga, Dr Edgar Ouko Otumba, Omar Yusuf Mohamed and Norman Magaya. It is their contention that,

while the 1st respondent was obligated by articles 81 and 86 of the *Constitution* as well as section 39(1C) of the *Elections Act* to transmit election results electronically, the Elections Technology System was

> "penetrated and/or deliberately compromised and used in a manner not intended by law so as to interfere with and affect the result of the Presidential Election."

8. They also contend that prior to August 8, 2017, the 1st respondent deliberately refused to respond to or accede to numerous requests that were made by NASA through its Chief Executive Officer, Mr Magaya, and its agents. It is their further contention that the information and data that is sought is critical to demonstrate that the 1st respondent did not conduct a free, fair, secure, verifiable, accountable and transparent election.

9. The petitioners, aware of the limited time this court has to determine the Presidential Election Petition before it, pray that the orders sought should be granted expeditiously as no prejudice would be caused to the Respondents in granting them.

10. In addition to the above, it is the petitioners' case that based on Dr Otumba's analysis and hypotheses of the Presidential Election contained in his report dated August 17, 2017, the results declared by the 2nd respondent, it is impossible to verify individual results obtained from any individual polling station and the systematic data, with no characteristic of randomness, indicated a programmed data transmission system that was symptomatic of unreal and cooked figures hence the need for the orders sought in the notice of motion.

11. Regarding spoilt and rejected votes, it is the petitioners' case that an analysis of those votes shows that 395,510 such votes are unaccounted for and are indicative of illegal manipulation as well as alteration of rejected and spoilt votes during tallying of all votes.

12. That therefore a scrutiny of the IEBC System, logs and returns is imperative and in submissions, the petitioners have argued that the Presidential EleCtion Results were made in absolute breach of/and non-compliance with the mandatory provisions of sections 39(1C) and 44 of the *Elections Act* as well as the *Elections (Technology) Regulations, 2017*. In that regard, they contend that the KIEMS was designed in a manner to ensure that text results could not be transmitted without images on the prescribed form embodying the totality of election results in every polling station. The end result, in their view, was that the evidence adduced, points to indicators of interference with the KIEMS system, fraud in the filing of Forms 34A, 34B and 34C and the KIEMS system was not secured as by law required. It is their other view that the said system was breached and/or deliberately compromised and used in a manner not intended in law.

13. Relying on the decisions of this court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Petition No 2B of 2014; [2014] eKLR and *Nicholas Kiptoo Arap Salat v*

Independent Electoral and Boundaries Commission & 7 others, Petition No 23 of 2014; [2015] eKLR, they submit that they are entitled to a scrutiny under section 82(1) of the *Elections Act* and that based on the evidence in the affidavits in support of the application they have established sufficient reasons for such an order.

14. Relying further on regulation 15 of the *Elections (Technology) Regulations, 2017*, the petitioners submit that the computer and system logs requested are permanent and leave a perpetual trail that is relevant in determining some of the issues raised in the petition. They have also relied on sections 2 and 4 of the *Access to Information Act* (No 31 of 2016) to make the point that they are entitled to the information sought as a matter of right and that this court should invoke both article 50 of the *Constitution* (on the right to a fair trial) and article 259 thereof (construing and interpreting the *Constitution*) and grant the orders sought.

1st and 2nd Respondents' Case

15. In response to the application, the 1st respondent filed a replying affidavit sworn on August 26, 2017 by Mr Moses Kipkogei, its Legal Officer. In the said affidavit, it is the 1st respondent's case that:

    i. the application seeks to expand the petition in an unconstitutional manner in that it seeks to introduce new evidence after the limitation period established by article 140 of the *Constitution* had lapsed;

    ii. no basis has been laid in law for the grant of scrutiny under section 82 of the *Elections Act*, No 24 of 2011;

    iii. the applicants are foraging, in an unconstitutional manner, for evidence which should have otherwise been sought prior to the filing of the petition;

    iv. grant of the information sought is likely to compromise the integrity and security of the information technology systems; and

    v. compliance with the orders sought would be onerous in view of the strict timelines prescribed under the *Constitution* for hearing and determination of the petition; and that regulation 15 of the *Elections (Technology) Regulations, 2017* provides an avenue for obtaining the information sought which regulation has not been complied with.

16. In submissions filed contemporaneously with the application, the 1st respondent submitted that this court should be persuaded by the decision of the Court of Appeal in *Nicholas Salat v Wilfred Rotich Lesan & others*, Civil Appeal No 228 of 2013 where by a majority decision of the court, it was held that where no sufficient basis for a scrutiny had been laid, no such order should be granted.

17. They also submitted that Onyancha, J in *Hassan Mohamed Hassan & another v IEBC & 2 others*, HC at Garissa Election Petition No 6 of 2013, had set out the law as regards scrutiny and held that a sufficient reason had to be given on why a scrutiny should be ordered.

18. The 1st respondent in addition submitted that reading section 82 of the *Elections Act* and rule 33 of the *Election Petition Rules 2013*, which set out the principles to be applied in any application for scrutiny, the applicants have been unable to show that they are deserving of the said order taking into account the strict timelines for hearing and determining Presidential Election Petitions in Kenya.

19. Lastly, and regarding regulation 15 of the *Elections (Technology) Regulations 2017*, the 1st respondent stated that the application before us falls outside the said regulation and should not be granted. Instead, the same should be dismissed with costs.

3rd Respondent's Case

20. In response to the motion, the 3rd respondent filed an affidavit in reply sworn on August 25, 2017 by Brian Gichana Omwenga, a technology advisor employed by the Jubilee Party and in it, he deponed that the application is misguided and devoid of merit because first, while the 1st petitioner places great emphasis on

> "the results that were being streamed in at a public electronic display in Bomas of Kenya and on an online portal",

the *Constitution* nor any written law do not impose an obligation on the 1st respondent to

> "exclusively use electronic systems to transmit results"

save that whatever system is used must be simple, accurate, verifiable, accountable and transparent.

21. Second, and as a corollary to the above, section 44A of the *Elections Act* grants the 1st respondent discretion to use a complementary mechanism where

> "technology either fails entirely, fails to work properly or does not meet the constitutional threshold of a system that is simple, accurate, verifiable, accountable and transparent."

22. Third, that the election of August 8, 2017 was conducted within the law as casting of ballots, the counting, announcement and transmission of the votes and results were undertaken in the presence of agents of the petitioners, a fact confirmed by independent observers such as Elections Observation Group (ELOG).

23. Fourth, that the streamed results were sent electronically and following the *Elections (General) Regulations, 2017* as well as the directions by the Court of Appeal in the case of the *Independent Electoral & Boundaries Commission (IEBC) v Maina Kiai & 5 others*, Civil Appeal No 105 of 2017; [2017] eKLR and that the results in all 290 Constituencies were conclusively tallied, collated and announced.

24. Fifth, that there was no legal requirement that the 1st respondent ought to avail Forms 34A to any presidential candidate for verification.

25 Sixth, that the 1st respondent does not have telecommunication facilities of its own and relied on Safaricom Ltd, Airtel Kenya Ltd and Telkom Kenya Ltd to provide transmission services and that regulations 20 and 24 of the *Elections (Technology) Regulations* while obligating the service providers to provide technological services as requested by the 1st respondent, technology is nonetheless susceptible to failure, sabotage or human error.

26. Seven, that for the above reasons, section 44A of the *Elections Act* was introduced by the Election Laws (Amendment) Act, 2017, obligating the 1st respondent to put in place a complementary mechanism for both identification of voters and transmission of election results to ensure compliance with article 38 of the *Constitution*, which mechanism it put in place; an action confirmed and upheld by both the High Court HC Constitution Petition No 328 of 2017, *National Super Alliance Kenya v Independent Electoral & Boundaries Commission & 2 others*. That decision was later upheld at the Court of Appeal.

27. Ninth, pursuant to regulation 21 of the *Elections (Technology) Regulations,* the 1st respondent posted to the public a list of 11,000 polling stations without 3G coverage and this was a matter well within the petitioners' knowledge. In addition, that in such situations, the Forms 34A would be ferried physically to the Constituency Tallying Centres or transmitted electronically in places where there was 3G network coverage.

28. Tenth, that even if the petitioners were to be granted access to the information and equipment that they were seeking, the 1st respondent would require 14 days to do so as the computer logs for example run into approximately 100,000 pages.

29 Lastly, that the application and prayer for leave to file additional affidavits is a fishing exercise to help the petitioners engage in a wild goose chase for information only meant to affirm their bias and conspiracy theories and that their hacking of systems claims have been discredited by experts. That, therefore, the application ought to be dismissed with costs.

B. Analysis

30. Having read the notice of motion and responses to it and having heard the submissions by counsel representing the parties herein, the question that we must answer is whether the

petitioners are entitled to the prayers in the said motion. In answering that question we note that as framed and argued, the application seeks three kinds of prayers:

i. access to information relating to the hardware and software used in the conduct of the Presidential Election and particularly in transmission of results.

ii. access to and scrutiny of certified copies of Forms 34A, 34B and 34C.

iii. leave to file further affidavits.

31. We shall in that context address the second issue as the first and peripherally address the right to information generally as we see that implicit in scrutiny is also the fact that the information sought is first granted before any scrutiny can be initiated.

32. We shall in the above regard begin by addressing the law regarding scrutiny and in that regard, the right to scrutiny of votes specifically and generally as well as and recount of votes in an election petition is anchored on section 82(1) of the *Elections Act* (Act No 24 of 2011) and rule 29 of the *Elections (Parliamentary and County Elections) Petition Rules, 2017*. The *Presidential Election Petition Rules, 2017* are however silent on the issue of scrutiny.

33. Section 82 of *Elections Act* thus reads as follows:

> " Scrutiny of votes
>
> 1. An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.
>
> 2. Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—
>
> a. the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;
>
> b. the vote of a person whose vote was procured by bribery, treating or undue influence;
>
> c. the vote of a person who committed or procured the commission of personation at the election;
>
> d. the vote of a person proved to have voted in more than one constituency;

e. the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

(3) The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters."

34 On the other hand and by way of comparison only, rule 29 of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* provides:

" Scrutiny of votes.

(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

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

(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.

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

(a) the written statements made by the presiding officers under the provisions of the Act;

(b) the copy of the register used during the elections;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt papers;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers; and

(j) the statements showing the number of rejected ballot papers.

(5) ..."

35. In addition to the above statutory provisions, there has been consistent jurisprudence from our courts, on how the law on scrutiny should be applied in electoral matters. We will analyse some of the decisions as here below:

i. High Court

36. In the case of *Hassan Mohamed Hassan & another v IEBC & 2 others* Petition 6 of 2013; [2013] eKLR, the petitioner had sought scrutiny of votes in 15 polling stations. The court (Onyancha J) in dismissing the application pronounced itself as follows:

> "... a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast. However, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes. In my view and understanding, for a party to provide sufficient reason upon which the court can decide to grant the order, the party shall provide sufficient evidence to that end. If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application....
>
> On the other hand where an application for scrutiny or recount is made after adequate relevant evidence has been adduced during the trial, it will be such evidence that will provide, if at all, sufficient reason upon which the court will make relevant orders. It is my view however that whether the application for scrutiny or recount is made before, during or at the end of the trial of a petition,

the court must be satisfied generally, that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition.

The decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. That is to say that the court's reason to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition." [emphasis added.]

37. Further, in the case of *Philip Mukwe Wasike v James Lusweti Mukwe & 2 others*, Bungoma High Court Petition No 5 of 2013; [2013] eKLR, the learned Judge (Omondi J) observed that:

> " The purpose of scrutiny is:-
>
> (1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.
>
> (2) Assist the court in determining the valid votes cast in favour of each candidate.
>
> (3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process."

38. Further elaboration on the issue of scrutiny was provided in the case of *Philip Osore Ogutu v Michael Aringo & 2 others*, Busia High Court Petition No 1 of 2013 wherein the Petitioner had sought scrutiny of votes in 15 polling stations during the pre-trial conference. Upon making a formal application, Tuiyott J after setting out the law regarding scrutiny, observed that as pertaining to the timing of the application, it would be upon the party seeking scrutiny to choose when to approach the court. He thus observed [paragraph 18]:

> " ...It all depends, I think, on the ability of the applicant to marshal sufficient evidence to persuade the court that scrutiny is deserved. And there is no reason why this cannot be made prior to the hearing given that the Election Petition Rules require that the substance of the evidence to be relied on by the parties be set out in the affidavits accompanying the petition or the responses."

39. The learned judge further observed [paragraph 20]:

> " There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a need to guard against an abuse of the process. I would agree with Mr K'opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery."

40. We also note that in the case of *Jacob Mwirigi Muthuri v John Mbaabu Murithi & 2 others*, High Court at Meru, Petition No 2 of 2013; [2013] eKLR, the Court (Lesiit, J) held that [paragraph 28 & 29]:

> " [28] ... Unless an order for scrutiny and recount is the only prayer sought in the petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the petition and the witness affidavits of the petitioner.
>
> [29] It is clear from the foregoing that where an application for scrutiny is made, the court must be satisfied that an order for scrutiny and recount has been justified by the party applying and secondly, that the order is necessary for the just resolution of the election petition. Scrutiny is one of the tools that the court uses to investigate whether an election was conduced in accordance with constitutional principles and to establish that indeed the result as declared was a reflection of the will of the electorate that took part in that election. The only way the court can test whether an order for scrutiny and recount is deserved and justified is first by considering the Petition and the affidavit in support to find out whether they disclose the petitioner's cause of action and whether they contain concise statements of the material facts relied upon in support of the allegations of impropriety or illegality and secondly by calling of evidence and testing of that evidence through cross examination and re examination process to test the veracity of the same. There

> can be no need to call evidence for examination through the trial process if none has been advanced in the Petition and the petitioner's pleadings and in particular the affidavits of potential witnesses."

41. Similar sentiments as above were expressed by Kimaru, J in the case of *Rishad HA Amana v IEBC & 2 others*, High Court at Malindi Petition No 6 of 2013; [2013] eKLR where he emphasized that [paragraph 34]:

> "...the recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the petitioner has adduced evidence during the actual hearing of the petition. The petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the petitioner and the respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the petitioner that there is need for scrutiny."

ii. Court of Appeal

42. In the case of *Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others*, Civil Appeal No 38 of 2013; [2014] eKLR, the Court of Appeal took the position that [paragraph 148]:

> "If the trial court had adopted a purposive interpretation of rule 33(4), it would be apparent that if a petitioner seeks scrutiny and recount of votes in a constituency, the purposive approach is that he is seeking scrutiny and recount of votes in all the polling stations in the constituency. Further, it is also our considered view that section 82 of the *Elections Act* is the legal foundation for scrutiny. In this section, the mandate of the court is to order scrutiny of votes and not scrutiny of polling stations. Rule 33(4), must be interpreted so as not to negate and violate the import of Section 82 that provide [sic] for scrutiny of votes without imposing a restriction that scrutiny is confined to polling stations. It is our view that a regulation cannot add a limitation to a statutory provision when no such limitation exists in its enabling statute."

43. On appeal to the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Petition No 2B of 2014; [2014] eKLR the Supreme Court in disagreeing with the above holding of the Court of Appeal, held as follows [paragraph 157]:

> "This gives the impression that where a petitioner makes a claim for a recount or scrutiny in a constituency, it should be granted as a matter of course. If such a position were to be sustained, it would stand as a contradictory precedent, with the potential to disrupt the stability of decision-making already evolving, in the practice of scrutiny and recount. It would mean that once an application for recount or scrutiny refers to a constituency, then the trial court must automatically order scrutiny in all the polling stations in the constituency."

44. In its further elaboration, the Supreme Court opined [paragraph 159]:

> "On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained."

iii. Supreme Court

45. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (*supra*), this court set out the following guiding principles with respect to scrutiny and recount of votes in an election petition. At paragraph 153, the court pronounced itself as follows:

a. The right to scrutiny and recount of votes in an election petition is anchored in section 82(1) of the *Elections Act* and rule 33 of the *Elections (Parliamentary and County Elections) Petition Rules, 2013*. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

b. The trial court is vested with discretion under section 82(1) of the *Elections Act* to make an order on its own motion for a recount or scrutiny of votes as it may specify, <u>if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the</u>

court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or recount.

c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of rule 33(4) of the *Election (Parliamentary and County Elections) Petition Rules*. [Emphasis added.]

46. In the case of *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others*, Petition No 23 of 2014; [2015] eKLR this court then answered the question whether the law on scrutiny and recount was properly applied by the High Court and the Court of Appeal. Upon analyzing certain specific authorities, the court noted as follows [paragraph 52]:

> "The foregoing principles are the basis for certain specific questions which we have to consider: did the appellant provide a sufficient basis for the trial court to make orders of scrutiny and recount? Did the denial of an order for scrutiny compromise the appellant's case? Should this court interfere with the discretion of the trial judge, and overturn the decision of the appellate court upholding the trial Judge's findings?" [Emphasis added.]

47. The court had earlier settled the law on the matter in the case of *Nathif Jama Adama v Abdikhaim Osman Mohamed & 3 others* Petition No 13 of 2014; [2014] eKLR, where it held as follows (paragraph 75):

> "It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny."

48. The court went ahead and pronounced itself as follows [paragraph 76]:

> "But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signalled in the pleadings, as having contested results. This is the import of the wording of rule 33 (1) of the Elections Petition Rules, that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest."

49. We further note that the court in the case of *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 3 others*, Petitions No 3, 4 & 5 of 2013 (Consolidated), ordered a scrutiny of the following forms: all Form 34 which were used by the IEBC in tallying the presidential votes from each of the 33400 polling stations including the Forms 34 used by IEBC in tallying the diaspora votes and all Forms 36 which were used by IEBC in aggregating the tallies of presidential votes from all Forms 34. In making the orders, the Supreme Court elaborated that scrutiny would serve the following aims:

i. Establishing the accuracy or otherwise of the total tallies of the presidential votes as indicated on the Form 34s.

ii. Establishing the number of registered voters, the number of valid votes cast and the number of rejected votes as indicated on each Form.

iii. Comparing the number of registered voters indicated in Form 34 and the number of registered voters on the principal register. The principal register to be used would be the external hard drive presented by the IEBC in the annexure in the replying affidavit of Ahmed Isaac Hassan.

50. When giving its decision, the court explained that the reason it ordered for a *suo motu* scrutiny was so that it could understand better the vital details of the electoral process, and to gain impressions on the integrity thereof.

iv. Comparative Analysis

51. In the case of *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr*, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]:

> "Before the court permits the recounting, the following conditions must be satisfied:

i. The court must be satisfied that a *prima facie* case is established;

ii. The material facts and full particulars have been pleaded stating the irregularities in counting of votes;

iii. A roving and fishing inquiry should not be directed by way of an order to re-count the votes;

iv. An opportunity should be given to file objection; and

v. Secrecy of the ballot should be guarded.

52. Further, the court went on and observed that:

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts."

53. Although the above case relates to the issue of recount of votes, we find the principles highlighted therein relevant in determining the basis under which a court can order scrutiny. Indeed, comparative jurisprudence from the already reviewed Kenyan cases, aligns with the said holding.

What of the right to access information? What is the law governing the said right?

54. The right of access to information is provided for in various legal instruments as hereunder:

Article 35 of the *Constitution* provides that:

1. Every citizen has the right of access to##

    a. Information held by the State; and

b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.

2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

3. The state shall publish and publicise any important information affecting the nation.

55. Further, section 4 of the *Access to Information Act, 2016* (No 31 of 2016) provides:

> "(1) Subject to this Act and any other written law, every citizen has the right of access to information held by—
>
> a. the State; and
>
> b. another person and where that information is required for the exercise or protection of any right or fundamental freedom.
>
> (2) Subject to this *Act*, every citizen's right to access information is not affected by—
>
> (a) any reason the person gives for seeking access; or
>
> (b) the public entity's belief as to what are the person's reasons for seeking access.
>
> (3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
>
> (4) This *Act* shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
>
> (5) Nothing in this *Act* shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information."

56. The *Access to Information Act*, also defines the term 'information' to include all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production.

57. In addition, section 27 of the *Independent Elections and Boundaries Commission Act, 2011* (No 9 of 2011) provides:

> 1. The Commission shall publish and publicize all important information within its mandate affecting the nation.
>
> 2. A request for information in the public interest by a citizen##
>
> a. Shall be addressed to the Secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and
>
> b. May be subject to confidentiality requirements of the Commission.
>
> 3. Subject to article 35 of the *Constitution*, the Commission may decline to give information to an applicant where##
>
> a. The request is unreasonable in the circumstances;
>
> b. The information requested is at deliberative stage by the Commission;
>
> c. Failure or payment of the prescribed fee; or
>
> d. The applicant fails to satisfy any confidentiality requirements by the Commission.
>
> 4. The right of access to information under article 35 of the *Constitution* shall be limited to the nature and extent specified under this section.
>
> 5. ...

58. Further, the *Elections (Technology) Regulations, 2017* provides for information security and data storage. In this regard, regulations 15, 16 and 17 provide:

> "15. Data Storage and access to Information
>
> 1. The Commission shall store and classify data in accordance with the principles set out in the Access to Information Act, 2016 (No 31 of 2016)

2. An application to access information shall be in writing in English or Kiswahili and shall be made in the Form set out in the Second Schedule providing details and sufficient particulars for the public officer or any other official to understand what information is being requested.

3. ...

4. The information officer shall reduce to writing, the request made under sub-regulation (3) in the Form set out in the Second Schedule and the information officer shall then furnish the applicant with a copy of the written request.

16. Request for Information

A person may request for information from the Commission, in accordance with section 27 of the *Independent Elections and Boundaries Commission Act, 2011* (No 9 of 2011).

17. Data Retention and Archive

All electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall, unless the Commission or the court otherwise directs, be archived in accordance with the procedures prescribed by the Commission subject to the *Public Archives and Documentation Service Act* (cap 19) and the Kenya Information and Communications Act, 1998 (No 2 of 1998)."

59. Applying law and the principles relating to scrutiny as well as and the law on access to information to the present application, there is no doubt that the petitioners have signalled their intention to seek scrutiny and we have in that regard set out the specific parts of the Petition in which the issue of scrutiny has been pleaded as well as the kind of information they intend to access. They have also set out the parameters of the intended scrutiny in the petition namely, all rejected votes and spoilt votes, the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C, and the KIEMS Kit, the server(s) and website/portal.

60. At the hearing of the application, a question was posed by the court as to the efficacy of a scrutiny of all the documents and equipment listed in the application taking into account the timelines for determining a Presidential Election dispute. It was the petitioners' counsel's position that the whole exercise involving both access to the Forms and technology should not take more than a few hours. Counsel for the 1st respondent on the other hand stated that the access to Forms 34A and 34B may be granted and a report generated by the Registrar of this court within a day. Indeed, it was counsel's position that the 1st respondent would avail all the original Forms 34A and Form 34B, as requested by the petitioners, as long as the exercise that would ensue thereafter would be supervised by the court.

61. Counsel for the 2nd respondent on his part stated that some of the prayers sought by the petitioners would be impossible to implement. As a way of example, he stated that the KIEMS devices that were being sought, are kept in the respective constituencies and hence it would be impracticable to retrieve them within a short time for purposes of access by the petitioners. Furthermore, counsel also urged that if the court were to allow the petitioners or any other person access to the KIEMS system as pleaded, the Commission would require to put in place a back-up system in order to safeguard the information stored therein, which system would take very long to set up. In addition, the Commission would also need to test the forensic tools that are to be used by the Petitioners in order to ensure that they are compatible with the system. We also note that counsel for the 1st, 2nd and 3rd respondents cautioned that any meaningful access to the software would take at the very least 3 weeks.

62. Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by counsel for the 3rd respondent, a party must be bound by its pleadings and secondly, any scrutiny of either the Forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.

63. In the above regard, and noting the submissions by counsel for the 1st respondent regarding access to Forms 34A and 34B prayers 5 and 6 of the application read as follows:

> "5. The 1st respondent be compelled to give access to and supply to the court and to the petitioners for scrutiny, certified photocopies of the original Forms 34A's 34B's and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

> 6. The 1st respondent be compelled to give the petitioners access to Form 34A's 34B's and 34 C's from all 40,800 polling stations. (sic)"

64. In submissions before us, Mr Muite, learned senior counsel on behalf of the 1st respondent, stated that his client had no objection to access being granted in the above terms and in such other terms as the court may determine. Counsel for the petitioners did not address this apparent concession but counsel for the 3rd respondent partly addressed the issue and conceded to a limited and programmed access to information contained in Forms 34A and 34B.

65. On our part, we see no reason to deny the said prayers more so when the 1st respondent has assured the court that any report on the access to and scrutiny of the Forms 34A and 34B would be filed in court within 48 hours of any such order by this court and we shall therefore make the necessary orders at the end of this ruling.

66. Regarding prayers 3 and 4 of the application, on the technological aspects of the election, noting the limited time that this court has to hear and determine the petition challenging the Presidential Election and noting the need to ensure that only those orders that are practicable, reasonable and helpful in reaching a just and fair determination of the petition should be granted, we shall invoke that criteria in addressing the said prayers. We also particularly note the petitioners' apprehension that the physical Forms 34A and 34B produced in court by the 1st respondent may not necessarily contain the results that were electronically transmitted and hence the request to access the IEBC's system in order to confirm the validity of the information contained therein. We further take into account the fact that our electoral system is partly electronic by its nature and hence the role played by technology in this regard cannot be completely ignored. Consequently, we hereby analyze the merit of each of the petitioners prayers as hereunder.

67. With regard to prayer 3 specifically, some of the actions for which access is sought have the potential of compromising the integrity and security of the 1st respondent's electoral technological system and of individuals persons which, if granted, it is likely that the future use of the system may be compromised and therefore it is important to ensure that there is absolute confidentiality of passwords and usernames, locations of servers, identity of password holders, IP addresses and software running applications *inter alia*.

68. Prayer 3 further seeks access and supply of a large number of software and hardware but in our view, there are possible security and software integrity issues that militate against a blanket grant of all the orders sought therein. Some of the orders sought also go outside the relevance and purview of the petitioners' case. Consequently, any order granted with respect to this prayer must be practical, timeous and relevant to the issues in contest. We shall at the end of this ruling therefore grant orders of access and supply of information that meet the

above criteria and we are confident that the said information will also assist the court reach a fair decision in the petition and without jeopardizing or compromising any party's stated position in it.

69. Regarding prayer 3(a), the same is impractical and difficult to grant because Safron Identity and Security, it was submitted by counsel for the 1st and 3rd respondents, is a soft ware company based in France and not being party to these proceedings, to demand that "persons and systems" related to it should be accessed by the Petitioners is impractical and may unnecessarily delay the hearing and determination of the petition.

70. Regarding prayer 7 on the filing of further affidavits arising from the above information being obtained, noting the time left for hearing and determination of the petition (less than 4 days), such an order would only but delay the proceedings and we see prejudice if the respondents would not be able to respond to the issues raised therein. That prayer is therefore disallowed.

71. Having so held, one aspect of the petition and application require addressing at this stage. It has been the petitioners claim in pleadings that during the Presidential Election, Forms 34A were not captured, stored and transmitted in the expected timeframe, a claim partly raised in prayer 3(g) of the application. In that context, we hereby order that the 1st respondent shall supply to the petitioner and 3rd respondent for their scrutiny scanned and transmitted copies of Forms 34A and 34B forthwith.

C. Final Orders

72. Having so held, the final orders we make are that the petitioners as well as the 3rd respondent shall be granted a read only access, which includes copying (if necessary) to –

a. Information relating to the number of servers in the exclusive possession of the 1st respondent.

b. Firewalls without disclosure of the software version.

c. Operating systems without releasing the software version.

d. Password policy.

e. Password matrix.

f. System user types and levels of access.

g. The IEBC Election Technology System Redundancy Plan comprising of its business continuity plan and disaster recovery plan.

h. Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:

   (i) Certified copies of all reports prepared pursuant to regulation 10 of the *Elections (Technology) Regulations , 2017*; and

   (ii) Certified copies of certificate(s) by a professional(s) prepared pursuant to regulation 10(2) of the *Elections (Technology) Regulations, 2017*

i. Specific GPRS location of each KIEMS Kit used during the presidential election for the period between and including August 5, 2017 and August 11, 2017.

j. Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;

k. Polling station allocation for each KIEMS Kit used during the Presidential Election;

l. Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

   (i) List of the technical partners;

   (ii) Kind of access they had; and

   (iii) List of APIs for exchange of data with the partners

m. Log in trail of users and equipments into the IEBC Servers.

n. Log in trails of users and equipments into the KIEMS Database Management Systems.

o. Administrative access log into the IEBC public portal between August 5, 2017 to date.

p. The information listed in (m), (n) and (o) above shall be issued in soft copy to the petitioners and 3rd respondent.

q. Certified photocopies of the original Forms 34A's 34B's and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

r. Forms 34A 34B and 34 C from all 40,800 polling stations.

s. Scanned and transmitted copies of all Forms 34A and 34B.

73. Consequent upon the said orders, we hereby make the following further orders:

i. The Registrar of this court assisted by a number of judicial officers and staff as she may determine shall supervise access to the certified copies of original Forms 34A and Forms 34B by the petitioners and 3rd respondents at such a venue as she shall determine in consultation with the parties. A report on that exercise and related issues shall be filed by the Registrar by Tuesday, August 29, 2017 at 5.00 pm and parties are at liberty to submit on it at the end of the hearing.

ii. In the exercise set out in (a) – (p) above, priority shall be given to the;

1. 292 Polling stations as deponed to at paragraph 12 of Norman Magaya Affidavit sworn on August 23, 2017;

2. 688 polling stations as deponed to at paragraph 15 of Omar Yusuf Mohammed affidavit sworn on August 24, 2017;

3. 14,078 polling stations as deponed at paragraph 70 of Dr Nyangasi Oduwo's affidavit dated August 18, 2017

iii. An ICT officer designated by this court from among its ICT staff and two independent IT experts appointed by the court shall supervise access to the technology in paragraph 72 above at such a venue as they may determine in consultation with the parties. A report on that exercise and related issues shall be filed by the said officer and experts by 5.00 pm on Tuesday, August 29, 2017 and parties are at liberty to submit on it at the end of the hearing.

iv. The parties to the petition are entitled to have a maximum of two agents/experts in each of the exercises above. The agents shall at all times comply with the directions of the Registrar and the ICT officer to ensure expeditious conclusion of the above exercise.

v. There shall be no order as to costs.

It is so ordered.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Kanjama (Intended Amicus Curiae) (Election Petition 1 of 2017) [2017] KESC 27 (KLR) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 27 (KLR)

Civil Practice and Procedure *– suits – parties to a suit – amicus curiae - whether admission of a person as an amicus in a matter before the Supreme Court was a sufficient ground for admission in a subsequent suit.*

Brief facts

The applicant filed the instant application seeking joinder to the petition as *amicus curiae.* The applicant stated that he sought to assist the court with the interpretation and application of relevant constitutional principles, electoral law, computer information systems, accounting and governance auditing and any other area his expertise would be required. The applicant claimed that he had previously been enjoined as *amicus curiae* in *Supreme Court Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, where his submissions were substantially relied on and could guide the instant court in the matters he had indicated.

Issues

i. Whether admission of a person as an *amicus* in a matter before the Supreme Court was a sufficient ground for admission in a subsequent suit.

Held

1. The court took judicial notice that the applicant was its officer, being an advocate of the High Court. He was a renowned constitutional lawyer and it was the basis upon which he was admitted as an *amicus* in *Supreme Court Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR. In the instant petition, the court was unconvinced that the applicant possessed sufficient expertise to address the court on the technological issues. The court did not require a person with a legal background, as his primary professional discipline, which the applicant was, but a technocrat in information technology and systems, which was a secondary discipline possessed by the applicant.
2. The fact that a person was previously admitted as an *amicus* in a matter before the court was not a sufficient ground for admission in a subsequent suit as each case was determined on its own merit and unique issues and circumstances.

Application dismissed.

Citations

Cases

Kenya

1. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR); [2012] 3 KLR 718 - (Explained)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Applied)

Statutes

None referred to

Advocates

None mentioned

August 27, 2017, the Court delivered the following Ruling:

1. This is a notice of motion application dated and filed on the August 25, 2010, seeking joinder to the petition as *amicus curiae*.
2. The applicant seeks the following orders:
   (a) That the application be certified as urgent and heard ex-parte in the first instance;
   (b) That this honorable court be pleased to grant leave to Charles Kanjama to be enjoined as amicus curiae in the proceeding of the presidential election petition herein, and to be represented by the firm of Muma & Kanjama Advocates;
   (c) That once leave to be enjoined as amicus curiae is granted, this honorable court be pleased to grant leave to the amicus curiae to present both oral and written arguments during the hearing and determination of the presidential election petition herein restricted to the following matters, namely;Burden and standard of proof – need for specificationelectoral irregularities: the constitutional & statutory standardsmanaging electoral timelinescontext and application of information & communication technologyverification of tallying and transmission of results *interlocutory applications, scrutiny & recount in a limited framedeveloping the role of amicus curiaethe public interest quote
   (d) That in the alternative, the proposed *amicus curiae* be admitted as an interested party and/or intervenor and allowed to participate in the proceedings herein.
   (e) That the information/evidence contained in the supporting affidavit be the proposed *amicus curiae* be admitted during the hearing of the petition herein.

3. The application is premised on the following grounds summarized ground:

   (i) That the proposed *amicus curiae* is an objective and non-partisan individual with technical competence and expertise in constitution and electoral law; computer information systems; accounting and governance audit and has previously been enjoined as *amicus curiae* in Supreme Court Advisory Opinion on the *Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, where his submissions were substantially relied on and may guide the honorable court in the matters he has indicated;

   (ii) That the applicant has a broad personal and professional perspective in the electoral process, from academic, practitioner, commentary and professional perspectives, including also as a voter and an accredited observer in the last two general elections, held in 2013 and 2017, which involvement has reflected his neutrality in the electoral process in general;

   (iii) That he seeks to assist the court with the interpretation and application of relevant constitutional principles, electoral law, computer information systems, accounting and governance auditing and any other area his expertise will be required.

4. The application is supported his affidavit dated August 23, 2017 in which he reiterates the grounds in the application. He depones that as a practicing advocate, he has engaged in numerous constitutional and electoral disputes representing parties, institutions and bodies of diverse political affiliations.

5. As regards his neutrality, he avers that he has not been approached by any of the principal stakeholders in the petition. That his application is objective, on his own behalf and professional initiative premised on his ability to be non-partisan while guiding the court in assessing competing claims and evidence.

6. In addition to his legal competencies, the applicant depones that he is a governance expert having qualified as a Certified Public Secretary (CPS), an accredited auditor and a registered and practicing member of the Certified Public Secretaries of Kenya (ICPSK), and will able assist the court in determining issues revolving around tallying, counting and transmission of the results.

7. It is his testimony that he has worked as a computer programmer and information and technology trainer at Strathmore College and has trained with the Institute for Management of Information Systems (IMIS) attaining a higher diploma.

8. He depones that he is the vice-chairperson of the Law Society of Kenya (LSK) Nairobi Branch, where he served as an observer, and has been accorded the opportunity to get

involved in informative discussions with advocates, attend seminars and be exposed to publications relating to elections. Furthermore, he represented LSK in the 2013 petition.

9. He avers that as the vice chairperson of the Kenya Christian Professional Forum (KCPF) a body focused on advocacy and networking on matters of life, family, religion and governance, which partners with the Kenya Conference of Catholic Bishops (KCCB), the National Council of Churches of Kenya (NCCK) and the Evangelical Alliance of Kenya (EAK) bodies which have been involved in mediation during the electoral disputes, and as observers in the election, he is able to bring a unique perspective on issues of public interest.

10. In his written submissions, he states that he has met the legal threshold for admission as *amicus curiae* as set down in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others[2015] eKLR*.

11. The petitioners oppose the application by way of a replying affidavit by Raila Odinga dated August 26, 2017.He disabuses the applicant's 'alleged' expertise in electoral process and avers that general expertise in law does not suffice for admission of one as an amicus.

12. It is also the petitioners' contention that the applicant seeks to introduce fresh evidence which not part of the record. He contends that his joinder will be an abuse of court process.

13. Lastly, that with the strict constitutional timelines, the interests of justice and time would not be served by admission of the applicant as amicus.

14. The 1st and 2nd respondents filed a replying affidavit and written submissions, both dated August 25, 2017. The replying affidavit is sworn by Moses Kipkogei, senior legal manager of the 1st respondent in which he opposes the application. He depones that the applicant has not demonstrated or established any field, expertise and/or knowledge that he would be submitting to aid the court in determining the petition before the court.

15. The 3rd respondent filed a replying affidavit, deponed by Davis Kimutai Chirchir and written submissions. He opposes the application for joinder and avers that the applicant does not meet the threshold for admission of an *amicus*. It is averred that the issues the applicant proposes to submit before this court are matters that have been extensively addressed in other courts already, hence already settled. That there are no exceptional arguments and/or insights that the applicant, Mr Kanjama can introduce to the case on the matters he wants to address as outlined in his submissions.

Determination

16. The jurisprudence as regards admission of amicus is settled and has been referred to in a similar application before this court in this matter, in the application by the Law Society of Kenya.

17. While admission of an amicus is at the discretion of the court, we note that all parties in the petitions have opposed the admission of the applicant, Mr Charles Kanjama, as an amicus. Particularly, that he does not possess the expertise he alleges to have but his is of a general nature. Further, and with particular reference to the petitioners, that he seeks to introduces new issues not advanced by the parties.

18. The court takes judicial notice that the applicant is its officer, being an advocate of the High Court. He is a renowned constitutional lawyer and it is the basis upon which he was admitted as an amicus in the matter he alluded to, being Supreme Court Advisory Opinion on the *Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.

19. On the contrary, in the petition before us, we are unconvinced that the applicant possess sufficient expertise to address the court on the technological issues. The court holds that it does not require a person with a legal background, as his primary professional discipline, which the applicant is, but a technocrat in information technology and systems, which is a secondary discipline possessed by the applicant.

20. We reiterate that the fact one was previously admitted as an amicus in a matter before this court is not a sufficient ground for admission in a subsequent suit as each case is determined on its own merit and unique issues and circumstances.

21. The upshot is that the application for admission as amicus is hereby dismissed.

Orders Accordingly

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aluochier (Interested Party) (Petition 1 of 2017) [2017] KESC 43 (KLR) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 43 (KLR)

Election Laws *- presidential election petition - joinder of interested parties in a presidential election petition - grounds considered for an applicant to be enjoined as an interested party - relevance and usefulness of the submissions of the intended interested party to the proceedings and the court - Supreme Court (Presidential Election Petition) Rules, 2017, rule 4(2); Supreme Court Rules, 2012, rule 25.*

Brief facts

The applicant sought joinder in the capacity of interested party to the petition. He urged that if he was denied joinder, he, as well as other Kenyan citizens, would suffer prejudice, as there was a real risk that the Government due to assume office, would stand in contravention of articles 1(1), 3(2), 2(2) and 3(1) of the Constitution.

It was the applicant's case that the basis of his application was different from what was presented by the petitioners. He contended that the grounds of the petitioners' case covered issues of the post-nomination day, voting day and post- voting day, as well as vote-counting records, and vote tallying. His grounds were that the 1st and 2nd respondents were not, eligible for election as President or Deputy President in the terms of the provisions of article 137 (1) (b), as read with articles 99 (1) (b), 148(1), and Chapter 6 of the Constitution.

The applicant contended that the 3rd respondent was not a 'political party' as defined in articles 91, 92 and 260 of the Constitution and hence it did not have the legal capacity to nominate any person for elective office under the Constitution.

Consequently, it was contended that the election of the 1st and 2nd respondents as President and Deputy President, was a nullity. The applicant contended that the 3rd respondent had not been holding free and fair elections, and had been acting unconstitutionally.

Issues

i. Whether an applicant seeking joinder as an interested party could introduce new facts, new parties and exclude some of the current parties.

ii. What were the factors to be considered in enjoining an interested party in a presidential election petition?

Held

1. The applicable law on joinder of interested parties was embodied in the Supreme Court (Presidential Election Petition) Rules, 2017 and the Supreme Court Rules, 2012. Under rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017, where there was

no applicable provision in the Act or in those rules, the procedures set out in the Supreme Court Rules, 2012 in so far as they were not inconsistent with the Act or these Rules, would apply to an election petition.

2. Rule 25 of the Supreme Court Rules, 2012 provided for interventions relating to applications to be joined as an interested party. It provided that the contents of an application for leave to be enjoined as an interested party would include:
   a. description of the interested party;
   b. any prejudice that the interested party would suffer if the intervention was denied,
   c. the grounds or submissions to be advanced by the person interested in the proceedings, and
   d. relevance and usefulness of the submissions to the proceedings and the court.
3. The applicant sought joinder to the suit and also sought to introduce new parties and exclude some of the existing parties. He also wanted the court to delve into issues that featured in the 2013 Presidential election. The applicant was in essence introducing new facts and issues that were not already before the court.
4. Where the applicant introduced a new petition, with issues not laid before the court, he was improperly making claims on a cause that belonged to other parties, in the main proceedings. That could not be allowed. Additionally, the court was also not convinced that the applicant would suffer any prejudice, if his proposed intervention was declined.

Application dismissed.

Citations

Cases

Kenya

Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) In general - (Cited)
2. Constitution of Kenya, 2010 articles 1(1); 2(2)(4); 3(1)(2); 40; 77(2); 90; 91; 92; 99(1)(b); 137(1)(b); 140(3); 148(1); 180; 193; 260 - (Interpreted)
3. Leadership and Integrity Act, 2012 (Act No 19 of 2012) section 13 - (Interpreted)
4. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 4(2) - (Interpreted)
5. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 25 - (Interpreted)

Advocates

None mentioned

August 27, 2017, the Court delivered the following Ruling:

A. The Application

1. The applicant seeks joinder in *Raila Amolo Odinga v Independent Electoral & Boundaries Commission & 2 others*, Presidential Election Petition No1 of 2017, in the capacity of interested party. His notice of motion is dated August 23, 2017, supported by an affidavit of the same date.

2. He urges that if he is denied joinder, he, as well as other kenyan citizens, will suffer prejudice, as there is a real risk that the government due to assume office, would stand in contravention of articles 1 (1), 3 (2)1(1), 2(2) and 3(1) of the *Constitution*.

3. It is the applicant's case that the grounds of his application are different from those presented by the petitioners. He contends that while the grounds of the petitioners' case cover issues of the post-nomination day, voting-day and post- voting-day, as well as vote-counting records, and vote tallying, his grounds are that the 1st and 2nd respondents were not, and are not, eligible for election as President or Deputy President, in the terms of the provisions of article 137 (1) (b), as read with articles 99 (1) (b), 148(1), and chapter 6 of the *Constitution*.

4. The applicant contends that the 3rd respondent is not a 'political party' as defined in articles 91, 92 and 260 of the *Constitution*; and hence it did not have the legal capacity to nominate any person for elective office under the constitution. Consequently, it is contended, the election of the 1st and 2nd respondents as President and Deputy President, is a nullity. The applicant contends that the 3rd respondent has not been holding free and fair elections, and has been acting unconstitutionally.

5. The applicant asks the court to determine the following points of law:

   a) Possible contravention of section 40 of the former *Constitution*;

   b) Possible contravention of article 77 (2) of the present *Constitution*;

   c) Possible contravention of section 13 of the *Leadership and Integrity Act*.

6. The applicant seeks the following reliefs:

   a) An order that the 1st and 2nd respondents are not eligible for election as President and Deputy President, pursuant to article 137(1)(b) as read with articles 99(1)(b) and 148(1) of the *Constitution*;

b) That for purposes of the general elections held on 8 August 2017, the 3rd respondent had no legal capacity to nominate any person as a candidate pursuant to articles 90, 99, 137, 180 and 193, and that, pursuant to article 2(4) of the *Constitution*, the nominations of the 1st and 2nd respondents registered by the IEBC, were invalid;

c) An order to invalidate the election of the 1st and 2nd respondents as President-elect and Deputy President-elect respectively;

d) An order to conduct a fresh election for president within sixty days of the date of the court's order, pursuant to article 140(3) of the *Constitution*;

e) An order that costs of, and incidental to this application abide the result of the said presidential election petition.

7. The applicant has not tendered any written submissions. But his application has been contested by the said 1st and 2nd respondents, through the replying affidavit of Moses Kipkogei, and by way of written submissions dated August 25, 2017. Their essential point is that the applicant has shown no personal stake in the proceedings, such as would provide a basis for joinder.

B.Joinder of Interested Parties: The Law

8. The applicable law on joinder of interested parties is embodied in rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017* as read with rule 25 of the *Supreme Court Rules, 2012*. Rule 4(2) aforesaid thus provides:

> " (2) Where there is no applicable provision in the Act or in these rules, the procedures set out in the *Supreme Court Rules, 2012* in so far as they are not inconsistent with the Act or these rules, shall apply to an election petition."

9. Rule 25 of the *Supreme Court Rules, 2012* is headed "interventions", and provides thus:

> " (1) A person may at any time in any proceedings before the court apply for leave to be enjoined as an interested party.
>
> (2) An application under this rule shall include –
>
> (a) A description of the interested party;
>
> (b) Any prejudice that the interested party would suffer if the intervention was denied; and
>
> (c) The grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons

> for believing that the submissions will be useful to the court and different from those of the other parties" [emphasis supplied].

10. While the applicant seeks joinder in the suit as it is, his application introduces new parties, and excludes some of the current parties. He seeks to be the petitioner; to have Uhuru Muigai Kenyatta as the 1st respondent; William Samoei Ruto as the 2nd respondent; Jubilee party as the 3rd respondent; Wafula Chebukati as the 4th respondent; and the Independent Electoral and Boundaries Commission as the 5th respondent. The applicant also wants us to delve into issues that featured in the 2013 presidential election.

11. The applicant is, in essence, introducing new facts and issues that are not before us. This court, in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others,* Supreme Court Petition No 12 of 2013, had thus held (para.24):

> " A suit in court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and rules, under the *Civil Procedure Code*, regarding parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

12. When the applicant introduces a new petition, with issues not already laid before the court, he is improperly making claims on a cause that belongs to other parties, in the main proceedings. This cannot be allowed. We are also not convinced that the applicant would suffer any prejudice, if his proposed intervention is declined.

13. We are inclined, in the circumstances, to dismiss the instant application. We make orders accordingly.

Odinga & another v Independent Electoral & Boundaries Commission & 2 others; Law Society of Kenya (Intended Amicus Curiae) (Petition 1 of 2017) [2017] KESC 35 (KLR) (Election Petitions) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 35 (KLR)

Election Law *– presidential election petition - application to be enjoined as amicus curiae in the presidential election petition – considerations for one to be enjoined as amicus curiae in a presidential election petition - where a party had applied and failed to be enjoined as amicus curiae in a previous presidential election petition - whether previous denial of a party's application to be enjoined as amicus curiae in a presidential election petition would automatically invalidate the party's future application to be enjoined as amicus curiae in presidential election petitions.*

Civil Practice and Procedure *– application to be enjoined as amicus curiae in the presidential election petition - considerations for one to be enjoined as amicus curiae in a presidential election petition - where a party had applied and failed to be enjoined as amicus curiae in a previous presidential election petition - whether previous denial of a party's application to be enjoined as amicus curiae in a presidential election petition would automatically invalidate the party's future application to be enjoined as amicus curiae in presidential election petitions – Supreme Court Rules, 2012 rule 54.*

Brief facts

Law Society of Kenya (LSK) filed an application seeking to be admitted to the instant petition as *amicus curiae* (friend of the court), pursuant to rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2017, and the Practice Directions issued by the court.

The application was premised on grounds that LSK had significant expertise and knowledge on constitutional and electoral law matters which were relevant to the instant petition; and that the LSK would assist the court in the interpretation and application of relevant constitutional and statutory provisions, Kenyan jurisprudence and comparative foreign law.

An advocate of the High Court and a council member, filed a replying affidavit in opposition of the application on grounds that the LSK did not qualify for admission as *amicus curiae* for lack of impartiality and the fact that it was an election observer. Though its chairperson, it had issued a statement after the election that the voting process was largely free, fair and credible. The opposing council member also alleged that LSK Council was split on the decision whether to seek admission in the petition as *amicus* and that some of the LSK members participated in the election.

Issues

i. What were the considerations for one to be admitted as *amicus curiae* in a presidential election petition?

ii. Whether the objectives of the LSK as listed out under section 4 of the Law Society of Kenya Act was a panacea by which the LSK could be admitted as *amicus curiae* in all cases.

iii. Whether previous denial of a party's application to be enjoined as *amicus curiae* in a presidential election petition would automatically invalidate the party's future application to be enjoined as *amicus curiae* in a presidential petition.

Relevant provisions of the Law

Supreme Court Rules, 2012

Rule 54

(1) The court may—

(a) in any matter allow an amicus curiae;

(b) appoint a legal expert to assist the court in legal submissions; or

(c) at the request of a party or on its own initiative, appoint an independent expert to assist the court on any technical matter.

(2) The court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest, or any other relevant factor.

(3) The fees and expenses of an advocate or expert appointed by the court on its own initiative shall be paid out of the Judiciary Fund in accordance to the scale of fees set by the Chief Justice from time to time.

Supreme Court (Presidential Election Petition) Rules, 2017

Rule 17 - Interlocutory applications

(1) Any interlocutory application at the close of pleadings shall be filed together with written submissions, made in accordance with these Rules, and not exceeding five pages.

(2) Within twenty-four hours of filing the interlocutory application, the applicant shall serve the application on every respondent.

(3) The respondent shall file a response to the application together with written submissions not exceeding five pages within twenty-four hours of service.

(4) There shall be no rejoinder from the applicant in an interlocutory application.

(5) The court may deliver the ruling on an interlocutory application by way of electronic communication to the parties.

(6) In delivering a ruling under sub rule (5), the court may defer the giving of reasons for the decision to a later date.

Held

1. The legal framework and principles for admission of *amicus* were statutory embodied in rule 54 of the Supreme Court Rules, 2012. As a friend of the court, a party was not to be partisan as it had no personal stake in the matter save for fidelity to the Constitution and assisting the court reach a legally sound determination. The decision whether to admit a party was at the discretion of the court, though parties on record could be invited to respond to such an application.

2. LSK was a statutory body whose objectives were provided for in section 4 of the Law Society Act. Key among them their objectives being: assisting the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; and in upholding the Constitution of Kenya and advancing the rule of law and administration of justice. One of the ways the Society assisted courts in the administration of justice, was when it acted as *amicus* in matters before those courts. However, that position was not a panacea for admission of the Society as *amicus* in all cases. Leave had to be sought and a basis satisfactorily laid.

3. While the applicant was previously denied admission as *amicus curiae* in a similar petition in 2013, that could not be a ground for subsequent denial. Neither could the fact that the LSK was previously admitted, be a ground for admission in subsequent proceedings. Each matter before the court was unique and raised unique issues for determination and legal questions under different circumstances. Subsequently, an application had to be determined on its merit, on a case to case basis so as to determine whether an intended applicant possessed the expertise relevant to assist the court. The court could not take judicial notice of an *amicus'* expertise. It was a matter of fact to be pleaded and proved.

4. Divergent positions of the LSK members were matters which needed proper contextualization given that every citizen was entitled to his/her political right in article 38 of the Constitution. When such an application was filed before the court, it had to be evaluated on the basis of the LSK's objectives and not individual LSK members.

5. The core of the instant petition was the interpretation and application of articles 81 and 86 of the Constitution. That placed the matter squarely within the LSK's objectives. The instant petition also raised the question as regards the validity or otherwise of the people's exercise of their sovereign power. Nothing could be of great public interest, so as to invite the safeguarding from the LSK than a question that touched on the people's exercise of their sovereign power.

Application allowed.

Orders

i. LSK was admitted as *amicus curiae*.

ii. LSK was directed to restrict its submissions on the single issue contained in its brief, being the rightful interpretation of section 83 of the Elections Act in relation to the Constitution.

Citations

Cases

Kenya

1. *Kuria & 5 others v Hassan & 4 others* Petitions 3, 4 & 5 of 2013; [2013] KESC 14 (KLR) (Consolidated) - (Explained)
2. *Muruatetu & another v Republic & 4 others* Petitions 15 & 16 of 2015; [2016] eKLR; [2016] 1 KLR 1099 (Consolidated) - (Mentioned)

3. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] eKLR; [2013] 1 KLR 685 - (Explained)
4. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Applied)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 38, 81, 86 - (Interpreted)
2. Elections Act, 2011 (Act No 24 of 2011) section 83 - (Interpreted)
3. Evidence Act (cap 80) section 106(4)(B) - (Interpreted)
4. Law Society of Kenya Act, 2014 (Act No 21 of 2014) section 4 - (Interpreted)
5. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 17- (Interpreted)
6. Supreme Court Act, 2011 (Act No 7 of 2011) section 14 - (Interpreted)
7. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 54 - (Interpreted)

Advocates

None mentioned

August 27, 2017, the Court delivered the following Ruling:

1. This is a notice of motion application dated and filed on August 25, 2017 by the Law Society of Kenya (LSK) seeking to be admitted to this petition as *amicus curiae*, or friend of the court.

2. Pursuant to rule 17 of the *Supreme Court (Presidential Election Petition) Rules, 2017*, and the Practice Directions issued by the court, this application is determined on the basis of written submissions only.

3. The applicant, LSK, prays that upon such admission being granted, it be granted an opportunity to submit written and oral arguments, and with leave of court, any information that the court may deem important and relevant to allow for the just disposition of the petition.

4. The application is premised on grounds that LSK is a public body established under the *Law Society of Kenya Act*, No 21 of 2014, with various objects and function, *inter alia*: assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; and uphold the *Constitution of Kenya* and advance the rule of law and administration of justice.

5. It is urged that because of its mandate and leadership, the LSK has significant expertise and knowledge on constitutional and electoral law matters which are relevant to the resolution of the underlying petition. That it will assist the court with the interpretation and application of relevant constitutional principles, Kenyan jurisprudence and comparative foreign law. Particularly, that it will assist the court by submitting on the following issues framed by the petitioners:

   (a) Whether the presidential election was conducted in accordance with the *Constitution* and the electoral laws existing electoral jurisprudence, particularly, the constitutional obligations that IEBC is required to meet under article 81 and 86 of the *Constitution*; and what interpretation or clarification ought to be made by this court in regard to the meaning of section 83 of the *Elections Act*; and

   (b) Whether the total number of rejected votes should be considered in ascertaining whether any candidate met the constitutional threshold.

6. The application is supported the affidavit of Isaac Okero, the president of the LSK, in which he reiterates the grounds in the body of the application. He cites the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR and urges that LSK has been previously admitted as an amicus before this court and that it has observed principles of impartiality whenever it has been admitted as an *amicus*.

7. He urges that the Society meets criteria for admission of amicus curiae as pronounced in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*[2015] eKLR and that it will abide by the guidelines set out in *Francis Karioko Muruatetu & another v Republic & others* [2016] eKLR.

8. On record is also the applicant's *amicus* brief, particularly on the constitutionality of section 83 of the *Elections Act*. He avers that no prejudice will be occasioned to any party were the application to be granted.

9. In response to the application, there is a replying affidavit sworn by Alex Gatundu, an advocate of the High Court and a council member of the applicant, LSK. The affidavit is filed in opposition of the application by the 3rd respondent. The deponent is a senior member of the Society.

10. He deposes to the centrality of impartiality on the part of a party seeking admission as *amicus curiae* and refers to the case *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR where the applicant herein was denied admission on the ground of lack of impartiality. He avers that equally, in this petition, LSK does not qualify for admission as *amicus* for lack of impartiality.

11. He avers that LSK participated in the elections, subject of the petition before court, as an accredited observer, and that its President, Isaac Okero issued a press release on August 10, 2017 in which it was observed, *inter alia* that: "the Electronic Voter Identification Devices (EVID) largely functioned correctly and the process was completed without substantial disruptions in most of the polling stations. The KIEMS appears to have functioned without any operational flaws and the voting process was largely free, fair and credible".

12. Mr Gatundu further avers that the LSK Council was spliton the decision whether to seek admission as amicus or not. He avers that some council members were actively involved in the election as candidates and/or nominated members to various parliamentary positions such as Edwin Sifuna and Allan Kosgey. Further, that Ms Faith Waigwa, the applicant's Vice-President chaired the Jubilee Party's National Elections Appeals Tribunal.

13. There is also produced screen shots of WhatsApp Text communication images and transcriptions of some council members, with a certificate of production under section 106(4)(B) of the *Evidence Act*, by Brian Gichana Omwenga, a technology advisor of Jubilee Party, as a demonstration of the partisan positions of some council members.

Determination

14. The legal framework for admission of amicus is statutory embodied in rule 54 of the *Supreme Court Rules, 2012*. This court, as rightly observed by the applicant, has set out the principles in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2015] eKLR.

15. Most important, as a friend of the court, a party must not be partisan as he has no personal stake in the matter save for fidelity to the *Constitution* and assisting the court reach a legally sound determination. The decision whether to admit apart is also as the discretion of the court, though parties on record may be invited to response to such an application. In this regard, we note that the petitioners and the 1st and 2nd respondents have not filed responses to this application.

16. The Law Society of Kenya is a statutory body whose objectives are provided for in section 4 of the *Law Society of Kenya Act*, key among them, as rightly put by the applicant, being: assisting the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya; and uphold the *Constitution of Kenya* and advance the rule of law and administration of justice. One of the way the Society assists courts in the administration of justice, is when it acts as amicus in matters before those courts. However, this position is not a panacea for admission of the Society as *amicus* in all cases. Leave must be sought and a basis satisfactorily laid.

17. In the application before this court, while the applicant was previously denied admission before this court as *amicus curiae*, in a similar petition in 2013 that cannot be a ground for subsequent denial as urged by the 3rd respondent. Neither can the fact that Society was previously admitted by a ground for admission in subsequent proceedings as urged by the applicant. Each matter before the court is unique and raises unique issues for determination and legal questions under different circumstances. This is the reason why an application has to be determined on its merit on a case to case basis so as to determine whether an intended applicant possesses the expertise relevant to assist the court. The court cannot take judicial notice of an amicus' expertise. It is a matter fact to be pleaded and proved.

18. For instance, the constitutional question, unconstitutionality of section 14 of the *Supreme Court Act*, in the *Jasbir Rai* case cited by applicant is not the issue now raised in this petition. Hence it cannot be a basis for admission in this matter. We have to evaluate this application on its own merit.

19. Regarding the impartiality of the applicant, we note the contents of the replying affidavit of Alex Gatundu and the reference to the LSK President's Press Release of August 10, 2017. This court would not delve into the internal functioning of the Society when determining applications like the one before it. Save to say that the otherwise divergent positions of the council members as averred in the affidavit are matters which need proper contextualization given that every citizen is entitled to his/her political right in article 38 of the *Constitution*. This court is not ready to pronounce that a council member cannot vie for a political office.

20. We take note that when such an application is filed before the court, it has to be evaluated on the basis of the Society's objectives and not individual Society members.

21. At the core of this petition is the interpretation and application of articles 81 and 86 of the *Constitution*. This places the matter squarely within the Society's objectives. In this petition is also the question as regards the validity or otherwise of the people's exercise of their sovereign power. We find that nothing can be of great public interest, so as to invite the safeguarding from the LSK than a question touching on the people's exercise of their sovereign power.

22. Consequently, we find and hold that the Law society of Kenya has made a case for its admission as *amicus curiae* in this matter. As the court reserves the right to direct the *amicus* on how to proceed, we direct that the Society restricts its submissions on the single issue contained in its brief, particularly: the rightful interpretation of section 83 of the *Elections Act* in relation to the *Constitution of Kenya 2010*.

23. The upshot is that the application for admission as *amicus curiae* is allowed.

Orders accordingly.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Mwaura (Intended Respondent) (Presidential Election Petition 1 of 2017) [2017] KESC 38 (KLR) (Election Petitions) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 38 (KLR)

Electoral Law *– joinder of parties - presidential election petition – application to be enjoined as amicus curiae - guiding principles applicable in determining an application to be enjoined as amicus curiae – where the applicant was a presidential candidate in the presidential election - what were the guiding principles applicable in determining an application to be enjoined as amicus curiae in a presidential election petition - whether being a presidential candidate in a presidential election was enough consideration for one to be enjoined as amicus curiae in a presidential election petition - whether an application by an independent candidate to be enjoined as amicus curiae could be allowed on grounds of objectivity of the applicant - whether a party who applied to be enjoined as amicus curiae had to demonstrate an identifiable stake or a legal interest in the proceedings - Supreme Court Rules, rule 4(2) and 54.*

Brief facts

The applicant filed an application based upon rule 22 of the Supreme Court (Presidential Election Petition) Rules, 2017 and the inherent power of the court to be enjoined as an intended respondent or in the alternative as *amicus curiae* or in such capacity as the court could direct. The applicant relied on the grounds that: he was a relevant party as he was an independent candidate in the August 8, 2017 presidential election; and that he was able to table material that brought objectivity to the process of adjudicating the issues raised in the instant petition because he was as an independent candidate that was not affiliated to any political party.

The petitioner opposed the application on the ground that the applicant had not demonstrated any identifiable stake or legal interest in the proceedings. He averred that the applicant wished to advance his own interest, in the matter and did not demonstrate that he would suffer any prejudice if the application was declined.

Issues

i. What were the guiding principles applicable in determining an application to be enjoined as *amicus curiae* in a presidential election petition?

ii. Whether being a presidential candidate in a presidential election was enough consideration for one to be enjoined as *amicus curiae* in a presidential election petition.

iii. Whether an applicant could apply to be enjoined as an interested respondent or in the alternative as *amicus curiae* or in such capacity as the court could direct.

iv. Whether the applicant met the legal requirements for admission to the proceedings as an interested party.

Relevant provisions of the Law

Supreme Court Rules, 2012

Rule 54(2)

The Court shall before allowing an *amicus curiae* take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest, or any other relevant factor**.**

Supreme Court (Presidential Election Petition) Rules, 2017.

Rule 4(2)

"(1) a person may at any time in any proceedings before the Court apply for leave to be enjoined as an interested party.

(2) An application under this rule shall include-

(a) a description of the interested party;

(b)any prejudice that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties"

Held

1. The guidelines for one to be enjoined as *amicus curiae* were:

1. An amicus brief should be limited to legal arguments.
2. 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.
3. An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tended to compromise their essence as well as the terms of the Constitution's called for resolution of disputes without undue delay. The court could therefore, and on a case- by- case basis, reject *amicus* briefs that did not comply with that principle.
4. 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.
5. The court could 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 was not defeated solely by the subsistence of a State interest, in a matter of public interest.
6. Where, in adversarial proceedings, parties alleged that a proposed *amicus curiae* was biased, or hostile towards one or more of the parties, or where the applicant, through previous

conduct, appeared to be partisan on an issue before the court, the court would consider such an objection by allowing the respective parties to be heard on the issue.

7. An *amicus curiae* was not entitled to costs in litigation. In instances where the court requested the appearance of any person or expert as *amicus*, the legal expenses could be borne by the Judiciary.
8. The court would regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.
9. In appropriate cases and at its discretion, the court could assign questions for *amicus* research and presentation.
10. An *amicus curiae* should not participate in interlocutory applications, unless called upon by the court to address specific issues.

2. The applicant did not meet the criteria set out in law and precedent as he was biased and was opposing the application which when put into context revealed that he was partisan. The intended *amicus curiae was* not neutral and his application had to fail. However, on perusal of the record, the applicant met the conditions set out in law on joinder of interested parties to a suit. The applicant was a candidate in the August General Elections, 2017 and he had shown a personal stake or interest in the matter.

3. For one to be enjoined in proceedings as an interested party, they had to move the court by way of a formal application. Enjoinment was not as of right, but was at the discretion of the court; hence, sufficient grounds had to be laid before the court on the basis of the following elements:

1. The personal interest or stake that the party had in the matter had to be set out in the application. The interest had to be clearly identifiable and had to be proximate enough, to stand apart from anything that was merely peripheral.
2. The prejudice to be suffered by the intended interested party in case of non- joinder had to also be demonstrated to the satisfaction of the court. It had to also be clearly outlined and not something remote.
3. Lastly, a party had to, in its application, set out the case and/or submissions it intended to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that those submissions were not merely a replication of what the other parties would be making before the court.

4. The applicant as a candidate in presidential election had a definitive stake in the outcome of the case.

Application allowed.

Orders

i. *The applicant was admitted as an interested party.*
ii. *Applicant written submissions to be filed by 8am on August 28, 2017 and limited to 5 pages only, of font 12, 1.5 spacing.*

Citations

Cases

Kenya

1. *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2016] KESC 12 (KLR) - (Explained)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Explained)

Statutes

Kenya

1. Election Offences Act, 2017 (Act No 37 of 2016) In general - (Cited)
2. Supreme Court (Presidential Election Petition) Rules, 2017 (cap 9B Sub Leg) rules 4(2); 22 - (Interpreted)
3. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 54(2) - (Interpreted)

Advocates

None mentioned

August 27, 2017, the Court delivered the following Ruling:

1. The applicants notice of motion application dated August 23, 2017 and filed on even date is anchored on rule 22 of the *Supreme Court (Presidential Election Petition) Rules, 2017* (Rules) and the inherent power of the court. The motion is supported by his affidavit, that of Miriam M Mutua's and George Kariuki Njoroge's all dated August 23, 2017.

2. The applicant seeks joinder in *Raila Amolo Odinga & another v IEBC & 2 others*, Petition 1 2017, in the capacity of intended respondent/ *amicus curiae* but subject to his name only, appearing in the proceedings as he was the presidential candidate.

3. The applicant seeks to move the court for orders that:

    (1) The notice of motion be certified urgent and heard *ex parte* and service thereof on the respondents be dispensed with in the first instance owing to its extreme urgency.

    (2) Michael Wainana Mwaura, an independent candidate in the August 8, 2017 presidential election be forthwith enjoined as an interested respondent, or in the alternative as *amicus curiae*, or in such capacity as this honourable court may direct.

    (3) Upon the grant of order 2 herein, the replying affidavit of Michael Wainana Mwaura sworn on August 23, 2017 and lodged herein be deemed as properly filed and service

thereof be effected on the respondents forthwith under such terms and directions as this Honourable Supreme Court shall make.

(4) Costs abide in the cause.

4. The application is premised upon the supporting affidavit of the applicant, Miriam M Mutua and annexure therein. The grounds are summarized as:

(1) The applicant is complying with the statutory mandate of rule 22 of the petition *Rules*.

(2) The applicant is a relevant party as he was an independent candidate in the August 8, 2017 presidential election having garnered 13,257 votes as declared by the 1st respondent.

(3) He is able to table material that brings objectivity to the process of adjudicating the issues as an independent candidate not affiliated to any political party.

(4) His joinder will aid the court view the involvement of such an independent candidate in the general conduct and the process of the Presidential election sought to be impugned.

(5) An IT expert under the auspices of the applicant has demonstrated by means of his IT expertise that the minimum time required for forensic IT data examination of the IEBC IT systems is 2-3 months. These timelines or cost (Kshs 10-30 million) to conduct the audit was never proffered by the petitioners.

5. The applicant in his affidavit in support of the motion deposes that he has perused all the evidence presented by the petitioners and is unable to find merit in the proposition that the presidential elections held on August 8, 2017 should be annulled.

6. He avers that there are only two discernible grounds in the petition arising for determination; (1) the validity of the conduct of a presidential election (presumably the August 8, 2017 presidential petition); (2) the commission of an election offence as provided under the *Election Offences Act* (No 37 of 2016). He deposes that the petitioner has introduced two unsubstantiated grounds; (1) the allegedly discrepant data between the Forms 34A and the poll data results at the National Tallying Center and (2)Alleged ballot stuffing in consequence of alleged eviction of the petitioners' agents at polling stations.

7. His running mate Miriam Mutua has also filed a supporting affidavit dated August 23, 2017 where she reiterates the contents of the applicants affidavit and also opposing the petition. Further, annexed to the motion is George Kariuki Njoroge's affidavit dated August 23, 2017, IT expert testimony refuting the petitioners IT evidence and also opposing the petition.

8. In response to the application, the petitioner has filed a replying affidavit to application by intended interested parties and *amicus curiae* dated and filed on August 26, 2017 deponed to by Raila Amollo Odinga. He opposes the application as the applicant has not demonstrated any identifiable stake or legal interest in the proceedings. He avers that the applicant wishes to advance his own interest, in the matter and does not demonstrate that he would suffer any prejudice if the application was denied. He prays the application be dismissed with costs.

9. The 1st & 2nd respondent are also opposed to the application, and have filed a replying affidavit deponed to by Moses Kiplagat, a Senior Legal Manager of the 1st respondent to that effect. He avers that the applicant fails to meet the threshold of rule 54(2) of the *Supreme Court Rules, 2012* as he is not impartial or independent. They urge the court to dismiss the application.

The Law

10. Rule 54 of the *Supreme Court Rules, 2012* read with rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017* set out criteria to be met when applying for *amicus*.

> 54. (2) The court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest, or any other relevant factor.

11. The court has found occasion to pronounce its self on its inherent power to admit *amicus curiae*, in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, Supreme Court Petition No 12 of 2013,[2015] eKLR (an application by Katiba Institute), it considered the role and set out the guiding principles applicable in determining an application to be enjoined in that capacity. The court held (at paragraph 41), that:

> " (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" [emphases supplied].

12. The applicant herein does not meet the criteria set out in law and precedent as he is biased and is opposing the application which when put into context reaveals that he is partisan. As such the intended amicus curiae is not neutral and his application must fail.

13. However, on perusal of the record, the applicant meets the conditions set out in law on joinder of interested parties to a suit. The party herein was a candidate in the just concluded General Elections, and this has shown a personal stake or interest in the matter.

14. Rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*. Rule 25 of the *Supreme Court Rules, 2012* is headed Interventions, and provides:

> "(1) A person may at any time in any proceedings before the court apply for leave to be enjoined as an interested party.
>
> (2) An application under this rule shall include-
>
> (a) a description of the interested party;
>
> (b) any prejudice that the interested party would suffer if the intervention was denied; and
>
> (c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the court and different from those of the other parties"

15. The principles set out in paragraph 37 of *Francis Karioki Muruatetu & another v Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR demonstrate elements applicable where a party seeks to be enjoined in proceedings as an interested party , they are:

> One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:
>
> (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
>
> (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.

(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.

16. We find that the applicant as a candidate in presidential election, has a definitive stake in the outcome of the case.

Consequently, we make the following order:

17. The application is hereby allowed.

(a) To the extent that the applicant is admitted as an interested party.

(b) Applicant written submissions to be filed by 8am on the August 28, 2017 and limited to 5 pages only, of font 12, 1.5 spacing.

Orders accordingly.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot (Applicant) (Presidential Election Petition 1 of 2017) [2017] KESC 34 (KLR) (Election Petitions) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 34 (KLR)

Election Law *– presidential election petition - application to be enjoined as an interested party – application to be enjoined as an interested party in the presidential election petition – where the applicant was a presidential candidate in the election - what were the considerations for one to be enjoined as an interested party in a presidential election petition - whether being a presidential candidate in a general elections was enough consideration for one to be enjoined as an interested party in a presidential election petition – Supreme Court Rules, 2012 rules 25 and 26.*

Civil Practice and Procedure *– joinder of parties - application to be enjoined as an interested party – application to be enjoined as an interested party in the presidential election petition – where the applicant was a presidential candidate in the election - what were the considerations for one to be enjoined as an interested party in a presidential election petition - whether being a presidential candidate in a general elections was enough consideration for one to be enjoined as an interested party in a presidential election petition – Supreme Court Rules, 2012 rules 25 and 26.*

Brief facts

The applicant was a presidential candidate in the August 8, 2017 general election and sought to be enjoined as an interested party in the instant petition. The application was based on grounds that the applicant had a direct and legitimate interest in the instant petition and that the applicant's interests in the proceedings was to champion the collective cause of his party and constituents in the manner the elections were conducted.

The 1st respondent opposed the application on the grounds that, the applicant sought to pursue a partisan position and therefore was not be enjoined as an intervenor as provided for under rule 25 of the Supreme Court Rules. The 2nd respondent also opposed the application on grounds that the application failed to meet the threshold of rule 25 of the Supreme Court Rules.

Issues

i. What were the considerations for one to be enjoined as an interested party in a presidential election petition?

ii. Whether being a presidential candidate in a general elections was enough consideration for one to be enjoined as an interested party in a presidential election petition.

Held

1. The applicant had failed to show in terms of rule 25 of the Supreme Court Rules, 2012 that he would suffer any prejudice if the intervention was denied and that the grounds or submissions to be advanced would be different from the other parties to the proceedings.

2. Enjoinment was not as of right but was at the discretion of the court. Sufficient grounds had to be laid before a court, on the basis of the following elements:

a. The personal interest or stake that the party had in the matter had to be set out in the application. The interest had to be clearly identifiable and had to be proximate enough, to stand apart from anything that was merely peripheral.

b. The prejudice to be suffered by the intended interested party in case of non-joinder, had to be demonstrated to the satisfaction of the court. It had to also be clearly outlined and not something remote.

c. A party had to, in its application, set out the case and/or submissions it intended to make before the court, and demonstrate the relevance of those submissions. It was also demonstrate that the submissions were not merely a replication of what the other parties would be making before the court.

3. The applicant was a presidential candidate in the August 8, 2017 general elections. That was an identifiable stake in the matter, and he would be directly affected by the outcome of the presidential election petition.

Application allowed.

Orders

i. Applicant was to file the alleged report in his affidavit by 8.00 am on August 28, 2017 and serve upon all parties.

ii. Applicant written submissions to be filed by 8:00 am on August 28, 2017 and limited to 5 pages only, of font 12, 1.5 spacing

Citations

Cases

Kenya

1. *Muruatetu, Francis Kariuki & another v Republic & 4 others* Petitions 15 & 16 of 2015; [2017] KESC 2 (KLR) - (Explained)
2. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 22, 23, 140, 159,140(2) - (Interpreted)
2. Elections Act, 2011 (Act No 24 of 2011) In general - (Cited)

3. Supreme Court (Presidential Election Petition) Rules , 2017 (Act No 7 of 2011 Sub Leg) rules 21, 22 - (Interpreted)
4. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rules 25, 26 - (Interpreted)

Advocates

None mentioned

August 27, 2017, the Court delivered the following Ruling:

An application for joinder as an interested party under rule 25 of the *Supreme Court Rules, 2012* as read with rule 4 (2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*

1. By a notice of motiondated August 21, 2017under a Certificate of Urgency premised on article 22, 23, 140, and 159 of the *Constitution of Kenya 2010*, the provisions of the *Elections Act 2012*, rules 21 and 22 of the *Supreme Court (Presidential Election Petition) Rules 2017*, rules 25 and 26 of the *Supreme Court Rules, 2012* and all other enabling provisions of the law), the applicant seeks the following reliefs:

    (i) That the application be certified as urgent and heard on priority basis; and

    (ii) That the applicant, Ekuru Aukot, be enjoined as an interested party in the petition.

2. The application is premised on the following grounds:

    a. That the intended interested party has direct and legitimate interest in the petition herein related to the issues subject for determination by this honorable court.

    b. That the intended interested party was a Presidential candidate during the National General elections held on the 8th of August 2017.

    c. That the results of the said elections were announced and declared on the 11th day of August whereby the 2nd respondent declared and announced the 3rd respondent as the duly elected President of the Republic of Kenya.

    d. That the said election and declaration has since been challenged by the petitioners herein and by dint of article 140(2) of the *Constitution*, this court has 14 days to hear and determine the said petition and the set timelines started running on August 18, 2017

    e. That the applicant herein, Dr Ekuru Aukot was a presidential candidate on a Third-way Alliance Kenya party ticket in the just concluded elections who had several agents monitoring the electoral process and he has compiled his own independent

audit of the electoral process with a view of establishing its transparency, credibility, verifiability and accountability hence he is entitled to be a party in these proceedings to help the court reach a judicious and fair determination of the matter at hand.

f. That being a presidential candidate in the elections which are subject of the petition herein, theapplicant is entitled to join as a petitioner and he will suffer prejudice if he is not joined as a party in these proceedings.

g. That as demonstrated in the annexed affidavits, the submissions to be advanced by the applicant in this petition are of relevance and useful to the court and different from those of the other parties herein in that the applicant has been an active player in these elections and he has gathered crucial information, facts and analysis that have a direct bearing on the proceedings herein and the ultimate outcome.

h. That in light of the mandatory constitutional time constraints, this application ought to be disposed of expeditiously to avoid a delay in the hearing of the main petition.

i. That the applicant wishes to be heard before a determination can be made on this matter because he will be directly affected by the outcome of this petition.

3. The annexed affidavit of Martin Gavole Aguya Mwenesi, the Secretary General of theapplicant's party (Thirdway Alliance Kenya) deposes that:

a) The applicant, if enjoined to these proceedings, will enrich existing democratic space in Kenya (paragraph 5 of the affidavit)

b) The applicant will raise the issue of failure of the electronic transmission of votes (paragraphs 8 and 9 of the affidavit)

c) Theapplicant's party has compiled a report revealing the discrepancies in the forms availed by the 1st respondent (a copy of this report is however not annexed to the affidavit)

d) That there were numerous failures of the Kenya Integrated Elections Management (KIEMS) system.

4. The application is also supported by the affidavit of Mr Miruru Waweru the chairman of theapplicant's political party (Thirdway Alliance Kenya) sworn on the August 25, 2017and filed on August 25, 2017; the affidavit of Mr Martin Gavole Aguya Mwenesi, the Secretary General of the applicant's party (Thirdway Alliance Kenya) sworn on the August 21, 2017and filed on August 25, 2017, annexing a preliminary report of the party's review of the various IEBC reports and process.

5. The applicant submits that his interest in these proceedings is to champion's the collective cause of hisparty and constituents in the manner that the elections were conducted. He contends that he has direct and legitimate interest in the present petition since he was a presidential candidate in the August 8, 2017general election; that he will suffer prejudice if he is not enjoined as a party in the proceedings; and, that the submissions he shall advance during the hearing of the petition will be different from those of the other parties in the proceedings.

6. There are two responses opposing the application. The first is a replying affidavit of the 1st and 2nd respondent sworn by Moses Kipkogei, the legal officer of the 1st respondent dated August 25, 2017 and filed August 26, 2017; and the second is by the replying affidavit of the 3rd respondent's sworn by Mr. Davis Kimutai Chirchir, the chief agent of Jubilee Party, sworn on the August 25, 2017 and filed on the August 25, 2017.

7. It is the 1st respondents evidence that the applicant intends to pursue a partisan position and cannot be joined as an intervenor as provided under rule 25 of the *Supreme Court Rules, 2012* a position confirmed by the Supreme Court in *Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 others* [2014] eKLR. The application must fail.

8. The thirdrespondent avers that the applicant has failed to meet the threshold in rule 25 of the *Supreme Court Rules, 2012* already conceded defeat if the concluded General Elections and cannot suffer any prejudice nor will he be directly affected by the outcome of the petition, therefore the application must fail;

9. The respondents have written submissions on record that affirm their positions.

10. Although the applicant highlights the principles set by this court on interventions/joinder of interested persons in the case of *Francis Kariuki Muruatetu and Wilson Thirimbu Mwangi v Republic and 4 others*, Supreme Court Petition No 15 and 16 of 2015 (consolidated) (the Muruatetu case), he fails to show (in terms of rule 25 of the *Supreme Court Rules, 2012* that:

    (i) he would suffer any prejudice if the intervention was denied

    (ii) the grounds or submissions to be advanced will be different from the other Parties to the proceedings.

11. Rule 25 of the *Supreme Court Rules, 2012* provides:

    (1) A person may at any time in any proceedings before the court apply for leave to be joined as an interested party.

    (2) an application under this rule shall include —

        (a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied; and

(3) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the court and different from those of the other parties.

(4) An application under this rule shall be determined on the basis of written submissions.

Provided that thecourt may, where the applicant is unrepresented, direct that submissions may not be made orally.

This rule is applicable in this instance by dint of rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*:

(2) Where there is no applicable provision in the Act or in these rules, the procedures set out in the *Supreme Court Rules, 2017* in so far as they are not inconsistent with the Act or these rules, shall apply to an election petition.

12. While interpreting this provision in the *Muruatetu* case, this court laid out clear guidelines on instances when a person may be enjoined to proceedings before it as an interested party. At paragraph 37, the court held:

.....Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before thecourt, and demonstrate the relevance of those submissions. It should also demonstrate that

> these submissions are not merely a replication of what the other parties will be making before the Court. [Emphasis added]

13. Consequently, the application conforms to the principles laid out in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, (an application by LSK) in Supreme Court Petition No. 12 of 2013, [2015] eKLR and *Francis Karioki Muruatetu & another v Republic & 5 others,* Supreme Court Petition No 15 & 16 of 2015 (consolidated); [2016] eKLR in that the applicant: was a presidential candidate in the August 8, 2017 general elections. This is an identifiable stake in the matter, and he will be directly affected by the outcome of the present presidential election petition.

14. Accordingly, we make the following orders:

    (a) The application is hereby allowed.

    (b) The applicant is to file the alleged report in his affidavit by 8.00 am on August 28, 2017and serve upon all parties.

    (c) Applicant written submissions to be filed by 8am on the August 28, 2017 and limited to 5 pages only, of font 12, 1.5 spacing.

    Orders accordingly.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Attorney General (Intended Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 36 (KLR) (Election Petitions) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 36 (KLR)

Constitutional law*- Office of the Attorney General - Powers of the Attorney General - right of audience of the Attorney General in proceedings that raised matters of public interest - Constitution of Kenya, (2010) article 156; Office of the Attorney General Act, section 7.*

Election Law *- presidential election petition – joinder of parties – application by the Attorney General to be enjoined as amicus curiae – right of audience of the Attorney General in matters of public interest - authority of the Attorney General to be enjoined in suits which a government was not a party - what were the factors the Office of the Attorney General had to satisfy so as to be enjoined as amicus curiae in a suit - Constitution of Kenya, (2010) article 156; Office of the Attorney General Act, section 7.*

Civil Practice and Procedure *– joinder of parties – application by the Attorney General to be enjoined as amicus curiae – application to be enjoined as amicus curiae in a presidential election petition – guiding principles applicable in determining an application by the Attorney General to be enjoined as amicus curiae.*

Brief facts

The Attorney General sought to be enjoined to the proceedings as a*micus curiae* in the presidential election petition on the basis that he had both a constitutional and statutory obligation to assist the court in matters involving complex and legal questions and to place materials and expert research that would aid in fair, just and impartial adjudication of the issues in dispute.

The petitioners opposed the application on grounds that the applicant having been admitted as *amicus* in the 2013 presidential petition took a partisan view supporting the 1st and 3rd respondent's case.

Issues

i. What were the guiding principles applicable in determining an application to be enjoined as *amicus* curiae?

ii. Whether the Attorney General could raise the issue about how the IEBC conducted the election in an *amicus* brief; an issue which he had previously raised and which had been determined by the Court of Appeal in the case of *IEBC v Maina Kiai & 4 Others* [2017] eKLR

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 156 (1) There is established the office of Attorney-General.

(2) The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.

(3) The qualifications for appointment as Attorney-General are the same as for appointment to the office of Chief Justice.

(4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.

(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

Office of the Attorney General Act, 2012

Section 7

Audience by Attorney-General in matters of public interest,

(1) Despite the provisions of any written law to the contrary or in the absence of any other written law, the Attorney-General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers—

(a) to be of public interest or involves public property; or

(b) to involve the legislature, the judiciary or an independent department or agency of the Government.

(2) In the exercise of the powers of the Attorney-General under subsection (1), the Attorney-General shall—

(a) notify any court, tribunal or any other administrative body of the intention to be enjoined to the suit, inquiry or administrative proceedings; and

(b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.

(3) Where a suit, inquiry or any other proceedings is pending before a court, tribunal or any other administrative body to which the Attorney-General does not have a right of audience, it shall be

sufficient for the Attorney-General to file a certificate of the intention of the Attorney-General to be joined in the proceeding.

(4) The court, tribunal or any such administrative body shall, upon receipt of a certificate under subsection (3), enjoin the Attorney-General in the proceedings.

Held

1. The role played by the Attorney General as an institution within the Executive Arm of Government in Kenya was an important one as enumerated by article 156 of The Constitution of Kenya, 2010 which established the office of the Attorney General and gave the office of the Attorney General the authority to appear as a friend of the court in civil proceedings to which the Government was not a party with leave of the court.
2. Article 156(4)(c) of the Constitution and the Office of the Attorney General Act, 2012, outlined the function and powers of the Attorney General. Key among them being the right of audience of the Attorney General before the courts in matters of public interest. Section 7 of the Office of the Attorney General Act granted the Attorney- General the right of audience in proceedings of any suit, that involved the legislature, the judiciary or an independent department or agency of the government. The Attorney General also had the power to notify any court, tribunal or any other administrative body of the intention to be enjoined to the suit, inquiry or administrative proceedings; and satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the office.
3. The instant proceedings involved issues of great public interest. The complex interplay of law and fact presented in the instant case touched on the sovereignty of the people and the inalienable right of every Kenyan citizen to determine the form of governance for Kenya. Millions of Kenyan citizens participated in the General Elections held on August 8, 2017. Despite being one of Kenya's highest voter outcome statistically, it preceded a lengthy period of electoral law reform culminating in Chapter Seven of the Constitution of Kenya, 2010. Elections, properly conducted, represented the people's will and it enabled the exercise of their sovereign power through democratically elected representatives. The Office of the Attorney General was an integral part of the National Executive and it bore the privilege of executive authority but was bound by the necessary and sacred strictures of exercise of that power. It had to be exercised in a manner compatible with the principle of service to the people of Kenya, for their well-being and benefit pursuant to article 129(2).
4. The Attorney General satisfied the Supreme Court that issues of public interest were involved in the instant suit. The Attorney General elected to be enjoined in the proceedings as a friend of the court. The Attorney General's mandate was to be assessed against the following principles:
    a. An *amicus* brief should be limited to legal arguments.

b. 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.

c. An *amicus* brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tended 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 did not comply with this principle.

d. 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.

e. The court could 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 was not defeated solely by the subsistence of a State interest, in a matter of public interest.

f. Where, in adversarial proceedings, parties alleged that a proposed *amicus curiae* was biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appeared to be partisan on an issue before the court, the court would consider such an objection by allowing the respective parties to be heard on the issue

g. An *amicus curiae* was not entitled to costs in litigation. In instances where the court requested the appearance of any person or expert as *amicus*, the legal expenses may be borne by the Judiciary.

h. The Court would regulate the extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.

i. In appropriate cases and at its discretion, the court could assign questions for *amicus* research and presentation.

j. An *amicus curiae* was not to participate in interlocutory applications, unless called upon by the court to address specific issues.

k. The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.

l. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.

m. The applicant ought to show that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available. The applicant ought to draw the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there was no intention of repeating arguments already made by

the parties. And such new matter as the applicant sought to advance, had to be based on the data already laid before the court, and not fresh evidence.

n. The applicant ought to show expertise in the field relevant to the matter in dispute, and in that regard, general expertise in law did not suffice.

o. Whereas consent of the parties to the proposed *amicus* role was a factor to be taken into consideration, it was not the determining factor.

5. The court, which was the custodian of rules of validity, propriety, and fair play under the Constitution and the law, remained in charge, in regulating the precise role the Attorney-General could play if admitted as *amicus curiae*. While the Attorney General would enrich the material placed before the instant court, on issues of law, relevant in determining the petition, the court had to guard against granting the Attorney General leave to address all issues proposed.

6. Permitting the Attorney General to address the issue of how the IEBC conducted the presidential election, which the Attorney General had addressed as *amicus curiae* in the case of *IEBC v Maina Kiai & 4 Others* [2017] eKLR would, with respect, be allowing the Attorney General to re-litigate issues in a matter to which he was an active party to the adversarial proceedings and in which he preferred a clear position for or against a party which was also before the instant court, directly or by association. That bore the risk of prejudicing the parties concerned negating the core principle that justice must not only be done, but be seen to be done.

7. Where, in adversarial proceedings, parties alleged that a proposed *amicus curiae* was biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appeared to be partisan on an issue before the court, the court would consider such an objection by allowing the respective parties to be heard on the issue.

8. Due to the strict bounds of time within which the court was to hear and determine the petition, the parties did not have adequate time to respond to the Attorney General's brief before the petition was determined. To avert the risk, the specific issue of how the IEBC conducted the presidential election, was to be expunged from the *amicus* brief.

9. The other questions addressed in the Attorney General's *amicus* brief were pertinent to the instant case. Since the 2013 General Elections, the electoral jurisprudence set by the Supreme Court and other courts inspired electoral law reform in various aspects. The Attorney General was part of that process and brought a critical originalism perspective regarding the process to the proceedings, as a friend of the court. The *amicus* brief addressed itself to pure issues of law and in a clear, concise way. The role of interpretation and application of the law to the facts in the case however rested with the court.

Application allowed.

Citations

Cases

Kenya

1. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR) - (Explained)
2. *Kuria & 5 others v Hassan & 4 others* Petition 3, 4 & 5 of 2013; [2013] KESC 14 (KLR) (Consolidated) - (Explained)
3. *Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* Petition 5, 4 & 3 of 2013; [2013] KESC 8 (KLR) - (Explained)
4. *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* Petition 12 of 2013; [2015] KESC 26 (KLR) - (Explained)

Trinidad and Tobago

Peters v Attorney General [2002] 3 LRC 32 - (Explained)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 81, 86, 156(4)(c)(5)(6); Chapter seven - (Interpreted)
2. Office of the Attorney General Act, 2012 (Act No 49 of 2012) sections 6(2)(a); 7 - (Interpreted)

Advocates

Attorney General

August 27, 2017, the Court delivered the following Ruling:

1. By an application dated August 25, 2017, the Attorney General of the Republic of Kenya seeks to be enjoined to these proceedings as *amicus curiae* on the basis that he has both a constitutional and statutory obligation to assist the court in matters involving complex and legal questions and to place materials and expert research that will aid in fair, just and impartial adjudication of the issues in dispute. In particular, that:

    a) The Attorney General is authorized under article 156 (5) of the *Constitution* to appear with leave of the court, as a friend of the court in any civil proceedings to which the government is not a party;

    b) Article 156(6) of the *Constitution* obligates the Attorney- General to promote, protect and uphold the rule of law and defend the public interest; and

    c) Under section 6(2)(a) of the *Office of the Attorney General Act, 2012*, the Attorney-General is also authorized, with leave of the court, to appear in any civil proceedings:

    d) The Attorney General, having been part of the post 2013 electoral reform process in the context of article 81 of the *Constitution*, bears special knowledge to aid the court in the determination of the Petition.

e) The conduct of presidential elections is a matter of great public interest necessitating the participation of the Attorney-General as the principal legal advisor to the Government; and as the promoter, and protector of the rule of law, and defender of the public interest.

f) The petition raises pertinent issues involving the interpretation of the *Constitution*.

2. The Attorney General proposes to aid the court in determining the following issues:

(a) What is the proper constitutional and legal standard applicable to the conduct of presidential elections in Kenya as envisaged under both articles 81 and 86 of the *Constitution*?

(b) What were the effects as regards the use of technology in presidential election introduced by the Elections Laws (Amendment) Act No 36 of 2016 and Elections Laws (Amendment) Act No 1 of 2017?

(c) What was the effect of the jurisprudence enunciated by the Court of Appeal in the case of *IEBC v Maina Kiai & 4 others* (Civil Appeal No 105 of 2017) on how IEBC conducted the presidential election in issue?

(d) How should the Supreme Court treat rejected/spoilt votes in determining the total votes cast under article 138 (4) of the *Constitution*?

(e) What is the proper constitutional and legal threshold for invalidating or upholding a presidential election under article 140 of the *Constitution*?

(f) What remedies can the court grant in determining a presidential election petition under article 140 of the *Constitution*?

3. The Attorney General submits that his joinder to these proceedings will enhance the right of access to justice in terms of the qualitative normative content of the political rights. This he argues, will open positive lines of development in electoral law jurisprudence: a prerogative guided by this court in the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, Supreme Court Petition No 12 of 2013 (the Mumo Matemu case) in the following terms:

> " The *Constitution of Kenya, 2010* by express terms, requires courts to develop the law to the extent that it does not give effect to a right of fundamental freedom. (Art 20 (3)(a). This is the very foundation for well-informed inputs before the court, which inherently justifies the admission of amicus curiae. We have a duty to ensure that our decisions enhance the right of access to justice as well as open

> positive lines of development in jurisdiction, to serve the judicial system within the terms of the *Constitution*. [Emphasis added]"

4. It is submitted that the presidential election petition raises questions of great public interest revolving around the application and interpretation of the *Constitution*. Citing the Trinidad and Tobago case of *Peters v Attorney-General* [2002] 3 LRC 32 CA, the Attorney General submits that; (per Sharma, JA:)

> "An election petition is not a matter in which the only persons interested are candidates who strive against each other in elections. The public are substantially interested in it and that it is an essential part of the democratic process. It is not a lis between two persons, but a proceeding in which the constituency itself is the principal party interested. The characteristics of an election petition are fundamentally different from civil proceedings. Hence for example there was the need for special rules concerning, for example, the notice and publication, which is outside the courts ordinary jurisdiction and procedures. An election petition is quite unlike any of the initiating proceedings in the High Court. It is not a writ, or originating summons, nor is it in any way close to say a petition in bankruptcy or a petition for divorce which respectively have their own rules of procedure. In a sense an election petition can be described as *sui generis*."

5. The Attorney General admits that he has issued several legal advisory opinions to the 1st respondent on complex issues of law regarding the conduct of elections in Kenya in preparation for the proper conduct of Elections in Kenya. It is further urged that: (i) the Office of the Attorney-General made a professional legal input into the electoral law reform processes, specifically to the Joint Parliamentary Select Committee and in a report dated August 16, 2017 recommended reforms of the integrated electronic system of voter registration, identification and result transmission; (ii) contributed to parliamentary debates on electoral reforms at the Committee stages; (iii) participated in several court proceedings before the superior courts strictly on pure points of law regarding the preparation on the conduct of the elections in Kenya; and (iv) participated in the formulation and approval of several electoral laws including Acts of Parliament and the various subsidiary legislations which anchors the legal basis for the conduct of elections in Kenya.

6. The petitioner has filed a replying affidavit deponed to by Raila Amollo Odinga, on August 26, 2017 and filed on the August 26, 2017. He opposes the application as he believes that based on the past and previous conduct, the Attorney General is partisan and would be prejudiced by their admission. Having been admitted as amicus in the 2013 presidential petition, he avers that he took a partisan view supporting the 1st and 3rd respondents case.

7. It is his evidence that the Attorney General does not disclose any distinctive or novel aspects of the legal issues that he would address that are already not covered by the parties, and that there are no complex constitutional issues requiring his intervention. Consequently, the pray for the application to be dismissed.

8. The role played by the Attorney General as an institution within the Executive Arm of Government in Kenya is no doubt an important one. In this regard, article 156 of the *Constitution* which is the guiding compass provides:

> " Attorney-General.
>
> 156. (1) There is established the office of Attorney-General.
>
> (2) The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.
>
> (3) The qualifications for appointment as Attorney-General are the same as for appointment to the office of Chief Justice.
>
> (4) The Attorney-General—
>
> (a) is the principal legal adviser to the Government;
>
> (b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
>
> (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.
>
> (5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.
>
> (6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.
>
> (7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions." [Emphasis added]

9. Pursuant to article 156(4)(c) of the *Constitution*, the *Office of the Attorney General Act, 2012*, outlines the function and powers of the Attorney General, including audience before the courts, by the Attorney General in matters of public interest. Section 7 of this *Act* provides:

> " Audience by Attorney-General in matters of public interest, etc.
>
> (1) Despite the provisions of any written law to the contrary or in the absence of any other written law, the Attorney-General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers—
>
> (a) to be of public interest or involves public property; or
>
> (b) to involve the legislature, the judiciary or an independent department or agency of the Government.
>
> (2) In the exercise of the powers of the Attorney-General under subsection (1), the Attorney-General shall—
>
> (a) notify any court, tribunal or any other administrative body of the intention to be enjoined to the suit, inquiry or administrative proceedings; and
>
> (b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.
>
> (3) Where a suit, inquiry or any other proceedings is pending before a court, tribunal or any other administrative body to which the Attorney-General does not have a right of audience, it shall be sufficient for the Attorney-General to file a certificate of the intention of the Attorney-General to be joined in the proceeding.
>
> (4) The court, tribunal or any such administrative body shall, upon receipt of a certificate under

subsection (3), enjoin the Attorney-General in the proceedings." [Emphasis added]

10. The proceedings before this court indeed involve issues of great public interest. The complex interplay of law and fact presented in this case touch on the sovereignty of the people and the inalienable right of every Kenyan citizen to determine the form of governance for our country. Millions of Kenyan citizens participated in the general elections held on August 8, 2017. Despite being one of Kenya's highest voter outcome statistics, it precedes a lengthy period of electoral law reform culminating in chapter seven of the *Constitution of Kenya, 2010*. Elections, properly conducted, represent the people's will and enable the exercise of their sovereign power through their democratically elected representatives. The Office of the Attorney General is an integral part of the National Executive and bears the privilege of Executive Authority but is bound by the necessary and sacred strictures of exercise of that power: it must be exercised in a manner compatible with the principle of service to the people of Kenya, for their well-being and benefit pursuant to article 129(2).

11. However, section 7(2) of the *Office of the Attorney General Act*, mandates the Attorney General to satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office.

12. The Attorney General has satisfied this court, by the very nature of the proceedings, that issues of public interest are involved. He has also elected to be enjoined in these proceedings as a friend of the court. His mandate will therefore be assessed against the principles laid out by this court in the *Mumo Matemu* case (*op cit*), reproduced 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 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.

xi. The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.

xii. The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.

xiii. The applicant ought to show that the submissions intended to be advanced will give such assistance to the court as would otherwise not have been available. The applicant ought to draw the attention of the court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the court, and not fresh evidence.

xiv. The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.

xv. Whereas consent of the parties, to proposed *amicus* role, is a factor to be taken into consideration, it is not the determining factor.

13. In light of the foregoing provisions of the *Constitution*, Legislation and guiding principles developed by this court in the Mumo Matemu case, we now evaluate the application by the Attorney General on issues proposed to be addressed in his *amicus* brief.

14. In the case of *Raila Odinga & others v Independent Electoral and Boundaries Commission & others*, SC Petition No 5 of 2013 [the Raila Odinga case], the Attorney General, in a ruling dated March 25, 2013 was enjoined to the proceedings as *amicus curiae* in the following terms:

> "…….the Attorney-General, is the custodian of the legal instruments of the Executive Branch, and the recognised advisor of the State in matters of public interest. Secondly, and interlinked with the foregoing point, the said office is the main player in the performance of the Executive's role vis-a-vis the operationalization of the *Constitution*. Thirdly, the *Constitution* expressly provides that, in certain instances, the Attorney-General may obtain the court's permission to appear as *amicus*. Fourthly, the court, which is the custodian of rules of validity, propriety and fair play under the *Constitution* and the law, remains in charge, in regulating such precise role as the Attorney-General may play if admitted as amicus curiae." [Emphasis added]"

15. While we appreciate that the Attorney General will enrich the material placed before this court, on issues of law, relevant in determining the petition, we find ourselves guarded against granting the Attorney General leave to address all the issues proposed and for good reason.

16. The Attorney General was the 4th respondent in the *Maina Kiai* case and opposed that petition in various respects. He has however listed the issue: what was the effect of the jurisprudence enunciated by the Court of Appeal in the case of *IEBC v Maina Kiai & 4 others* (Civil Appeal No 105 of 2017) on how IEBC conducted the presidential election in issue? as one of the proposed questions to be addressed in the amicus brief. We recognize that instances such as , call for intervention and guidance by courts, and this court in particular, while enforcing the provisions of article 156(5) of the *Constitution* and section 7(1) and (2) of the *Office of the Attorney General Act, 2012*. Such an intervention is indeed permissible under section 7(2) (b) of the *Office of the Attorney General Act*. Permitting the Attorney General to address us on this issue, would, with respect, be allowing the Attorney General to re-litigate issues in a matter to which he was an active party to the adversarial proceedings and in which he preferred a clear position for or against a party which is also before this court, directly or

by association. This bears the risk of prejudicing the party (ies) concerned negating the core principle that justice must not only be done, but be seen to be done.

17. The following principle in the *Mumo Matemu* case applies in this matter: 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. Due to the strict bounds of time within which this court ought to hear and determine the petition, parties do not have adequate time to respond to the Attorney General's brief in before a determination on it. To avert the risk, the specific issue relating to the *Maina Kiai* case, should therefore be expunged from the *amicus* brief.

18. The other questions addressed in the Attorney General's amicus brief are pertinent to the case before this court. Since the 2013 general elections, the electoral jurisprudence set by this and other courts has inspired electoral law reform in various aspects. The Attorney General has been part of that process and brings a critical originalism's perspective regarding this process to the proceedings, as a friend of the court. The amicus brief addresses itself to pure issues of law and in a clear, concise way. The role of interpretation and application of the law to the facts in this case however rests with this court.

Orders

19. The application is hereby allowed with orders that the question: "What was the effect of the jurisprudence enunciated by the Court of Appeal in the case of *IEBC v Maina Kiai & 4 others* (Civil Appeal No 105 of 2017) on how IEBC conducted the presidential election in issue?" be expunged from the *amicus* brief.

Orders accordingly.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Wafula (Interested Party) (Presidential Election Petition 1 of 2017) [2017] KESC 41 (KLR) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 41 (KLR)

Electoral Law *– presidential election – application to be enjoined as an interested party – application to be enjoined as an interested party in a presidential election petition – what were the considerations for one to be enjoined as an interested party in a presidential election petition - what were the considerations for one to be admitted as an interested party in Supreme Court proceedings – Supreme Court Rules, 2012 rule 25.*

Civil Practice and Procedure *– application to be enjoined as an interested party – application to be enjoined as an interested party in a presidential election petition – what were the considerations for one to be enjoined as an interested party in a presidential election petition - what were the considerations for one to be admitted as an interested party in Supreme Court proceedings – Supreme Court Rules, 2012 rule 25.*

Civil Practice and Procedure *– application to be enjoined as an interested party – application to be enjoined as an interested party in the presidential election petition – where the application introduced new parties and excluded other parties – where the application introduced new facts and issues that were not before the court - whether an application to be enjoined as an interested party that introduced new parties whilst excluding other parties and that introduced new facts and issues that were not before the court was valid.*

Brief facts

The applicant sought to be enjoined as an interested party in the presidential election petition. The application introduced new facts and issues not before the Supreme Court and also alleged that the 1st and 2nd petitioners were interfering with the trial process of the court by pre-empting the exercise of normal judicial discretion.

The petitioners opposed the application on grounds that the application was made in bad faith and that it was frivolous, vexatious and an abuse of court process. The 1st and 2nd respondents also opposed the application on grounds that the application had the intention of diverting the true issues in contest in the main petition.

Issues

i. What were the considerations for one to be enjoined as an interested party in a presidential election petition?

ii. Whether an application to be enjoined as an interested party that introduced new parties and excluded other parties, and that introduced new facts and issues that were not before the court was valid.

Held

1. An applicant for joinder had to satisfy the Supreme Court that they fulfilled the legal requirements for joinder under rule 25 of the Supreme Court Rules.
2. The application introduced new parties and excluded some of the parties in the instant petition. The application introduced new facts and issues that were not before the court. The applicant was not in a position to advance any submissions that would be helpful to the court.
3. The applicant sought to introduce a new petition and pre-empted the duly lodged cause of the parties in the main proceedings. That was not acceptable. The applicant would not suffer any prejudice if his intervention was denied

Application dismissed.

Citations

Cases

Kenya

1. *Muruatetu, Francis Karioko & another v Republic & 4 others* Petitions 15 & 16 of 2015; [2017] KESC 2 (KLR) (Consolidated) - (Mentioned)
2. *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* Petition 12 of 2013; [2015] eKLR - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya, 2010 article 22 - (Interpreted)
2. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 4(2) - (Interpreted)
3. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 25 - (Interpreted)

Advocates

None mentioned

August 27, 2017, the Court delivered the following Ruling:

A. The Application

1. The applicant seeks joinder in *Raila Amolo Odinga v Independent Electoral & Boundaries Commission & 2 others*, Presidential Election Petition No 1 of 2017, in the capacity of interested party. His notice of motion, dated August 24, 2017, and supported by his affidavit of the same date, was filed on August 25, 2017.

2. The application is based on article 22 of the *Constitution of Kenya*, and his prayers are that:

> '(a) This court be pleased to grant *ex parte* orders enjoining the applicant herein as an interested party, in the 2017 General Election Petition, so that his orders under Civil Suit No 05 of 2016, pending in the High Court of Kenya at Bungoma, are not compromised by the decision in the current petition.
>
> (b) The costs of this application be provided for.'

3. The application raises several grounds, as follows:

(a) That the 2017 general election issues are similar to matters pending in the High Court of Kenya at Bungoma, in Civil Suit No 5 of 2016, and relating to the same parties;

(b) That the hon President, Uhuru Muigai Kenyatta, the hon Deputy President, William Samoei Ruto, and the majority leader, the hon Adan Duale, had appeared in the said Civil Suit No 5 of 2016, filed in the High Court at Bungoma; and

(c) That the High Court of Kenya at Bungoma had declined to give a hearing date, as its diary was full; and on October 26, 2016, the applicant had requested that the matter be transferred to the Supreme Court, which request was declined by the court. He had then filed a complaint to this court, on December 30, 2016, but the court has not considered the complaint.

4. The applicant contends that the principals of the NASA coalition of parties have forged election results, and attempted to hack the digital tallying system several times, without having to answer to any regulatory agencies of the state.

5. The applicant alleges that the NASA principals are interfering with the trial process in this court, by pre-empting the exercise of normal judicial discretion.

6. The petitioners, through the replying affidavit of Raila Amolo Odinga, dated August 26, 2017, aver that the application rests on bad faith, and is frivolous, vexatious, and an abuse of court process. The deponent avers that the application has the intention of diverting the true issues in contest, which have their relevance only to the conduct of the 1st and 2nd respondents, as well as to the declaration of the 3rd respondent as the winner of the presidential election held on August 8, 2017.

7. The 1st and 2nd respondents also contest the said application through the replying affidavit of Moses Kipkogei, as well as their written submissions – both dated August 25, 2017. They contend that the applicant's motivation can only serve the purpose of circumventing the due

conduct of the electoral process, as provided for in article 140 of the *Constitution*, as read with the *Supreme Court (Presidential Election Petition) Rules, 2017*.

B. Joinder of Interested Parties: The Law

8. An applicant for joinder has to satisfy this court that he or she has fulfilled the legal requirements of joinder. the relevant law is rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017*, as read with rule 25 of the *Supreme Court Rules, 2012*. The said rule 4(2) thus stipulates:

> (2) Where there is no applicable provision in the act or in these rules, the procedures set out in the *Supreme Court Rules, 2012* in so far as they are not inconsistent with the act or these rules, shall apply to an election petition."

9. Rule 25 of the *Supreme Court Rules, 2012* is headed "Interventions", and provides thus:

> (1) A person may at any time in any proceedings before the court apply for leave to be enjoined as an interested party.
>
> (2) An application under this rule shall include –
>
> (a) A description of the interested party;
>
> (b) Any prejudice that the interested party would suffer if the intervention was denied; and
>
> (c) The grounds of submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the court and different from those of the other parties" [emphasis supplied].

10. The significance of these provisions of law is underlined in past decisions of this court, such as: *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others*, Supreme Court Petition No 12 of 2013; and *Francis Karioki Muruatetu & another v Republic & 5 others*, Petition 15 as consolidated with 16 of 2013 [2016] eKLR.

11. We note, in the instant matter, that the applicant seeks joinder, even as his application introduces new parties to a cause already resting before the court; and he, at the same time, excludes some of the current parties. The applicant, in essence, is introducing new facts and issues that were not before the court. It follows that he is not in a position to advance any submissions that will be helpful to the court, as it resolves the main question in hand. He is, in effect, introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the

applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application.

Orders accordingly.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Presidential Election Petition 1 of 2017) [2017] KESC 33 (KLR) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 33 (KLR)

Electoral Law *- presidential election petition - service of the petition and close of pleadings - admission of documents filed and served out of time - whether the Supreme Court could retain in the court record documents filed and/or served out of time by the petitioner in a presidential election petition - Supreme Court (Presidential Election Petition) Rules 2017, rules 10 and 12.*

Brief facts

The instant application sought to strike out and/or expunge from the court record documents which were not served by the petitioner upon the 3rd respondent. It also sought to expunge from the record documents that were filed out of time.

Issues

Whether the court could retain in the court record documents which were filed and served out of time.

Held

1. The application was solely based on the ground that the documents and annexures in question were filed and/or served out of time contrary to rule 10 as read together with rule 12 of the Supreme Court (Presidential Election Petition) Rules 2017.
2. The documents and annexures in question were not only in support of but inextricably linked to the petition filed on August 18, 2017. They had already been referred to in Dr. Nyangwasi's affidavit in support of the petition which was filed and served in time together with the petition. The documents and annexures in question were filed on August 20, 2017, long before the commencement of the formal hearing of the petition.
3. The applicant did not claim or demonstrate that the filing of the documents and annexures in question would introduce new evidence, or change the character of the petition. The retention of the documents and annexures in question on the court record would not jeopardize or undermine the ability of the court to hear and determine the petition within the constitutional time limit of 14 days.
4. The rules of the court had to be adhered to by all litigants at all times to ensure the orderly and expeditious conduct and disposal of disputes that came before it. However, in the interests of justice, the court's inherent jurisdiction would be invoked in favor of retaining the documents and annexures in question on the court record.

*Application dismissed***.**

Orders

Documents and annexures in question were to be served upon the applicant not later than 9. am on Monday, August 28, 2017.

Citations

Cases

None referred to

Statutes

Kenya

Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rules 10, 12 - (Interpreted)

Advocates

None mentioned

August 27, 2017, the Court delivered the following Ruling:

1. This is an application by way of notice of motion dated August 25, 2017, seeking to strike out and/or expunge from the court record documents which were not served by the petitioner upon counsel for the 3rd respondent. The documents sought to be expunged from the record on grounds that they were not served are:

    (a) Prof Kaloki's affidavit referred to at paragraph 22 of the 1st petitioner's affidavit sworn on August 18, 2017

    (b) Dr Nyagasi Oduwo's further annexures marked as (DNO-1) being a copy of the blank form 34 A for Ruai Girls Secondary School Polling Station in Kasarani Constituency.

    (c) Dr Nyagasi Oduwo's annexures labeled 'Meru' marked as (DNO-2A) in support of the averments contained at paragraph 12-69 of his affidavit.

    (d) Dr Nyagasi's annexures labeled 'Trans Nzoia' (DNO-3N) in support of the averments contained at paragraphs 70-137 of his affidavit.

2. In particular, the applicant seeks to expunge from the court record the following documents on ground that they were filed out of time:

    (a) Volume 60 of the documents in support of the petition dated August 18, 2017;

    (b) Volume 61 of the documents in support of the petition dated August 18, 2017;

(c) Volume 62 of the documents in support of the petition dated August 18, 2017 and;

(d) Volume 63 of the documents in support of the petition dated August 18, 2017.

3. The grounds upon which the application is based are that; the documents in question were filed out of time and that they have not been served upon the applicant herein. It is the applicant's argument that failure to file and serve the applicants with the impugned documents is in breach of rule 10 of the *Supreme Court (Presidential Election Petition) Rules*; which provides that the petitioner shall, within two days of filing the petition, serve the petition upon the respondent. The applicant contends that the failure to file and serve on time offends rule 12 of the *Supreme Court (Presidential Election Petition) Rules*. This rule provides that pleadings shall be closed upon filing a response. It is the applicant's submission that it's constitutional right to a fair hearing has been infringed and or violated by the failure on the part of the petitioners to comply with the provisions of the law.

4. Mr Ngatia, counsel for the 3rd respondent submitted that the documents and annexures in question have not been served to date, thus seriously prejudicing the 3rd respondent's capacity to respond to the contents therein.

5. In opposition to the application, the petitioners herein, contend that the application by the 3rd respondent seeking to strike out and/or expunge the documents in question was itself filed out of time and is therefore incompetent and/or improperly before the court. Secondly, the petitioners argue that the annexures and documents sought to be expunged are public records and commonly available to all the parties to these proceedings. Accordingly, no prejudice would be occasioned to the applicant if the said documents were retained on record. The petitioners also submit that the documents allegedly filed out of time are not pleadings and therefore are not bound by the limitations of time under the applicable rules. Finally, the petitioners submit that the documents allegedly not served upon the respondents may have been inadvertently omitted and can be availed to the respondents.

6. In response to the petitioners' claim that the 3rd respondent's application was itself filed and served out of time, Mr Ngatia contends that contrary to such a claim, the application was filed in time but could not be served on time as the offices of counsel for the petitioner were closed when the former attempted to effect service.

7. Having considered the application, the affidavits in support thereof, and the submissions of counsel for both parties, we have arrived at the following conclusions:

1. The application is solely based on the ground that the documents and annexures in question were filed and/or served out of time contrary to rule 10 as read together with rule 12 of the *Supreme Court (Presidential Election Petition) Rules 2017*.

2. The documents and annexures in question are not only in support of, but inextricably linked to the petition filed on August 18, 2017.

3. The documents and annexures in question had already been referred to in Dr Nyangwasi's affidavit in support of the petition which affidavit was filed and served in time together with the petition.

4. The documents and annexures in question were filed on August 20, 2017, long before the commencement of the formal hearing of the petition.

5. The applicant herein has not claimed nor demonstrated that the filing of the documents and annexures in question seek to introduce new evidence, or change the character of the petition.

6. The retention of the documents and annexures in question on the court record would not in our view jeopardize or seriously undermine the ability of this court to hear and determine the petition within the constitutional time limit of 14 days.

8. It is the applicant's contention that failure to serve the said documents and annexures in time will seriously prejudice his ability to respond to the contents therein, thus undermining his right to a fair hearing. The applicant's assertion is not an idle one. Indeed, the rules of this court must be adhered to by all litigants at all times to ensure the orderly and expeditious conduct and disposal of disputes that come before it. However, in view of the findings and conclusions we have made, and in the interests of justice to all parties in this petition, we are inclined to invoke our inherent jurisdiction in favour of retaining the documents and annexures in question on the court record. By the same token, in order to safeguard the applicant's right to a fair hearing, we direct that the documents and annexures in question be served upon the applicant not later than 9.am on Monday, August 28, 2017.

Orders:

(i) The notice of motion dated August 25, 2017 is hereby dismissed.

(ii) Costs to abide the cause.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Information Communication Technology Association (ICTAK) (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 40 (KLR) (Election Petitions) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 40 (KLR)

Electoral Law *– presidential election petition – application to be enjoined as amicus curiae - guiding principles applicable in determining an application to be enjoined as amicus curiae - whether an application to be enjoined as amicus curiae that addressed points of law which were addressed by other parties in the petition was valid - Supreme Court Rules, Rule 54.*

Civil Practice and Procedure *– application to be enjoined as amicus curiae - application to be enjoined as amicus curiae in a presidential election petition - guiding principles applicable in determining an application to be enjoined as amicus curiae - whether an application to be enjoined as amicus curiae that addressed points of law which were addressed by other parties in the petition was valid - Supreme Court Rules, Rule 54.*

Brief facts

The applicant filed an application based upon rule 54 of the Supreme Court Rules, and other provisions of the law to be enjoined as *amicus curiae.*

The applicant relied on the grounds that: the intended *amicus curiae* had been greatly involved in ICT policy as well as technical matters in Kenya; had a legitimate interest in being enjoined in the petition, so as to make submissions on diverse election-technology questions which had a bearing on the determination of the matter; and that the participation of the intended *amicus curiae* in the proceedings would contribute substantially towards realizing a professionally-sound decision.

The petitioners opposed the application on grounds that the time frame for hearing and determining the petition was limited and as such the interests of justice would not be served by admitting the applicant. The 1st and 2nd respondents contested the proposed joinder on grounds that the applicant had not established any expertise or knowledge that would aid the court in determining the petition as required under rule 54(2) of the Supreme Court Rules, 2012. The 3rd respondent opposed the application on grounds that the applicant did not meet the legal threshold for admission as *amicus curiae*

Issues

i. What were the guiding principles applicable in determining an application to be enjoined as *amicus curiae* in a presidential election petition?

ii. Whether an application for admission as *amicus curiae* that addressed points of law that were addressed by other parties in the petition was valid.

Relevant provisions of the Law

Supreme Court (Presidential Election Petition) Rules, 2017

Rule 54

(1) The Court may –

(a) in any matter allow amicus curiae;

(b) appoint a legal expert to assist the Court in legal admissions;

(c) at the request of a party or on its own initiative, appoint an independent expert to assist the court on any technical matter;

"(2) The Court shall before allowing an amicus curiae take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest or any other relevant factor.

Held

1. To be allowed joinder, the applicant had to meet the legal requirements provided under rule 4(2) of the Supreme Court (Presidential Election Petition) Rules, 2017 as read with Rule 54 of the Supreme Court Rules, 2012.
2. An *amicus* brief should be:
    a. limited to legal arguments ;
    b. 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.
    c. 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.
3. The applicant had indicated that the *amicus* brief would be limited to legal arguments. However, the *amicus* brief addressed points of law already addressed by other parties.
4. The applicant had not demonstrated what specific question it sought to address. The applicant's propositions bore a general orientation that was not focused on a specific question falling for determination before the instant court. The application did not meet the requisite threshold.

Application dismissed with no orders as to costs.

Citations

Cases

Kenya

1. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Explained)

2. *Muruatetu, Francis Karioko & another v Republic & 4 others* Petitions 15 & 16 of 2015; [2017] KESC 2 (KLR) (Consolidated) - (Explained)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 81, 86 - (Interpreted)
2. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) In general - (Cited)
3. Elections (Technology) Regulations, 2017 (Act No 24 of 2011 Sub Leg) In general - (Cited)
4. Elections Act, 2011 (Act No 24 of 2011) sections 39, 44, 44A - (Interpreted)
5. Societies Act (cap 108) In general - (Cited)
6. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 4(2)- (Interpreted)
7. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 54(2) - (Interpreted)

Advocates

None mentioned

August 27, 2017, the Court delivered the following Ruling:

A. The Application

1. The applicant's notice of motion, dated August 21, 2017, was filed on the same day. The application is supported by the affidavit of Adrian Kamotho Njenga, sworn on the same date. It is attended with an amicus brief, dated August 25, 2017. The application is based upon rule 54 of the *Supreme Court Rules*, and other provisions of the law.

2. The orders sought are:

   (a) That this application be heard and determined before the hearing of the election petition;

   (b) That the Information Communication Technology Association of Kenya (ICTAK), the applicant herein, be enjoined in the said petition as amicus curiae.

3. The grounds of the application are as follows:

   (a) That the intended *amicus curiae* has been greatly involved in ICT policy as well as technical matters in Kenya;

   (b) That the intended *amicus curiae* has a legitimate interest in being enjoined in the petition, so as to make submissions on diverse election-technology questions which have a bearing on the determination of the matter.

(c) That the participation of the intended *amicus curiae* in the proceedings will contribute substantially towards realizing a professionally-sound decision, that incorporates the public interest.

4. The applicant submits that it had been registered by the Government of Kenya on the February 20, 2007 under the *Societies Act*, and that it stands out as the prime association for ICT professionals, and industry players in Kenya.

5. The applicant states its objectives as: to extend the frontiers of knowledge and of application of ICT; to advance competence in the practice of ICT, and promote the formulation of effective policies in the application of ICT in society. It enumerates its programmes as including: ICT Policy Development and Advocacy; ICT Industry Research; ICT Value awards; Cyber Security Awareness and Training; ICT Systems Audit; Continuous Professional Development Programs; and hosting the International Conference on Future and Emerging Technologies (ICEFICT). In that context, the applicant contends that it will provide crucial insight such as to enlighten the court, as regards the contested Information Communication Technology (ICT) issues which are likely to arise.

6. The applicant further submits that it will, from a professional standpoint, advance the position that successful deployment of electoral systems is contingent upon the fulfilment of the conditions contemplated under the *Elections (Technology) Regulations, 2017*.

7. It also submits that it will provide highlights from a balanced standpoint, as to whether transmission failure, if adjudged to have occurred, would have affected the results of the presidential election. The applicant states that it will offer an objective appraisal of the technology issues arising in the petition.

8. The applicant submits that at the hearing, it will urge the Supreme Court to assess whether the 1st respondent properly discharged its duty as prescribed under articles 81 and 86 of the *Constitution*, as read with sections 39, 44 and 44A of the *Elections Act,2011*, regulations 82 and 87 of the *Elections (General) Regulations,2012* , and the provisions of the *Elections (Technology) Regulations, 2017*.

9. This application is contested by the petitioners in their replying affidavit dated August 26, 2017. They urge that, given the limited time-frame for hearing and determining the petition, the interests of justice would not be served by admitting the applicant.

10. The 1st and 2nd respondents also filed a replying affidavit, as well as written submissions, both dated August 25, 2017, contesting the proposed joinder. It is their position that the applicant has not established any expertise or knowledge that would aid the court in determining the petition, as required under rule 54 (2) of the *Supreme Court Rules, 2012*.

11. The 3rd respondent has also filed a replying affidavit, dated August 25, 2016, and written submissions, in opposition to the application. He contends that the applicant does not meet the legal threshold for admission as amicus curiae, quite apart from not assuring the court of an impartiality of views.

B. Admission to *Amicus* Status: The Law

12. To be allowed joinder, the applicant has to meet certain legal requirements. The relevant law is rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017* as read with rule 54 of the *Supreme Court Rules, 2012*.

13. Rule 4(2) of the *Supreme Court (Presidential Election Petition) Rules, 2017* provides:

> "Where there is no applicable provision in the act or in these rules, the procedures set out in the *Supreme Court Rules, 2017* in so far as they are not inconsistent with the act or these rules, shall apply to an election petition."

14. Rule 54 of the *Supreme Court Rules, 2012* provides:

> "(1) The court may –
>
> (a) in any matter allow *amicus curiae*;
>
> (b) appoint a legal expert to assist the court in legal admissions;
>
> (c) at the request of a party or on its own initiative, appoint an independent expert to assist the court on any technical matter;
>
> (2) "The court shall before allowing an *amicus curiae* take into consideration the expertise, independence and impartiality of the person in question and it may take into account the public interest or any other relevant factor."

15. In *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others,* Supreme Court Petition No 12 of 2013, [2015] eKLR, this court considered the role of *amicus curiae*, and set out the guiding principles applicable in determining an application to be enjoined in that capacity, as follows (para. 41):

> "(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...

> "(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."

16. These principles were further affirmed in *Francis Karioki Muruatetu & another v Republic & 5 others* [2016] eKLR. Now applying these clear yardsticks to the applicant herein, we note, firstly, that the applicant indicates that the amicus brief will be limited to legal arguments. In the second place, however, we are not convinced that the *amicus* brief addresses points of law not already addressed by the other parties.

17. The petitioners' and the respondents' cases relate to, inter alia, the interpretation and application of articles 81 and 86 of the *Constitution*, as read with sections 39, 44 and 44A of the *Elections Act, 2011*, regulations 82 and 87 of the *Elections (General) Regulations, 2012*, and provisions of the *Elections (Technology) Regulations, 2017* in so far as they bear upon the election of the President.

18. Each of the parties has relied on experts, speaking by way of affidavits; and each party has lodged submissions on the said provisions. The applicant has not demonstrated what aspect of such matter it seeks to address. The applicant's propositions bear a general orientation that is not focussed on a specific question falling for determination before this court. We are, in the circumstances, not satisfied that the application meets the requisite threshold, and we dismiss the same, with no orders as to costs.

Orders accordingly.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Presidential Election Petition 1 of 2017) [2017] KESC 37 (KLR) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 37 (KLR)

Civil Practice and Procedure *- affidavits - affidavits in presidential election petitions - timelines for filing affidavits - whether the affidavits in in support of the petitioners' application seeking access to data and information were filed out of time contrary to rule 10 of the Supreme Court (Presidential Election Petition) Rules - Supreme Court (Presidential Election Petition) Rules, 2017, rule 10.*

Brief facts

The 1st respondent made an application to expunge various affidavits that had been filed on grounds that the affidavits were filed out of time allowed for filing an election petition contrary to rule 10 of the Supreme Court (Presidential Election Petition) Rules; and that they raised new causes of action and contained additional evidence that changed the nature and character of the petition, to which the 1st respondent was constrained to respond.

Issues

Whether the affidavits in in support of the petitioners' application seeking access to data and information were filed out of time contrary to rule 10 of the Supreme Court (Presidential Election Petition) Rules.

Held

1. All the affidavits sought to be expunged from the court record were referred to as "affidavits in support of the petitioners' application" dated August 24, 2017 and filed on August 25, 2017; seeking *inter alia*, direct and unfettered access to data and information. There was no merit in the applicant's claim that the affidavits in question were filed out of time contrary to rule 10 of the Supreme Court (Presidential Election Petition) Rules.
2. Whether the affidavits sought to introduce new evidence and change the character of the petition was a question to be determined by the court while considering the interlocutory application.

Application dismissed.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 25, 50 - (Interpreted)

2. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rule 10 - (Interpreted)
3. Supreme Court (Presidential Election Petition) Rules, 2017 (Act No 7 of 2011 Sub Leg) rules 2, 6, 10, 11, 12, 17 - (Interpreted)
4. Supreme Court Act, 2011 (Act No 7 of 2011) sections 24, 31 - (Interpreted)

Advocates

Mr Amollo Otiende for the petitioners

August 27, 2017, the Court delivered the following Ruling:

1. This is an application by way of notice of motion dated August 26, 2017 by the 1st respondent seeking orders to expunge from the court record the following documents:

   (a) Affidavit of Dr Edgar Ouko Otumba sworn on August 25, 2017, and filed on the same date;

   (b) Affidavit of Norman Magaya in support of the petition sworn on August 23, 2017 and filed on August 25, 2017;

   (c) Omar Yusuf Mohamed sworn on August 24, 2017, and filed on August 25, 2017; and

   (d) Supplementary affidavit of Ogla Karani sworn on August 25, 2017

2. The application is based on grounds that:

   (i) The affidavits in question were filed out of time allowed for filing an election petition contrary to rule 10 of the *Supreme Court (Presidential Election Petition) Rules*.

   (ii) The affidavits in question raise new causes of action and contain additional evidence that change the nature and character of the petition, to which the 1st respondent is constrained to respond.

3. In opposition to the application, counsel for the petitioners Mr Amollo Otiende submitted that the same was filed under a misapprehension. According to counsel, the affidavits in question were filed in support of the interlocutory application dated August 24, 2017 by the petitioner. The affidavits were not filed in support of the petition as alleged by the applicant. The applicant has not controverted Mr Otiende's assertion.

4. We have considered the application, the affidavits in support thereof and submissions by counsel for both parties. We have noted that all the affidavits sought to be expunged from the court record are referred to as "affidavits in support of the petitioners' application dated

August 24, 2017 and filed on August 25, 2017; seeking *inter alia*, direct and unfettered access to data and information." This being the case, we find no merit in the applicant's claim that the affidavits in question were filed out of time contrary to rule 10 of the *Supreme Court (Presidential Election Petition) Rules*. The question as to whether the said affidavits seek to introduce new evidence and change the character of the petition is one to be determined by this court while considering the interlocutory application.

Orders:

(i) The notice of motion dated August 26 is hereby dismissed.

(ii) Costs to abide the cause.

Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Presidential Election Petition 1 of 2017) [2017] KESC 39 (KLR) (Election Petitions) (27 August 2017) (Ruling)

Supreme Court of Kenya

DK Maraga, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ

Neutral citation: [2017] KESC 39 (KLR)

Electoral Law *- presidential election petition - service of election petition documents - delay in effecting service - striking out documents from the record of the court for want of service - considerations that the court would have under the circumstances - Supreme Court (Presidential Election) Rules, 2017, rule 11(1).*

Brief facts

The applicant sought orders to strike out from the court record documents filed by the respondents which were served out of time. The orders were sought on grounds that the documents were served upon the petitioners out of time contrary to the provisions of rule 11(1) of the Supreme Court (Presidential Election) Rules, 2017. The applicant stated that the delay in serving the documents prejudiced the petitioners' right to adequately consider and reply to the issues that the documents raised. The applicant also said that the respondents did not seek leave to file and serve the documents out of time.

Counsel for the 1st and 2nd respondents explained that at the time service was being effected, the office of the petitioners' advocates was closed. Additionally, counsel for the 3rd respondent said that no prejudice was suffered as there was a delay of only a few hours.

Issues

Whether the Supreme Court would strike out documents which were served out of time from the court record.

Held

The nature of the application was such that if it were to be granted, it would dispose of the entire case of the 1st, 2nd and 3rd respondents at a preliminary stage. Such a drastic consequence would not be justified if the scales of justice were weighed in favour of all the parties to the petition.

Application dismissed.

Citations

Cases

Kenya

1. *Odinga, Raila & 5 others v Independent Electoral& Boundaries Commission & 7 others* Petitions 5, 3 & 4 of 2013; [2014] eKLR (Consolidated) - (Mentioned)
2. *Salat, Nicholas Kiptoo Arap Korir v Independent Eectoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR) - (Mentioned)

Statutes

Kenya

Supreme Court (Presidential Election) Regulations, 2017 (Act No 7 of 2011 Sub Leg) regulation 11(1) - (Interpreted)

Advocates

Mr Awele for the applicant

Mr Nyamodi for the 1st and 2nd respondent

Mr Ngatia for the 3rd respondent

August 27, 2017, the Court delivered the following Ruling:

1. This is an application by way of notice of motion dated August 26, 2017, seeking to strike out and/or expunge from the court record documents filed by the 1st, 2nd and 3rd respondents, which were not served upon counsel for the petitioner. The documents sought to be expunged from the record are:

   (a) The 3rd respondent's response to the petition dated August 24, 2017;

   (b) Volume 1 and 2 of the analyses of Winnie Guchu dated August 24, 2017;

   (c) Volumes 1 and 2 of the affidavit of Mr Davis K Chirchir sworn on August 24, 2017;

   (d) The affidavits of Mr Davis K Chirchir sworn on August 24, 2017 in reply to Mr Godfrey Osotsi's affidavits 1 & 2 and the affidavit of Mr George Kegoro;

   (e) The affidavit of Winnie Waceke Guchu dated August 24, 2017 in reply to the affidavits of the 1st petitioner, Dr, Nyangasi Oduwo and Olga Karani;

   (f) The affidavits of Mary Karen Sorobit dated August 24, 2017 in response to the affidavits of Mohamed Noor Barre, Moses Wamuru;

   (g) Benson Wasonga and Ibrahim Muhamud Ibrahim;

   (h) The affidavit of He Uhuru Muigai Kenyatta dated August 24, 2017;

   (i) The affidavits of Brian Gichana Omwenga dated August 24, 2017; in reply to the affidavits of Koitamett Ole Kina and Aprielle Oichoi

   (j) The affidavit of Dr Karanja Kibicho dated August 24, 2017;

   (k) The affidavit of Andrew Wakahiu dated August 24, 2017;

(l) Volumes 1 and 2 of the report of the list of stations where the number of registered voters matches the number of rejected votes by Winnie Guchu Waceke dated August 24, 2017;

(m) Volumes 1, 2 and 3 of the analysis of the alleged numerical discrepancies in the affidavit of Dr Nyangasi Oduwo dated August 24, 2017;

(n) The affidavit of Brian Gichana Omwenga dated August 24, 2017;

(o) A volume '2' of the analysis of form 34B;

(p) A list of documents for service;

(q) A consolidated analysis of alleged numerical discrepancies in the affidavit of Dr Nyangasi Oduwo;

(r) Volumes 1 and 2 of the 1st and 2nd respondent's responses to the petition;

(s) The Kenya Gazette Special Issue Vol CXIX-No 86;

(t) Exhibit WWC-4(c);

(u) Volumes 1, 2 and 3 of IEBC Forms 34B.

2. The ground upon which the application is based is that; the documents in question were served out of time contrary to regulation 11(1) of the *Supreme Court (Presidential Election) Regulations* which provides that:

> " Upon service of a petition under rule 10, a respondent who wishes to oppose the petition may within four days of service of the petition file and serve a response which shall..."

3. It is the applicant's argument that time is of the essence in a presidential election petition and that the delay in serving the said affidavits, annexures and responses prejudiced the petitioners' right to adequately consider and reply to the issues raised. To support his argument, the applicant relies upon this court's judgment in *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 7 others*, Election Petition No 5 of 2013.

4. Mr Awele, counsel for the applicant submitted that, in addition, the respondents have failed to seek leave to file and serve the impugned responses and affidavit out of time.

5. In response to the submission that the petitioner's advocate's office was closed, counsel submitted that the respondent ought to have made prior arrangements to ensure that the office remained open. The applicant urges the court to allow this application.

6. Mr Nyamodi, counsel for the 1st and 2nd respondent relied upon the sworn affidavit of Moses Kipkogei a legal officer with the 1st respondent who stated that; he accompanied the process server to the offices of Murumba and Awele Advocates and on arrival at approximately 11.45pm they found the office closed. Consequently, service was effected the next day. He submitted that the petitioners' advocate ought to have availed himself for purposes of accepting service on the night of August 24, 2017 in the same way the court had gone out of its way to indulge all the parties as they filed their documents. In addition, counsel for the 1st respondent also went out of his way to accept service at night when the petition was filed. Counsel submitted that the *Raila* case, was not applicable to the facts that gave rise to the present application.

7. Mr Nyamodi urged the court to find that the delay of service was beyond his fault and dismiss the application.

8. Mr Ngatia counsel for the 3rd respondent submitted that no prejudice was suffered by the petitioners as the delay was only a few hours.

9. He urged the court to consider the peculiar circumstances around this case and excuse the delay in serving. He relies upon this court's ruling in the case of *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 7 others*, Election Petition No 5 of 2013 and the reasoning in *Nicholas Kiptoo Arap Korir Salat v Independent Eectoral and Boundaries Commission & 7 others*, [2014] eKLR.

10. We have considered the application, the affidavit in support thereof, and submissions of counsel. The nature of this application is such that were it to be granted, it would dispose of the entire case of the 1st, 2nd and 3rd respondents at this preliminary stage. Such a drastic consequence in our view cannot be justified if the scales of justice are weighed in favour of all the parties to this petition. For the same reasons we have dismissed applications dated August 25, 2017 by the 3rd respondent and August 26, 2017 by the 1st respondent this particular application must suffer a similar fate.

Orders:

(i) The notice of motion dated August 26, 2017, is hereby dismissed.

(ii) Costs to abide the Cause.

Odinga v Independent Electoral & Boundaries Commission & 3 others (Petition 5, 4 & 3 of 2013 (Consolidated)) [2013] KESC 8 (KLR) (24 October 2013) (Ruling)

Supreme Court of Kenya

WM Mutunga, CJ & P, KH Rawal, DCJ & VP, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 8 (KLR)

Jurisdiction *– jurisdiction of the Supreme Court – where the summons to appear had been issued in the course of the presidential election petition – claim that the Supreme Court did not have jurisdiction to hear the case since the petition had been determined - whether the court had jurisdiction to hear the case arising from the summons where the presidential election petition had already been concluded.*

Brief facts

The instant case arose during the hearing of the presidential election petition involving *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others.* The petition had elicited keen public interest and generated endless media coverage and commentary. Due to the highly charged environment, the Supreme Court issued certain directions whereby everyone was ordered to desist from prosecuting the merits and demerits of the case in any forum other than the Supreme Court.

During the hearing of the petition, the court noted a news item published in the Daily Nation Newspaper, which was attributed to Mr. Eric Mutua, the Chairman of the Law Society of Kenya (LSK). The said article was faulting the Supreme Court's rejection of the 839-page affidavit filed by the Coalition for Reforms and Democracy. Further, in another report on the same page, Mr. Mutua indicated LSK's intention to determine circumstances that led to the failure of the technology system used in the elections.

After considering the contents of the said publications, the Supreme Court issued a summons to Mr. Mutua to appear before it on a date to be notified by the Registrar of the court. Thereafter, the Registrar of the Supreme Court issued a summons dated July 22, 2013, to Mr. Mutua directing him to appear before the court on August 1, 2013.

Counsel appearing for the LSK, however, raised certain preliminary issues to be heard and determined before the court could proceed with the intended clarification from Mr. Mutua. Thereafter, the court directed all the parties present to make their respective written submissions to enable the court to make its ruling.

Issues

i. Whether the Supreme Court had jurisdiction to hear a case arising from a summons issued in the course of the presidential election petition, where the petition had already been heard and finally determined.

ii. What amounted to a preliminary objection in law?

Held

1. A preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings, and which if argued as a preliminary point would dispose of the suit. Examples were an objection to the jurisdiction of the court, a plea of limitation, or a submission that the parties were bound by the contract giving rise to the suit or to refer the dispute to litigation (*Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at 700).
2. The issue in the instant case emanated not from the substantive facts or issues raised in the petition, but from an ancillary order issued by the court during the proceedings totally unrelated to the main cause of action. That order had not been acted upon or perfected, and the summons issued pursuant thereto by the Registrar of the Supreme Court, was meant to give effect to the court's observation and consequent directions made on March 28, 2013.
3. It was a legal and constitutional obligation of any court, from the basic level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice delivery. It followed that the Supreme Court's jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, would not be exhausted until the court was satisfied and declared as much.
4. Even though the court had concluded the hearing of the petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the petition, remained uncompromised. The court therefore could, as it did, issue summons in the cause of its orders made during the pendency of the main hearing.

The Supreme Court was not functus officio and thus had jurisdiction to entertain the proceedings.

Orders

No order as to costs.

Citations

Cases

Kenya

1. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1 - (Mentioned)
2. *Roy Shipping SA and all other persons iInterested in the Ship 'Mama Otan' v Dodoma Fishing Company Ltd* Civil Appeal 238 of 1997; [1997] KECA 333 (KLR); [1995 – 1998] 2 EA 293 - (Mentioned)

United Kingdom

Owners of the Rive Rima [1987] 3 All ER 1; [1988] UKHL J0616-1 - (Mentioned)

Regional Court

Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 - (Distinguished)

Jersey

Jersey Evening Post Limited v A1 Thani [2002] JLR 542 - (Explained)

Statutes

None referred to

Texts

1. Pretorius., DM., (2005), *The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law* Johannesburg ; South African Law Journal, pp 122 - 832
2. The Daily Nation (2013), *Lawyer's Take On Top Court* Nairobi; The Daily Nation, March 28, 2013

Advocates

None mentioned

October 24, 2013, the Court delivered the following Ruling:

A. Background

1. Following the March 4, 2013 General Elections pursuant to which the Chairman of the Independent Electoral and Boundaries Commission (IEBC), Mr Issack Hassan declared Mr Uhuru Kenyatta as the (then) President-elect, three presidential election petitions namely, Petition No 3 of 2013, Petition No 4 of 2013 and Petition No 5 of 2013, were filed before the Supreme Court.

2. On March 25, 2013 the court consolidated the three petitions and ordered that Petition No 5 of 2013, Raila Odinga and 5 others v Independent Electoral and Boundaries Commission and 3 others, be deemed to be the pilot file.

3. The petition, not surprisingly, elicited keen public interest and generated endless media coverage and commentary. Amidst this highly charged environment, on March 20, 2013, the court deemed it fit to issue certain directions, in the interests of justice, and for the efficient, effective, transparent and impartial determination of the presidential election petitions, as consolidated.

4. One such directive read as follows:

> "The court is now fully seized of the petitions challenging the presidential elections. Towards this end, the petitioners and respondents and their agents,

supporters or advisors are directed to desist from prosecuting the merits of their cases in any forum other than this court".

5. During the hearing of the presidential election petition, the court noted a news item published on page 5 of the *Daily Nation* of March 28, 2013, which was attributed to Mr Eric Mutua, the Chairman of the Law Society of Kenya.

6. The newspaper report stated, in part, as follows:

> " *Lawyer's Take On Top Court*: Law Society of Kenya boss Eric Mutua has faulted a ruling by the Supreme Court to reject additional evidence. Mr Mutua said the decision to expunge an affidavit by the CORD could set a precedent for future rulings. The court rejected an 839 – page affidavit because it was filed without its consent."

7. On the same page, there was another report attributed to Mr Mutua wherein he allegedly stated:"we want to determine [the] circumstances that led to the alleged failure of the technology system used." These remarks were reported to have been made after the Law Society of Kenya had unveiled a committee to audit the March 4th General Election.

8. After considering the contents of the published reports, this court on March 28, 2013 made an order as follows:

> " We hereby issue summons for Mr Eric Mutua to appear at the Supreme Court on a date and time to be notified to him by the Registrar of the Supreme Court."

9. Thereafter, the Registrar of the Supreme Court issued summons dated July 22, 2013 to Mr Mutua directing him to appear before the Court on August 1, 2013.

10. On the said date, during the mention of the matter, representatives of several interested parties were present. The court indicated that the reason for the summons was to give Mr Mutua an opportunity to confirm or deny the reports published by the Daily Nation, as set out hereinabove. The court, at the time, clarified that the proceedings are not in the nature of contempt proceedings.

11. Learned counsel appearing for the Law Society of Kenya, however, raised certain preliminary issues to be heard and determined before the court could proceed with the intended clarification from Mr Mutua. Thereafter, the court directed all the parties present to make their respective written submissions to enable the court to make its ruling.

12. The submissions were duly filed and are duly considered by us.

B. The Preliminary Issues

13. Though differently worded by the parties involved, we shall take the issues formulated by counsel for the Law Society of Kenya for consideration and determination, namely:

    (i) the jurisdiction of the Supreme Court in light of the fact that the presidential election petition has already been heard and finally determined; and

    (ii) whether the Chairman of the Law Society of Kenya is the proper party to summon in respect of a news item written and published by the Daily Nation newspaper, a third party that was not summoned by the court.

C. Analysis

14. The nature and scope of a "preliminary issue" is cogently defined in the statement of Law, JA, in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 at 700:

> " So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation."

15. Considering the *ratio decidendi* in the above-cited case, we conclude, without much hesitation, that the second issue raised does not fall squarely within the scope of a "preliminary objection;" and we shall, at this stage, refrain from elaborating this issue any further.

16. The first issue, however, raises concerns regarding the jurisdiction of this court; and we are thus obligated to consider the same, as it is a threshold issue, to be resolved at the earliest opportunity. It is well recognised in our law that a court of law shall down its tools in respect of a matter before it, the moment it holds that it lacks jurisdiction. We hereinbelow enumerate the relevant cases justifying our decision to hear and determine the question of jurisdiction, as a preliminary point, though without making further comments on this indefatigable principle of law. These are:

    (i) *The Owners of the Rive Rima* [1987] 3 All ER 1;

    (ii) *Roy Shipping SA Agencies and all interested in the Ship "Mama Otan" v Dodoma Fishing Company Limited* [1995 – 1998] 2 EA 293;

(iii) *The Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* [1989] KLR 1.

17. In our view, the objections being raised as to this court's jurisdiction to issue the Summons dated July 22, 2013 must be regarded as separate and distinct from the question whether this court had, in the first place, jurisdiction to issue the order made on March 28, 2013. Indeed, it is to be taken that, had the summons been issued before the final determination of Petition No 5 of 2013, the parties would most probably not have raised the objection now before us. Thus, the real contention made as to the court's jurisdiction, is hinged on the supposition that because Petition No 5 of 2013 has been heard and determined, the court has become *functus officio*, and so has no further authority to hear or determine any matter attendant on any proceeding in the said petition.

18. We, therefore, have to consider the concept of "*functus officio*," as understood in law. Daniel Malan Pretorius, in "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*," (2005) 122 SALJ 832, has thus explicated this concept:

> " The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

19. This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550:

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available" [emphasis supplied].

20. As regards the preliminary objection before us, contesting this court's jurisdiction, there is no doubt that Petition No 5 as consolidated, has been finalized, and the judgment has been perfected. The issue before us emanates not from the substantive facts or issues raised in the petition, but from an ancillary order issued by the court during the proceedings – totally

unrelated to the main cause of action. That order has not been acted upon or perfected, and the summons issued pursuant thereto by the Registrar of the Supreme Court, was meant to give effect to the court's observation and consequent directions made on March 28, 2013.

21. It is a legal and constitutional obligation of any court, from the basic-level to the highest level , to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the court's jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the court is satisfied and it declares as much. Even though, therefore, the court concluded the hearing of the petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the petition, remained uncompromised. The court therefore could, as it did, issue summons in the cause of its orders made during the pendency of the main hearing.

22. We are also of the opinion that the authorities cited, which we have carefully considered, are not directly relevant to the facts before us. This is an issue of first impression, and no authority invoked by counsel has a direct bearing upon it.

23. We are, therefore, satisfied, and accordingly hold, that the court is not *functus officio*, and that we do have jurisdiction to entertain the proceeding before us.

24. We do not make any order as to costs in this proceeding.

Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, JB Ojwang, MK Ibrahim, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 6 (KLR)

Election Law *- presidential election - validity of a presidential election - election petition challenging the validity of the election of the President and Deputy President- grounds that the President-elect and deputy President-elect had not obtained the basic vote threshold to be validly elected - allegation of various irregularities that would affect the credibility of the Presidential Election - whether the irregularities were so grave as to render the election void - Constitution of Kenya, 2010, articles 70 , 138, 140.*

Election Law *- presidential election - vote tallying - rejected votes - whether the term "all the votes cast" included only valid votes or both valid or rejected votes - whether rejected votes should be included in the tally of all the votes cast - claim by the petitioner that the rejected votes should be excluded from the presidential election tally and order a re-tally of the votes cast - grounds that the rejected votes were marked ballot papers that had failed to comply with the approved standards in casting of votes during elections - whether the rejected votes should have been included in the final tally of the presidential election - Constitution of Kenya, 2010, article 738(4)(a), Elections (General) Regulations, 2012 regulation 77.*

Election Law *- presidential election - vote tallying - re-tallying of presidential votes - allegations of discrepancies in some polling stations - where Forms 34 & 36 which a returning officer used to declare presidential election results in a polling station and a constituency, county respectively, reflected discrepancies in 5 out of 22 polling stations with respect to numbers of votes cast - whether the discrepancies were substantial so as to affect the credibility of the electoral process.*

Law of Evidence *- burden of proof - standard of proof - burden and standard of proof in an electoral cause - party on whom the burden of proof lay - the standard to which the burden was to be discharged - whether proof was on a balance of probability or proof beyond reasonable doubt - where the evidential burden kept shifting depending on the circumstances - threshold to be met by a petitioner in an electoral cause.*

Jurisdiction *- Supreme Court of Kenya - original and exclusive jurisdiction – special jurisdiction of the Supreme Court to hear and determine a presidential election petition - where the jurisdiction was not boundless as it was limited in time and scope - whether it only related to legal, factual and evidentiary questions relevant to the determination of the validity of a presidential election - political question - role of the court in a fundamentally political-cum-constitutional process - principles that guided the court in its attempt to resolve the electoral question - whether the Supreme Court had*

jurisdiction to preside over the presidential election petition - Constitution of Kenya, 2070, articles 740, 163(3)(a), Supreme Court Act, (Act No 7 of 2011).

Brief facts

On 4th March, 2013 Kenya held its the first general election under the Constitution of Kenya, 20210. The election was conducted by the Independent Electoral and Boundaries Commission (IEBC). Under article 138 (4) of the Constitution it was provided that a candidate shall be declared elected as President if the candidate received more than half of all the votes cast in the election and at least twenty five per cent of the votes cast in each of more than half of the counties.

During the tallying process by the IEBC, there was a failure of the electronic results transmission system which left the IEBC with no other option but to resort to the manual tallying of results which resulted in an inability on the part of the IEBC to declare results as and when they were available.

In its computation of the total votes cast, IEBC had included the rejected votes in the calculation of the threshold-percentages in the tallying of the presidential election votes with the IEBC chairman declaring that the rejected votes would count towards the final tally and that percentages of all the votes tallied for each candidate would have to be updated to reflect the inclusion of the rejected votes.

On 9th March 2013, the Chairman of the IEBC, lssack Hassan (the 2nd respondent), announced that Uhuru Kenyatta (the 3rd respondent) had received 6,173,433 votes out of a total of 12, 338,667 (50.07% of all votes cast), while Raila Odinga (the main petitioner) had received 5,340,546 votes (43.31% of the votes cast). Pursuant to article 138(4) of the Constitution, Uhuru Kenyatta was declared the President-elect.

Subsequent to the declaration, three petitions were filed in the Supreme Court. The first petition contested the inclusion of the rejected votes in the final tally which the petitioners alleged had a distorting effect on the percentage votes won by each candidate. The second petition contested the manner in which the electoral process was conducted by the IEBC with regard to the presidential election. The third petition challenged the legality of the IEBC's declaration of the 3rd respondent and 4th respondent as President-elect and Deputy President-elect respectively. The final petition which was filed by Raila Odinga and which was later designated as the pilot petition in the consolidation of the petitions was based on the allegation that the electoral process was so fundamentally flawed, that it was impossible to ascertain whether the presidential results declared were lawful.

On March 30, 2013, the Supreme Court delivered its findings on the issues and the judgment with reasons for it's decision was delivered on April 16, 2013.

Issues

i. Whether the 3rd respondent and the 4th respondent were validly elected and declared as the President-elect and Deputy President-elect of the Republic of Kenya;

ii. Whether the presidential election was conducted in a free, fair, transparent and credible manner in compliance with the Constitution and the law;

iii. Whether in determining that a candidate had met the threshold stipulated in article 138(4)(a) of the Constitution, the term " all the votes cast" included
   a. Only valid votes, or
   b. Both valid and rejected votes;

iv. What consequential declarations, orders and reliefs were available to the petitioners?

Held

1. The Supreme Court's jurisdiction in a presidential election was both original and exclusive. No court other than the Supreme Court had the jurisdiction to hear and determine disputes relating to an election for the office of the President. That jurisdiction, however, was not boundless in scope as it was circumscribed in extent and in time. Limited in extent, in that it related only to an inquiry into the legal, factual and evidentiary questions relevant to the determination of the validity or invalidity of a presidential election.
2. The court must take care not to usurp the jurisdiction of the lower courts in electoral disputes. The annulment of a presidential election would not necessarily vitiate the entire general election and need not occasion a constitutional crisis, as the authority to declare a presidential election invalid was granted by the Constitution itself. The petitioner was required to present a specific, concise and focused claim, which did not purport to extend the Supreme Court's jurisdiction beyond the bounds set out in the Constitution. The Supreme Court would only grant orders specific to the presidential election.
3. According to article 140 of the Constitution, it was clear that expedition of the presidential election disputes was of the essence. As the electoral process had led to the declaration of a winner who could not assume office pending the determination of the petition, the protracted holding on of a President-elect, as well as a retiring President, presented a state of anticipation and uncertainty, which would not serve the public interest.
4. Where a party alleged non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance had affected the validity of the elections. That emerged from a longstanding common law approach in respect of alleged irregularity in the acts of public bodies. Therefore the petitioner must have set out the allegations in his petition by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.
5. An electoral cause was established much in the same way as a civil cause where the legal burden rested on the petitioner, but depending on the effectiveness with which the petitioner discharged the burden, the evidential burden could keep shifting. Ultimately, it was upon the court to determine whether a firm and unanswered case has been made.
6. The threshold of proof should in principle be above the balance of probability though not as high as beyond reasonable doubt save that it would not affect the normal standards where criminal charges linked to an election were in question. In the case of data specific electoral requirements (such as the threshold specified in article 138(4) of the Constitution for an

outright win in the presidential election), the party that bore the legal burden of proof had to discharge it beyond any reasonable doubt.

7. As a basic principle, it should not be for the court to determine who would come to occupy the presidential office, save that the Supreme Court, as the ultimate judicial forum, entrusted under the Supreme Court Act, 2011 (Act No 7 of 2011) with the obligation to assert the supremacy of the Constitution and the sovereignty of the people of Kenya must safeguard the electoral process and ensure that individuals accede to power in the presidential office in compliance with the law regarding elections. The Supreme Court must hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of that office, if there was any major breach of the electoral law, as provided in the Constitution and the governing law.

8. The special circumstances in the presidential election petition required an insightful judicial approach and there may have been unlimited number of ways in which such an approach would have guided the court. The fundamental one was the fidelity to the terms of the Constitution and of such other law that objectively reflected the intent and purpose of the Constitution which represented the special and historic compact among the people and had expressly declared that all powers of governance emanated from the people and were to serve the people.

9. The purpose of the pre-trial conference was set out in rule 10 of the Supreme Court (Presidential Election Petition) Rules, 2013. It was a preparatory forum used to lay the ground rules for the expeditious, fair and efficient disposal of the petition. The pre-trial conference enabled the court, upon hearing the parties and if need be, on its motion to make appropriate orders and give directions for ensuring the fair determination of the dispute.

10. The evidence on record portrayed that the tallying was indeed conducted in accordance with the law and the relocation of the political party agents had not undermined the credibility of the tallying nor provided a basis for annulling the outcome of the presidential election.

11. The voter registration process was essentially transparent, accurate and verifiable and the voter register compiled from the process served to facilitate the conduct of free, fair and transparent elections. The explanations given on the discrepancies in the published registers were sound and in accordance with the laws.

12. The court declined to make orders or grant reliefs sought by the petitioner, which would have occasioned conflicts between its jurisdiction and that of other lower courts especially as regarded other sets of election, which had proceeded on the same Voter Register.

13. The conduct of the presidential election was not perfect, even though the election had been of the greatest interest to the Kenyan people who had voluntarily voted. Although there were many irregularities in the data and information capture during the registration process, they were not so substantial as to affect the credibility of the electoral process and besides, no credible evidence had been adduced to show that such irregularities were premeditated

and introduced by the 1st respondent, for the purpose of causing prejudice to any particular candidate.

14. In regard to rejected votes being added in computing the final results, once a ballot paper which had been cast did not satisfy the requirements under the law, it could not be added in determining the election. The progressive character of the Constitution, and the interpretation of the provisions of article 138(4) of the Constitution which stated that a candidate shall be declared elected as President if the candidate received more than half of all votes cast in the election and at least twenty-five per cent of the votes cast in each of more than half of the counties, referred only to valid votes cast, and did not include ballot papers, or votes cast but were later rejected for non-compliance with the terms of the governing law.

15. IEBC was entitled to resort to the use of the manual tallying system as the Constitution and the electoral laws had specifically given the IEBC the discretion to either work with a full electronic system or a manual system. The court recognized that due to the inherent failure of the electronic systems and the fact that the manual tallying had not been faulted as being erroneous, the computation could not be challenged. Therefore the IEBC had no option after the transmission technology failed but to revert to the manual electoral system.

16. The applicable law entrusted the discretion to IEBC on the application of such technology as may be found appropriate. Since such technology had not achieved the necessary level of reliability, it could not as yet be considered a permanent or irreversible foundation for the conduct of the electoral process.

17. It was clear that a fresh election under article 140(3) of the Constitution would be triggered by the invalidation of the election of the declared President-elect by the Supreme Court following a successful petition against such election. Such a fresh election would be built on the foundations of the invalidated election and could only involve candidates who had participated in the original election. There would therefore be no basis for a fresh nomination of candidates for the resultant electoral contest.

18. [**Obiter**] Suppose, however, that the candidates, or a candidate who took part in the original election, dies or abandons the electoral quest before the scheduled date: then the provisions of article 138(8)(b) would become applicable, with fresh nominations ensuing. Barring the foregoing scenario, does the "fresh election" contemplated under article 140(3) bear the same meaning as the one contemplated under article 138(5) and (7)? The answer depends on the nature of the petition that invalidated the original election. If the petitioner was only one of the candidates, and who had taken the second position in vote-tally to the President-elect, then the "fresh election" will, in law, be confined to the petitioner and the President-elect. And all the remaining candidates who did not contest the election of the President-elect, will be assumed to have either conceded defeat, or acquiesced in the results as declared by IEBC; and such candidates may not participate in the "fresh election."

19. There was no evidence to prove that the candidate declared as the President-elect had not obtained the basic vote threshold and therefore that fact justified his being declared the validly elected President of Kenya.
20. The presidential election was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all the relevant provisions of the law.
21. The 3rd and 4th respondents were validly elected and declared as the President and Deputy President elect by the 2nd respondent in the presidential elections.
22. Rejected votes should not have been included by the 2nd respondent in calculating and determining the final tallies in favour of each of the presidential candidates.

Petition dismissed. Presidential election results as declared by IEBC upheld. Each party to the petition was to bear their costs.

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1. *Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission* [2001] UGSC 3 - (Explained)
2. *VK Bategana v EL Mushemeza* Election Petition 1 of 1996 - (Explained)

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1. *Douglas R Cagas v Commission on Elections* GR No 194139 of 2012 - (Applied)
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Constitution of the Republic of Croatia article 95 - (Interpreted)

Kenya

1. Constitution of Kenya, 1969 (Act No 5 of 1969) section 5(5)(e) - (Unconstitutional)
2. Constitution of Kenya articles 6, 10(2)(c); 36(b); 38(3)(b); 54; 73; 81; 82(1)(b); 83(3); 86(b); 88(4); 134(4); 138(3)(c)(4)(a); 140; 159(2)(d); 260 - (Interpreted)
3. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 59 - 62, 69; 71,73(4); 74; 77(1); 78; 79; 82; 85(1)(e) - (Interpreted)
4. Elections (Registration of Voters) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulations 12(3); 13 - (Interpreted)

5. Elections Act, 2011 (Act No 24 of 2011) sections 2 - 6, 39(2); 109(1)(p) - (Interpreted)
6. Independent Electoral and Boundaries Commission Act, 2011 (Act No 9 of 2011) sections 3, 4(m); 27(1); 44 - (Interpreted)
7. Public Procurement and Disposal Act (cap 412C) In general - (Cited)
8. Supreme Court (Presidential Elections) Rules, 2013 (cap 9B Sub Leg) rule 7, 10(1)(f); 11 - (Interpreted)
9. Supreme Court Act, 2011 (cap 9B) sections 3(a); 21(4) - (Interpreted)

Zambia

Constitution of Zambia Act, 1991 (Act No 1 of 1991) article 34(3) - (Interpreted)

Advocates

Mr Oraro Senior Counsel and Mr Regeru for the 1st petitioner

Mr Ndubi and Ms Kethi Kilonzo for the 2nd petitioner

Mr Nyamodi and Mr Nyaoga for the 1st respondent

Mr Ahmednassir Abdullahi Senior Counsel for the 2nd respondent

Mr Ngatia for the 3rd respondent

Mr Katwa Kigen for the 4th respondent

April 16, 2013, the Court delivered the following Judgment:

THE PRESIDENTIAL ELECTION OF 4TH MARCH, 2013:

A. Introduction

1 On the March 4, 2013, Kenya held its first General Election since the promulgation of the new Constitution on August 27, 2010. The *Constitution* was a culmination of the efforts of the Kenyan people to bring about a more progressive governance set-up. Kenyans affirmed the new *Constitution* as the supreme law of the Republic, which binds all persons and all State organs.

2 All powers to be exercised in public functions, therefore, must flow from the *Constitution*. Indeed, judicial authority, under article 159(1) of the *Constitution*, is derived from the people and vests in, and shall be exercised by the courts and tribunals established under this Constitution. Additionally, national values and principles of governance, as set out in article 10 of the *Constitution*, underpin the conduct of governance in every respect.

3 The Independent Electoral and Boundaries Commission (IEBC) was created by article 88 of the *Constitution*, for the management of the country's electoral processes. It is conferred with the responsibility for conducting free, fair and transparent elections.

4 The elections of March 4, 2013 were the first in Kenya to attempt to use electronic facilitation. The IEBC, at various stages of the election, deployed the following technologies:

(i) Biometric Voter Registration (BVR) during voter registration;

(ii) Electronic Voter Identification (EVID) on polling day; and

(iii) Results Transmission System (RTS) during tallying.

5 On November 19, 2012, the IEBC began a voter registration exercise, which culminated in approximately 14 million voters being registered. On March 4, 2013 voters went to the polls in significant numbers. A record 86% of registered voters were reported to have participated in the General Elections. After the polls officially closed on that day, the IEBC began the process of vote tallying, and the results were then broadcast to the public.

B. Declaration of Results, and the Ensuing Petitions

6 On March 9, 2013, five days after the General Elections were held, the Chairman of the IEBC, Mr Issack Hassan (second respondent), announced that Mr Uhuru Kenyatta had received 6,173,433 votes out of a total of 12,338,667 (50.07% of all the votes cast), while Mr Raila Odinga (the petitioner) had received 5,340,546 votes (43.31% of the votes cast). Pursuant to article 138(4) of the *Constitution*, Mr Hassan declared Mr Uhuru Kenyatta, the President-elect.

7 Subsequent to the announcement, three petitions challenging the results of the Presidential elections were filed at the Supreme Court.

(i) Petition No 3 of 2013

8 On March 14, 2013, petitioners Moses Kiarie Kuria, Denis Njue Itumbi and Flowrence Jematiah Sergon filed a petition against the IEBC as the 1st respondent, and Mr Isaack Hassan. The basis of the petition was that the respondents' decision to include rejected votes in the final tally had a prejudicial effect on the percentage votes won by Mr Kenyatta. The petitioners asserted that the secondrespondent's actions were in contravention of articles 136(a) and 138(c) of the *Constitution*, and rule 77(1) of the Elections (General) Regulations, 2012.

(ii) Petition No 4 of 2013

9 The second petition was filed by Gladwell Wathoni Otieno and Zahid Rajan on March 16, 2013, against the IEBC as the 1st respondent, Mr Issack Hassan as the 2nd respondent, Mr Uhuru Kenyatta as the 3rd respondent and Mr William Ruto as the 4th respondent. The petitioners aver that the election was not conducted substantially in accordance with the *Constitution*, or the *Elections Act* and the governing regulations.

10 In particular, the petitioners aver that the IEBC failed to establish and maintain an accurate Voter Register that was publicly available, verifiable and credible as required by articles 38(3), 81(d), 83(2), 86 and 88(4) of the *Constitution*, sections 3, 4, 5, 6, 7 and 8 of the *Elections Act*, 2011 and the *Elections (Registration of Voters) Regulations, 2012*.

11 The petitioners, in addition, claim that the true number of registered voters is unknown and, therefore, the IEBC did not have an accurate voters' register. They assert that the 1st and 2nd respondents repeatedly changed the official number of registered voters. The petitioners further assert that the absence of a credible Principal Voter Register vitiates the validity of the Presidential elections.

12 The petitioners further assert that the electoral management system adopted by the IEBC was complex and had many shortfalls, contrary to the constitutional requirement that it be a simple, accurate, verifiable, secure, accountable and transparent system. In particular, the petitioners aver that the IEBC failed to meet the mandatory legal requirement to electronically transmit election results. The petitioners aver that the failure of the electronic system put in place by the IEBC and their failure to electronically transmit election results affected the validity of the Presidential elections.

13 The petitioners aver that the 1st and 2nd respondents did not discharge their obligation under the *Constitution*, because the tallying and verification of the results did not happen at the polling stations; there was no electronic transmission of provisional results; and party agents were excluded from the National Tallying Centre.

14 The petitioners further aver that the 1st respondent violated the *Constitution* and the *Public Procurement and Disposal Act* (cap 412C, laws of Kenya), by awarding the tender to an unqualified bidder who then supplied devices that did not work properly, or simply failed, on election day.

(iii) Petition No 5 of 2013

15 The third petition was filed by Mr Raila Odinga on March 16, 2013 against the IEBC as the 1st respondent, Mr Isaack Hassan as the 2nd respondent, Mr Uhuru Kenyatta as the

3rd respondent and Mr William Ruto as the 4th respondent. The petitioner avers that the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful. The petitioner seeks relief from this court pursuant to articles 2, 6, 10, 38, 73, 82, 86, 259, 260 of the *Constitution*; the *Independent Electoral and Boundaries Commission Act*, 2011 (Act No 9 of 2011); regulations 59(1), 79 and 82 of the *Elections (General) Regulations 2012*; the *Elections Act, 2011*(Act No 24 of 2011) and sections 4 and 25 of the *IEBC Act, 2011*.

16 The petitioner avers that the first and second respondents did not carry out a valid voter registration, in contravention of article 83 of the *Constitution*, and section 3(2) of the *Elections Act*, 2011 because their official tally of registered voters changed several times. This resulted in the final total number of registered voters differing materially from what was in the Principal Register.

17 The petitioner also avers that the first respondent failed to carry out a transparent, verifiable, accurate and accountable election as required by articles 81, 83 and 88 of the *Constitution*. The petitioner asserts that there were several anomalies that occurred in the process of manual tallying, such as: the votes cast in several polling stations exceeding the number of registered voters; differences between results posted and the results released by the first respondent; the use of unsigned Form 36 to declare the results.

18 The petitioner further avers that the electronic systems acquired and adopted by the first respondent to facilitate the general election were poorly designed and implemented, and destined to fail. Due to the failure of the system, the first respondent was unable to transmit the results of the elections, in contravention of regulation 82 of the *Elections (General) Regulations, 2012*.

(iv) Consolidation of Petitions

19 On March 25, 2013, by the directions of the Supreme Court, the three petitions were consolidated. The court further ordered that the file for Petition No. 5 be deemed to be the pilot file for the recording of all proceedings and for rendering the final decision. The court gave the following directions with respect to parties in the consolidated petitions: the petitioner in Petition No 5 of 2013 to be referred to as the first petitioner; the petitioners in Petition No 4 of 2013 to be jointly referred to as the second petitioner; the petitioner in Petition No 3 of 2013 to be jointly referred to as the third petitioner; the respondents to remain as in Petition No 5.

C. Agreed Issues for Trial

20 Prior to the pre-trial conference, the court drafted a summary of the issues and served this upon the parties for scrutiny and consideration. This was the basis of agreement on issues for trial, which may be summarized as follows:

1. Whether the 3rd and 4th respondents were validly elected and declared as President-elect and Deputy President-elect respectively, in the Presidential elections held on the 4th of March, 2013. [This is the crux of the case].

2. Whether the Presidential election held on March 4th, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the *Constitution* and all relevant provisions of the law.

3. Whether the rejected votes ought to have been included in determining the final tally of votes in favour of each of the Presidential-election candidates by the 2nd respondent.

4. What consequential declarations, orders and reliefs this court should grant, based on the determination of the petition.

D. Presidential Election Vote-tally: Are "Rejected Votes" Relevant in Computing Percentages?

(i) Background

21 Petition No 3 seeks to challenge the decision by the 2nd respondent to include "rejected votes" in the tallying process when calculating the percentage of votes in favour of each candidate. The petitioner alleges that this decision was unlawful and had the prejudicial effect of reducing the percentage of votes won by Hon Uhuru Kenyatta. The respondents, on their part, aver that the *Constitution* does not expressly provide that rejected votes should not be counted in the computation of the threshold percentage for a win. Having sought and received divergent legal opinions on the issue, the respondents now urge the court to settle the issue, as it is likely to arise in future elections.

22 The specific questions to be answered in this claim are as follows:

1. Whether in determining that a candidate has met the threshold stipulated in article 138 (4)(a) of the *Constitution*, the term "all the votes cast" includes (i) only valid votes, or (ii) both valid and rejected votes.

2. Should a ballot paper that has been rejected under the provisions of regulation 77 of the *Elections (General) Regulations*, 2011, and has been categorized as being "void", be capable of being factored in, during the tallying process?

(ii) Petitioners' Case

23 The petitioners state that "rejected votes" were erroneously factored into the tallying system by the 2nd respondent, and that this has had the prejudicial effect of reducing the percentage of votes won by Uhuru Kenyatta, and keeping his tally only slightly above the threshold for a win.

24 The petitioners state that, at the commencement of transmission of presidential election results, the 2nd respondent excluded rejected votes from the computation of the percentage of the votes cast. They state that the common understanding at this stage, was that the votes cast as envisaged by article 138 of the *Constitution* included only ballots that constituted valid votes.

25 They further assert that in calculating the percentage attributable to each candidate, the respondents erroneously and unlawfully used a format that included rejected votes as a basis for determining whether a candidate had met the threshold stipulated in article 138(4)(a) of the *Constitution*.

26 They aver that rule 77(1) of the *Election (General) Regulations*, 2012 states that, rejected ballot papers shall be void and shall not be counted. Consequently, the results announced at each polling station as contemplated by articles 86(b) and 138(3) of the *Constitution*, cannot include rejected votes among the results announced in favour of any candidate. The petitioners contend that rule 77(1) of the *Election (General) Regulations*, 2012 states that, rejected ballot papers shall be void and shall not be counted. Consequently the results announced at each polling station as contemplated by articles 86(b) and 138(3) of the *Constitution*, cannot include rejected votes among the results announced in favour of any candidate.

27 In the submissions, Mr Regeru, counsel for the petitioners, based his arguments on several points, which he urged the court to use as tools of analysis, in reaching a conclusion in the matter: one being the law as stated in the *Constitution*, article 259; and section 109(1)(p) of the *Elections Act* 2012; another being arguments based on common sense and logic; and another still, the legal opinions filed as evidence; yet another, being the practice of the 1st and 2nd respondents; and another still, comparative practice in other jurisdictions. They urge that improperly-marked ballots should be rejected and not factored into the counting and tallying of votes. They rely on the case of *Popular Democratic Movement v Electoral Commission*, Constitutional Case No 16 of 2011, where the Court of Appeal of Seychelles

(Burhan, J), being faced with the question whether a rejected vote could be considered a "cast vote", held that:

> " rejected ballot papers are not to be counted as 'votes', therefore the term 'votes cast' cannot and will not include 'rejected' ballot papers".

(iii) Responses

28 Mr Ngatia, learned counsel for the 3rd respondent, in oral submissions, founded his client's case on certain facts: transmission of results started on the evening of March 4, 2013; electronic results were transmitted without factoring in the rejected votes, and a stage was reached when the rejected votes on the electronic board had accumulated to the figure of 300,000; so in a real sense, they became "candidate number 3," after the 1st candidate and the 2nd candidate; members of a rival political party then wrote a letter to the respondent, requesting that rejected votes be factored in the computation of percentages; to factor in the rejected votes would mean that a candidate who had a 53% lead could come down to 49%; and such a situation would then occasion a run-off election between the two leading presidential election candidates. Mr Ngatia submitted that, towards the evening of 5th of March, the 1st respondent announced that, thenceforth, the 2nd respondent would depart from its previous position and now factor in the rejected votes. He submitted that this announcement was made without giving any other Presidential election candidates an opportunity to be heard; and that all the legal opinions given, vindicated his complaints.

29 Mr Ngatia urged that the *Constitution*, in article 138, makes reference to "votes that are cast". But from the *Elections Act*, confusion is apparent; as a vote is equated to a ballot paper.

30 Mr Ngatia submitted that a ballot paper is nothing more than an instrument to convey the choice of a voter; and a vote is the definable and ascertainable ballot paper; once the ballot has been translated into a valid choice, it becomes a vote. He submitted that there cannot be a vote which is invalid, what is invalid is a ballot paper; and, as a vote is a defined choice, a ballot which does not translate into a vote is nothing more than a ballot which is rejected.

31 Mr Ngatia submitted that rejected votes should never be the basis for triggering a run-off election.

32 Mr Kigen, learned counsel for the 3rd respondent, also urged that the prospect of a ballot paper acquiring the character of a vote is conditional on it clearly showing the choice and preference of the voter. As long as the document deposited in the ballot box does not clearly show what the intention of the voter is, then it should not be included as a vote and should not be allowed as part of the tallying, in ascertaining winning margins.

33 Counsel contends that the inclusion of rejected votes can only work against a candidate with more votes, and not to the disadvantage of the runner-up.

34 Mr Oraro, learned counsel for the petitioner in Petition No 5, submitted that article 138(4) of the *Constitution* means what it says: there is no qualification to the phrase "votes cast"; thus all votes cast must be included whether valid or rejected, in the computation of the percentage threshold for a win. He argued that if the drafters intended that only a certain category of votes would be considered for purposes of determining whether the winning percentage threshold had been met, nothing would have been easier than to stipulate so.

35 He remarks a signal by this court that, it is not tenable to ascribe meanings to constitutional provisions through the sheer craft of interpretation, or by way of endeavours to discern the intentions of Parliament, where the wording of legislation is clear and entails no ambiguity.

36 Mr Oraro submitted that the distinction given by Mr Ngatia on 'vote' and 'ballot paper,' is a distinction without a difference: as what is defined in the *Elections Act* is a ballot paper; ballot paper means paper used to record the choice made by voters and shall include an electronic version of a ballot paper, or its equivalent for the purposes of electronic voting.

37 Counsel further submitted that the argument by the petitioners for excluding rejected votes is based upon a regulation; and so the position urged was that the *Constitution* should be made to fit the terms of subsidiary legislation: a proposition to be rejected, as regulations cannot be used to interpret a provision of the *Constitution* which is the supreme law.

38 Mr Oraro submitted that regulation 77 of the *Elections (General) Regulations, 2012* does not require the exclusion of rejected votes in the final tally, for the purpose of determining whether a presidential election candidate has attained the threshold percentage required by article 138 of the *Constitution*. For regulation 77(e) prescribes when a ballot paper is to be rejected, and is not to be attributable to any of the candidates, nor feature in the aggregate tally for the candidate.

39 Mr Oraro submitted that whether a ballot paper has been rejected and void, for purposes of being attributed to any one particular candidate, does not and cannot change the fact that it was a "vote cast".

40 Learned counsel, Mr Ndubi for the 2nd petitioner, agreed with the 1st petitioner's position, and urged that the *Constitution of Kenya, 2010* had the clear intention to repeal and replace the *Constitution of Kenya, 1969* which has been in force. The former Constitution had provided that "the candidate for President....and who receives a greater number of valid votes in the presidential election than any other candidate..." So, to determine the winner in presidential elections, the reference was to "valid votes"; and this is now replaced with "votes cast" – an expression so broad as to include "rejected votes".

41 For the respondents, counsel submitted that the decision to include "rejected votes" in the elections was made in good faith, based on a literal interpretation of article 138(4), as read together with articles 86(b) and 38(b) of the *Constitution*: and these articles do not provide that rejected votes should not be counted, or considered in the computation of presidential election vote-percentages, envisaged under article 138(4) of the *Constitution*.

E. The Voters' Register: Did it Affect the Validity of the Presidential Election?

(i) The petitioners' case

42 Lead counsel, Mr George Oraro, made submissions on the role of technology in relation to voter registration. He submitted that the first respondent had adopted the "BVR" (Biometric Voter Registration), a computer-based registration solution. This involves biometric technology, which uses computer finger-print scanners and digital cameras to capture the bio-data of an applicant; such personal details of finger-prints and face photo technology are used to verify the authenticity of the voter, and to ensure greater transparency and credibility in the elections.

43 The petitioner submitted that the first respondent had represented to the public that the BVR system would ensure quick and precise voter identification, and this would guarantee a credible election and prevent fraud.

44 Counsel focused his submissions on anomalies and discrepancies in the number of registered voters occasioned by the use of a plurality of voter registers. He submitted that, as of the December 18, 2012, the total number of registered voters on the provisional Voter Register was 14,333,339. The provisional register was then opened to the public for inspection. This register was completed and confirmed by IEBC by Gazette Notice; and it stood as the Principal Voter Register with a total of 14,352,545 registered voters. However, this number was inconsistent with the figure of 14,352,533 registered voters, by the first respondent's declaration of Presidential election results on March 9, 2013.

45 Mr Oraro submitted that the IEBC tried to explain the discrepancy in numbers by stating that the 14,352,533 were registered voters on the Principal Register, but had not included 12 special cases from Soy Constituency in Uasin Gishu County, as well as 31,318 persons registered in the non-biometric special register. However, Mr Oraro stated that this explanation was not valid, as it entailed mathematical inconsistencies: 14,352,533 +12+31,318=14,383,863 – an inconsistency that was further compounded by the figure of 36,236 which the third respondent's witness said was in the special register. Counsel submitted that the said special register was never made public. Mr Oraro submitted that the lack of information from IEBC was contrary to article 10(2)(c) of the *Constitution* which provides that transparency is one of the national values and principles of governance.

Counsel urged that IEBC's failure to publish the information was also contrary to section 27(1) of the *Independent Electoral and Boundaries Commission Act*, 2011 (No 9 of 2011) which provides that –

> " The Commission shall publish and publicize all important information within its mandate affecting the nation."

46 Learned counsel, Ms Kethi Kilonzo, for the 2nd petitioner, entered upon her submission by referring to the difference between the right to a free and fair election, in the terms of article 38(2) of the *Constitution*, and the right to be registered as a voter and to vote, provided for in article 38(3). She submitted that the right to vote is not an absolute right but a conditional right, and that one condition attached to this right is the requirement for the voter to be registered, before exercising the right to vote.

47 Counsel submitted that there can be no free and fair elections if there is no credible register. She derived the definition of a register from section 2 of the *Elections Act, 2011* (No 24 of 2011). By this provision, constituency register means:

> " the register of voters compiled in respect of each constituency by the Commission."

Section 2 of the same Act defines the principal register of voters as:

> " a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically."

48 Counsel submitted that section 3 of the Act provides that every citizen will be allowed to exercise their right to vote, subject to article 138(3) of the *Constitution*, if they are registered in the Principal Register of Voters. Based on this provision, learned counsel submitted that there is only one register, the Principal Register of Voters. She further submitted that section 4 of the Act provides that there shall be a register to be known as the Principal Register of Voters, which shall comprise a polling station register, a ward register, a constituency register, a county Register and the register of voters residing outside Kenya. Outside this Register, counsel urged, the law does not provide for any other register. She submitted that there was no provision in the law for a special non-biometric register. Learned counsel submitted that the use of the special register was a violation of the *Constitution* and the law. She also stated that the validity of the Presidential election, and the right to equality and to vote, was infringed by the use of this special register.

49 Further, learned counsel stated that there could be no additions to the Provisional Register as publicized by the IEBC on the December 18, 2012. This is because section 5 of the *Elections*

Act provides that there can be no registration of voters within 60 days of the first general election.

50 Section 6 of the Act provides that after fourteen days from the date of inspection of the register of voters, IEBC is to compile, complete and publish a notice in the gazette, if an amendment of the register of voters is effected. Counsel submitted that the special register of voters with biometrics should have been prepared before the gazettement process, and published thereafter.

51 In the Indian case of *Lakshmi Charansen and others v AKM Hassan Uzzaman and others*,1985 SCC (4) 689 SCALE 384, the Supreme Court considered the question of alterations to electoral rolls. The facts of the case were based on a writ petition filed before the High Court in Calcutta which alleged that the electoral rolls in the state of West Bengal had not been properly revised for the purposes of the general elections. The Supreme Court held that the erroneous inclusion or omission of the names of a few persons may have serious consequences. But if a considerable number of names of such persons are either wrongly included in, or excluded from the electoral roll, it will be of great consequence. The court also held that:

> "It is true as submitted on behalf of the Election Commission, a perfect electoral roll is not possible. But at the same time, it must be remembered that the name of any eligible voter should not be omitted from, nor the name of any disqualified person included in the electoral roll, in violation of any constitutional or statutory provisions. The error, when pointed out, has to be removed."

52 Learned counsel, Mr Oraro took up the issue of a registration book known as the "Green Book," used by IEBC; he urged that such a book was not provided for in law. He submitted that there had been a number of anomalies in voter registration, as in the case of Makueni Constituency, with different figures for registered voters for different elective posts: the total number of registered voters in the Principal Register of Voters is 64,708; for the Presidential seat is 64,708 (as reported by IEBC during declaration of results); for the same position, by Form 36, the figure is 64,525; for the Governor seat, 64,877; for Senator seat, 64,879 and for the National Assembly seat, 64,976.

53 Counsel urged that the election of the President in Makueni Constituency did not meet the test of verifiability, accuracy, or credibility.

54 Miss Kilonzo urged that in polling station No 083 in Kieni Constituency, the total number of votes cast was 321, with 310 for the President-elect. Yet the Principal Register published on the website of IEBC on the February 24, 2013, showed only one registered voter in that polling station. The presiding officer did not indicate the number of people who were

registered to vote in that polling station; and so a question remained as to whether these results were valid.

55 Counsel relied on case law to support her submissions. In the Indian case of *NP Ponnuswami v Returning Officer Nammakal Constituency* (1952) SCR 218, the Baharul Islam J held in a dissenting judgment [at 529 C] that:

> "the basis of a free and fair election is the voters list prepared in accordance with the Representation of People Act of 1950 and the Registration of Voters Rules of 1960. If this is not so done, the electoral rolls will have no sanctity and consequently election will also not inspire the confidence of the people."

56 Learned counsel, Mr Oraro also invoked the Indian Supreme Court case *Narendra Madivalapa Kheni v Manikarao Patil and others,* Supreme Court of India Civil Appeal No 1114 of 1976, where the court had to deal with alterations made to the electors' roll after the roll became final. The court found and held that:

> "there is a blanket ban in section 23(3) on any amendment, transposition or deletion of any [name] or the issuance of any direction for the inclusion of a name in the electoral roll of a constituency [after] the last date for making nominations for an election in that constituency. This prohibition is based on public policy and serves a public purpose. Any violations of such mandatory provision conceived to pre-empt scrambles to thrust into the rolls, after the appointed time, fancied voters by anxious candidates or parties spells invalidity and is in flagrant violation of section 23(3); names have been included in the electoral roll, the bonus of such illegitimate votes shall not accrue, since the vice of voidance must attach to such names. Such void votes cannot help a candidate win the contest."

(ii) The Responses

57 The first and second respondents filed a joint replying affidavit sworn by Ahmed Isaack Hassan on March 19, 2013. At paragraph 7 of the affidavit, the first and second respondents stated that the first respondent, in exercise of its mandate under articles 86 and 88(4) of the *Constitution*, and section 4(m) of the *Independent Electoral and Boundaries Commission Act*, had deployed appropriate technology in the performance of its functions. One of the areas where technology was employed was the registration of voters by use of the Biometric Voter Register (BVR).

58 At paragraph 12 of this affidavit, it is deponed that the Biometric Voter Registration technology was not meant to replace the legally required manual system of voter registration,

but was meant to provide an additional layer of efficiency and integrity in the electoral processes.

59 Counsel for IEBC submitted that this organization, with the concurrence of all line-stakeholders, had opted to use the Biometric Voter Registration technology in carrying out the voter registration exercise. It is submitted that in the process of voter registration, the Commission, in accordance with article 83 of the *Constitution*, put in place appropriate mechanisms to ensure that all persons who presented themselves for registration, were registered as voters. The first respondent referred to article 83(3) of *the Constitution* as the basis for having an all-inclusive voter register.

60 Article 83(3) of the *Constitution* thus provides:

> " Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election."

61 Upon completion of the voter registration exercise, the Commission developed the Principal Register of Voters, which was used in the March 2013 general elections. The first respondent's case sought to rebut three points raised by the petitioners. The first respondent responded to the assertion that the voter registration exercise failed the people of Kenya, because the registration process did not uphold the constitutional and statutory requirements, and fell short of the standards set by international best practice, by compromising the integrity of the voter registration exercise. The first respondent sought to rebut the presumption of the petitioners, that Biometric Voter Registration was meant to replace the manual registration process.

62 What constituted the Principal Register of Voters? In its submissions, the first respondent referred the court to the definition of a Principal Register of Voters as provided under section 2 of the *Elections Act* 2011 (No 24 of 2011). It is defined as follows:

> " a current register of persons entitled to vote at an election prepared in accordance with section 3 and this includes a register that is compiled electronically".

63 It was the first respondent's submission that a register compiled electronically is just a component of the Principal Register of Voters.

64 This submission was further elaborated by learned counsel for the first respondent, Mr Nyamodi who outlined the three components of the Principal Register of Voters, as set out below.

(a) The Biometric Voter Register

65 Mr Nyamodi referred to the affidavit of Dismus Ong'ondi sworn on March 19, 2013, as part of the evidence submitted in the first and second respondents' affidavit to Petition Number 5 of 2013, to define the Biometric Voter Registration System. The deponent described himself as the Director, Information and Technology of the first respondent. He described the BVR as a system that was used to register a voter's ten fingers and capture the face image. The biometrics are captured using this device of registration, comprising a software, a laptop computer, a digital camera and a device to capture fingerprints. The voter's details as required to be captured in law, were taken, and a record of the voter with biometrics was created. The information captured was used in the compilation of the Principal Register of Voters. This explanation was reiterated in the first and second respondents' written submissions.

(b) The Special Register

66 Learned counsel Mr Nyaoga, for the first respondent, urged that article 54 of the *Constitution* articulates the rights of persons with disabilities. It was in respect of this provision, that the special register, besides the biometric register, was developed. Mr Nyaoga emphasised that persons with disabilities are also protected under article 83(3) of the *Constitution*, which prescribes the components of the register of voters. He submitted that such persons are also protected under article 81, which bears the general principles of the electoral system.

67 Mr Nyamodi invoked article 38(3) of the *Constitution*, as an important safeguard for the right to vote. This article stipulates:

> "(1) ....
>
> (2) .....
>
> (3) Every adult citizen has the right, without unreasonable restrictions .....
>
> a) to be registered as a voter;
>
> b) to vote by secret ballot in any election or referendum; and
>
> c) to be a candidate for public office, or office within a political party of which the citizen is a member and if elected, to hold office."

68 Mr Nyamodi urged that the first respondent, by dint of article 88 of the *Constitution*, enjoys the unfettered mandate to organise the conduct of elections and referenda in Kenya and, specifically, to conduct the registration of voters; the first respondent has a free hand in the registration of voters, as provided by article 88 which states:

> "(1) There is established the Independent Electoral and Boundaries Commission.
>
> (2) A person is not eligible for appointment as a member of the Commission if the person—
>
> (a) has, at any time within the preceding five years, held office, or stood for election as—
>
> (i) a member of Parliament or of a county assembly; or
>
> (ii) a member of the governing body of a political party; or
>
> (b) holds any State office.
>
> (3) A member of the Commission shall not hold another public office.
>
> (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
>
> (a) the continuous registration of citizens as voters;
>
> (b) the regular revision of the voters' roll;
>
> (c) the delimitation of constituencies and wards;
>
> (d) the regulation of the process by which parties nominate candidates for elections;
>
> (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
>
> (f) the registration of candidates for election;

(g) voter education;

(h) the facilitation of the observation, monitoring and evaluation of elections;

(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) the development of a code of conduct for candidates and parties contesting elections; and

(k) the monitoring of compliance with the legislation required by article 82(1)(b) relating to nomination of candidates by parties.

(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation".

69 The first respondent in its submissions, urged that voter registration is a critical tool for enforcing universal suffrage, by ensuring that every individual who is eligible to vote is able to exercise his or her right to vote. It also serves the principle of equal suffrage as it guarantees that every voter will cast his or her ballot in parity with all other voters. Accordingly, the special register was a tool aimed at ensuring that there was no disenfranchisement of citizens who had the right to vote. It was the first respondent's submission that the special register was also anchored on article 27 of the *Constitution*, which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. It was, therefore, imperative to ensure that the registration process was inclusive, and provided for measures to include all persons.

70 It was on the basis of such constitutional guidelines, that the first respondent developed the special register. To this end, the first respondent invoked the case of *Georgian Labour Party v Georgia* 9103/04 (2008) ECHR 1888. The court, in this matter, stated thus:

> "The court considers that the proper management of electoral rolls is a pre-condition for a free and fair ballot.
>
> Permitting all eligible voters to be registered preserves, inter alia, the principles of universality and the equality of the vote, and maintains general confidence in the State administration of electoral processes"

71 The special register was meant, according to the first respondent, to serve a certain category of "special" persons:

a) voters with disability: those whose fore-limbs or parts of their fore-limbs were unavailable for the purposes of capturing their biometrics;

b) those who, due to the nature of their work, had either their fingerprints scarred or those whose fingerprints had lost impression and could not be captured.

(c) the elderly, whose fingerprints, due to the decrease in elasticity of their skin, could not be captured;

d) twelve persons from Soi Constituency who had been registered using the training codes and who had to be added to this register.

72 Mr Nyamodi, submitted that, over and above the biometric and special registers, the primary data entry point, which was done by hand, was the Green Book, otherwise known as the Primary Reference Book. He elaborated that upon the completion of the voter registration exercise, there emerged a need to clean up the register to eliminate persons who had registered more than once, and persons who had not used the requisite documents for registration, namely, a valid passport, or a personal identity card. This clean-up exercise created the duplicate register and the exceptional register. The persons in these two registers were not allowed to vote.

73 Counsel referred the court to the affidavit of Immaculate Kassait, who elaborated the process of voter registration. The deponent swore the affidavit as the Director, Voter Registration Programme of the first respondent. The deponent makes the following averments:

a) The Commission used a limited number of BVR kits which necessitated the sharing of these devices between polling stations within the same county.

b) It was a requirement that any person registering as a voter should state their preferred polling station.

c) In the course of registration, some voters were inadvertently assigned the wrong polling stations.

d) To correct these errors, the Principal Register of Voters was opened for inspection and verification to the Public, pursuant to the provisions of section 5 of the *Elections Act*.

e) The Commission then ordered a complete audit of the Principal Register, as against the Green Book which was the primary entry of data.

f) The persons assigned the wrong polling stations were then assigned the correct ones, as indicated in the Green Book, and these transfers factored into the Principal Register of Voters.

g) This verification exercise naturally resulted in a variation between the number of registered voters in the provisional register and the Principal Register.

h) On February 18, 2013, the Commission held a meeting in which it realised that the provisional register was only about 99.5% accurate, as it did not contain several names that had been captured in the Green Book, which was the primary reference document; for in some instances, the BVR kits had either been damaged or dis-configured and could not relay the data captured in them.

i) The Commission, in a bid to ensure that all the persons who had presented themselves for registration were not disenfranchised owing to the failure of the BVR kits, resolved to allow the persons in these special circumstances to vote, upon verification of their data.

j) The Commission certified the Principal Register, subject to this resolution. Minutes of the Commission's meeting with respect to this meeting were provided.

k) This resolution was communicated to the political party agents by the Commission Liaison Committee.

l) The use of the Green Book in the affected polling stations resulted in an upward variation in the registered voters at the affected polling stations.

74 The first respondent in its submissions, stated that the figure of 14,337,399 registered voters was a provisional figurewhich did not include the persons without biometrics, duplicates, exceptionals; and data not yet collected from BVR kits around the country. The special register contained a list of 36,236 individuals. There was also a further correction of 30,000 voters who were excluded from the main register due to operator-errors to do with double entry, and 13,237 of these were added to the main register. In Soi, twelve people were excluded from the main register, as they had been added onto the system through a test account, but were later transferred to the main register. The total number of registered voters across the country was, therefore, 14,352,545. In certain polling stations, such as NCC and Ngong, there was voter movement occurring before the polling date, due to operator- error. The total number of registered voters in this register was, therefore, 14,352,284. The variance between the two main operational registers is 261, a margin of error of 0.0018% which, according to the first respondent, can be considered materially insignificant.

75 Were alterations made to the Voter Register after the certification of the Register? Mr Nyamodi submitted that alterations or additions may have been made after the February 18,

2013. He added however that these alterations were made pursuant to the Commission's mandate under regulation 12(3) of the Elections (Registration of Voters) Regulations, 2012:

> " Regulation 12(3) states that the Commission may amend the Register of voters after it is certified to the extent necessary to reflect the result of determination of any claim, or appeal that was pending at the time the register was certified".

76 According to the 1st respondent, this regulation empowers the Commission to amend the register even after the certification, in view of the 100% audit, and the verification process which took place.

77 Mr Nyamodi submitted that the Principal Voter Register existed, and was determinable and verifiable. He submitted that the decisions made by the first Respondent to come up with the Voter Register was done so as to ensure that all the persons who had presented themselves to register as voters before the deadline, got an opportunity to vote and exercise their rights under articles 38(2) and (3) of the *Constitution*.

78 The case of the 2nd respondent was advanced by learned counsel Mr Ahmednassir Abdullahi and Mr Kamau Karori, who took turns in making submissions. The 2nd respondent urged this court to exercise judicial restraint in the discharge of its mandate, in the sphere of Presidential election disputes. Mr Abdullahi focused his attention on the broader issues of judicial adjudication in the political and constitutional domains. (These arguments are analysed further on).

79 The 3rd respondent asked the court to note that there were six different elections held on the same day, including that for the office of the President: and that the requirements of registration applied equally to all.

80 Mr Ngatia, learned counsel for the 3rd respondent, submitted that it was a principle guiding the preparation of the Voter Register, that the 1st respondent should make every effort to ensure that all qualified citizens of Kenya are able to register as voters, and able to vote during elections and referenda. He specified the relevant provisions of the law: Articles 10(a), 10(b), 38(3)(a), 88(4)(a), 138(3)(a) of the *Constitution*, which also express the values and principles of democracy and the participation of the people.

81 The 3rd respondent maintained that the Independent Electoral and Boundaries Commission had conducted its affairs in a transparent manner, by issuing press statements, and availing on its website notices and information regarding all aspects of the electoral process, including the registration of voters.

82 The 3rd respondent asserts that as far as he is aware, the Principal Register of Voters established under section 4(1) of the *Elections Act*, was prepared in full compliance with the provisions of that Act, and the *Elections (Registration of Voters) Regulations, 2012*.

83 Winifred Guchu, in her affidavit in support of the 3rd respondent's response, averred that all stakeholders in the electoral process, including the petitioner and his party ODM, had participated in, and were fully informed by the first respondent about the voter registration exercise and the various steps taken to assure the integrity, accuracy, impartiality, efficiency, simplicity and security of voter registration.

84 She further avers that on the basis of the aforesaid assurance, the Jubilee Coalition and the CORD Coalition used the voter register prepared by the 1st respondent to conduct nomination of candidates as stipulated in part III of the *Elections Act, 2011*, 2011.

85 Of the petitioner's claim that the 1st respondent had maintained multiple registers, this respondent averred that he used only one Voter Register, during the elections held on March 4, 2013, which had copies extracted from the Biometric Voter Registration system.

86 The 3rd respondent averred that the 1st respondent had taken robust steps to involve members of the public, and the Political Parties, in verifying the integrity and accuracy of the Voter Register – including the publication of a notice dated February 18, 2013 informing all stakeholders that the compilation of the Principal Register of Voters had been completed.

87 Ms Guchu averred that the 1st respondent published a notice informing the public that it would hold countrywide public sensitization on the use of the BVR kits on November 12, 2012 at several venues; and that it would release the data extracted from the Voter Register. This data was set out in various forms to provide voter numbers in all polling stations, and to give statistics of voters without biometrics per constituency, as well as a detailed voter registration analysis, and details with regard to expected daily enrolment for the period between November 19, 2012 and November 26, 2012.

88 Ms Guchu avers that all political parties received a copy of the provisional register of voters in the form of a CD-ROM, which she annexes to her affidavit, together with the e-mail communications by the 1st respondent to political parties. And she deposes that in one of the meetings, all political parties agreed that in the event of failure of the electronic voter identifying device (EVID), the print-out from the electronic register would be used in the election. The print-out would be made available at every polling station.

89 Ms Guchu adds that in yet another meeting, the political parties complained that some of their supporters had encountered difficulties with the register during the nomination exercise. Their complaints were that some names were missing from the electronic register, while they had registration acknowledgement-slips from the 1st respondent. The 1st

respondent explained that these were names of people whose biometric details had not been captured, or were captured but subsequently lost. Those details were retained in the manual register.

90 The 1st respondent subsequently provided all the political parties with a complementary list of registered voters capturing the details of all the voters whose biometrics were missing. The complementary list of this category of voters had a total of 36,236 registered voters. There was no objection from any political party concerning this complementary register.

91 Ms Guchu deposes that the allegation in Janet Ong'era's affidavit in support of Petition No 5 0f 2013, to the effect that the Voter Register was tampered with after the registration period had ended, so as to confer a benefit upon the 3rd respondent, is not truthful.

92 The 3rd respondent, in his affidavit, recounts the occasion of a press briefing at a meeting chaired by the Coalition for Reforms and Democracy's (CORD) Presidential candidate, in which that party urges that IEBC should revert to a manual voter registration process, since the electronic system appeared to be unreliable. The 3rd respondent submits that the petitioner cannot, in the circumstances, claim the IEBC deliberately set up the electronic system to fail.

93 The 3rd respondent seeks to rely on the opinion of the Canadian High Commissioner which indicates that the IEBC had considered preparing a manual voter registration system after the procurement of the BVR system became contentious. He further submits that the Cabinet, supervised by the petitioner in Petition No 5 of 2013, had set up a committee to assist the IEBC to procure the BVR system within a short time-frame.

94 He avers that registration of voters in Kenya is manual, since a person walks to a registration centre to register himself or herself, and such registration is not done electronically.

95 Counsel for the 3rd respondent invoked the Ugandan case of *VK Bategana v EL Mushemeza,* Election Petition No 1 of 1996 (HCU) (unreported), in which non-compliance with certain provisions of the Parliamentary Election (Interim Provisions) Statute, 1996 was held not to affect the results of the election. The non-compliance in that election included failure to display the Voters' Register, and voting by persons not registered.

96 Mr Katwa Kigen, learned counsel for the 4th respondent, submitted that a "register" cannot be treated as a record cast in stone; it should, instead, be perceived as an instrument used by the 1st respondent to ascertain the number of registered voters eligible to vote, and it need not be one register. He submits that article 38 of the *Constitution* entitles every adult citizen to be registered as a voter, and to vote.

97 Mr Kigen further submitted that, in accordance with article 83(3), of the *Constitution*, administrative structures set up for purposes of the conduct of elections, should not deny

a person the right to vote. He further urges that article 138 (3)(a) stipulates that all persons registered as voters are entitled to vote in the elections.

98 Mr Kigen submitted that all persons involved in the process of ensuring that implementation of the electoral laws, including IEBC, are required to ensure that an individual who registered to vote and who presents himself or herself to vote on the day of the elections, is given an opportunity to do so.

99 Mr Kigen submitted that the Voters' Register is compiled under s 4 of the *Elections Act*, whereas the registration and revision process is governed by s 5 of the same Act. These two provisions are, however, subject to the provisions of the *Constitution*.

100 Mr Kigen submitted that the definition of the Principal Register of Voters under section 2 of the *Elections Act*, indicates that the register contemplated is not one register, but rather, several registers. The 4th respondent avers that the provisions relating to registration of voters do not indicate that for a person to exercise his or her right to vote, his or her name must be in the "Principal Register."

101 Further, the 4th respondent submitted that the register must be current, must facilitate voting by electors, and includes a register that is electronically compiled. Mr Kigen noted that the word "include" infers that it is not one register that is contemplated by section 4 of the *Elections Act*, which provides that there shall be a Principal Register of Voters that shall "comprise of" a poll register in respect of every polling station, a ward register in respect of every ward, a constituency register in respect of every constituency, a county register in respect of every county, and a register of voters for persons residing outside Kenya. He avers that there are five registers contemplated, and that the argument that there exists only one register, is not founded in law.

102 The 4th respondent averred that IEBC discharged its obligations and acted in good faith, to ensure that the elections were transparent, participatory and inclusive, by maintaining an up-to-date website, and engaging in consultations with all political parties, including the petitioner's party, ODM.

103 Mr Kigen invoked the Zambian case of *Anderson Kambala Mazoka v MwanawasaScz/* Ep/01/02/03/2002, in which the court held that every person entitled to vote must be given an opportunity to vote, if he presents himself at the polling station. Counsel submitted that every person registered as a voter is entitled to vote, and that the petitioners must adduce credible evidence establishing the wrong-doing they allege, with regard to the register and the registration process.

104 The 4th respondent submitted that the test applicable is whether a majority of the voters were prevented from voting for their preferred candidate, and whether the election was so flawed,

or a dereliction of duty by the 1st respondent so seriously affected the result, that it could no longer be reasonably said to reflect the free choice and will of the majority of the voters.

F. Electronic Support for the Electoral Process: Its Role in the Validity of the Presidential Election

(i) The Petitioners' Case

105 The petitioners' claim is that all the electronic processes adopted by IEBC failed. After the failure, they allege, the respondent resorted to manual systems, in contravention of the law. The central claim revolves around the transmission of results, where both petitioners claim that section 39 of the *Elections Act 2011* (No 24 of 2011)as read with regulation 82 of the Elections (General) Regulations, 2012 create a mandatory obligation for the electronic transmission of results. Section 39 of the Elections Actstates that:

> "(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.
>
> (2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.
>
> (3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed".

106 Rule 82, *Elections (General) Rules, 2012* provides for the obligation to transmit provisional results electronically:

> "(1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.
>
> (2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 73".

107 Both petitioners argue that, without electronic transmission, there can be no basis for verification – since verification involves comparing the provisional results with the final tallies. They contend that the susceptibility of the electoral process, as conducted, to manipulation and corruption was all by design, calculated to ensure the 3rd and 4th respondents triumphed in the Presidential Election.

108 On the BVR, the 1st petitioner makes the claim that due to a botched procurement process, procurement was taken over by Government. This, he states, led to the loss of independence from the Executive by IEBC. With regard to EVID (Electronic Voter Identification), he claims that the procurement of the kits was the result of an illegal procurement process; and this led to the procurement of faulty kits that were bound to fail on election day, as indeed they did. He claims that IEBC abandoning EVID at the polling stations, "prevented millions of voters [from having] their votes counted accurately." This, he claims, was in direct derogation of regulation 69 of the *Elections (General) Regulations, 2012*, which states:

> "(1) before issuing a ballot paper to a voter, an election official shall—
>
> (a) require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;
>
> (b) ascertain that the voter has not voted in that election;
>
> (c) call out the number and name of the voter as stated in the polling station register;
>
> (d) in case of an electronic register, require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter once the image has been retrieved..."

109 The 2nd petitioner contends that the electronic voter registration (BVI) and Identification (EVID) systems comprise of a foolproof register of voters; it should automatically subtract from the main register voters who have voted, thus providing a running tally of votes cast. Biometric Registration of Voters has its basis in the *Elections (Registration of Voters) Regulations, 2012*, regulation 13, which provides for the capturing of the biometric data of a voter, such as the palm-print and facial impressions:

> "(1) A person who is not already registered as a voter but who wishes to be so registered shall make an application in Form C set out in the Schedule.
>
> (2) An application under subregulation (1) shall be made to the registration officer for the constituency in which the person wishes to be registered.
>
> (3) The registration officer shall, for the purpose of registration, collect such biometric data which include palm print and facial impressions

of the persons applying for registration, as the Commission may determine."

110 The second petitioner states that the BVR system should be centrally integrated [networked], to ensure multiple voting is rendered. She contends that IEBC's approach of downloading piecemeal, portions of the biometric register into laptops, leads to uncertainty as to what register was so downloaded. Without these safeguards, she contends, there was nothing to stop double voting.

111 Through her learned advocate, Ms Kethi Kilonzo, the second petitioner states that the electronic transmission of results generated a vote-count that maintained a consistent, spurious gap between the two leading presidential candidates. She contends that it is scientifically impossible to maintain such a consistent disparity in results that are being randomly relayed. She also states that the "rejected votes" generated were so considerable in numbers as to be inaccurate. She contends that IEBC occasioned undue delays in publicly acknowledging the evident failures in the electronic transmission system. In support of her contentions, she points to the daily Press article by M/s. George Kegoro and Wachira Maina, that basically affirms this position.

112 Ms Kilonzo also relies on an Indian case, *AC Jose v Sivan Pillai & others* 1984 AIR 921, to support the contention that, where certain requirements are prescribed by an Act, and its Rules, IEBC was not at liberty to derogate from such rules, or exercise any discretion. In the case in question, the Supreme Court of India stated:

> "(a) When there is no Parliamentary legislation or rule made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections [86 H].
>
> (b) Where there is an Act and there are express rules made thereunder, it is not open to the Commission to over-ride the Act or the rules and pass orders in direct disobedience to the mandate contained in the Act or the rules. The Powers of the Commission are meant to supplement rather than supplant the law (both statute and rules) in the matter of superintendence, direction and control as provided by article 324 [87A-B].
>
> (c) Where the Act or the rules are silent, the Commission has no doubt plenary powers under article 324 to give any direction in respect of the conduct of election [87C].
>
> (d) Where a particular direction by the Commission is submitted to the government for approval, as required by the rules, it is not open to

the Commission to go ahead with implementation of it at its own ... will even if the approval of the government is not given" [87D].

(ii) The Responses

113 All respondents argue that IEBC is not required by the *Constitution* or the law to establish and conduct an electronic election process as alleged by the petitioner. The processes of voting, counting and tallying and transmitting of the final results are required and designed by law as manual processes, contrary to the allegations of the petitioner. This is supported by rule 59 and 60 of the Elections (General) Regulations, 2012, which state:

'59. .....

(2) A voter shall cast his or her vote by the use of a ballot paper or electronically.

.....

"60. Where the Commission intends to conduct an election by electronic means, it shall, not later than three months before such election, publish in the gazette and publicise through electronic and print media of national circulation and other easily accessible medium guidelines that shall apply in such voting."

114 The respondents all contend that IEBC has a discretion under section 44 of the *Elections Act*, to deploy appropriate technology as it deems fit, in the administration and management of elections. Section 44 provides:

> "The Commission may use such technology as it considers appropriate in the electoral process."

115 The respondents urge that section 4(m) of the *Independent Electoral and Boundaries Commission (IEBC) Act, 2011* (No 9 of 2011), reiterates this discretion:

> "As provided for by article 88(4) of the *Constitution*, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the *Constitution*, and any other elections as prescribed by an Act of Parliament and, in particular, for —
>
> .....
>
> (m) the use of appropriate technology and approaches in the performance of its functions...."

116 Consequently, according to the respondents, there was no legitimate expectation that the Commission should make use of any technology in voting, ballot counting, transmission, tallying and declaration of the results.

117 The respondents state that, contrary to the averments of the petitioners, technology was never envisaged by the 1st respondent as the sole means of registering voters, of identifying them on voting day, or in the transmission and tallying of results. Electronic Technology is utilized in the elections as part of other numerous checks and controls built in the entire electoral process, to ensure that the 1st respondent fulfils its mandate under article 81 of the *Constitution*, to deliver free and fair elections. Technology, they argue, is not a replacement or alternative to the manual voting, counting, tallying and transmission processes, that are expressly required by law. Further, the respondents contend, the petitioners also misunderstand the policy and legal framework regarding the use of technology.

118 The respondents submit that all the allegations by the petitioners have not stood the test of scrutiny, in light of the pleadings and evidence produced. The 1st and 2nd respondents specifically submit that the technologies deployed in the election experienced challenges, but all such challenges were not catastrophic, as alleged, and did not impact negatively on the outcome of the elections.

119 The 1st and 2nd respondents contend that EVID worked well in a majority of the polling stations, alongside the manual process. Furthermore, they state that RTS, as a check-and-control mechanism, worked considerably well, as, out of a total of 31,025 polling stations, it did transmit results for all six elective stations as follows:

a) 14,232 (45.9%) polling stations sent results for the Presidential election;

b) 7,082 polling stations sent results for the Senators' elections;

c) 6,892 polling stations sent results for the Governors' elections.

d) 9,397 polling stations sent results for the Members of the National Assembly election;

e) 7,968 polling stations sent results for the County Ward Representatives election; and

f) 7,428 polling stations sent results for the Women's County Representatives election.

120 By the evidence, therefore, the technologies assisted in upholding, rather than vitiating, the will of the Kenyan people. Contrary to the allegation that the failure of the BVR/BVI devices prevented millions of voters from having their votes counted accurately, it is the 1st respondent's response that the BVI/BVR set-up was not designed to electronically count votes.

121 On the allegation that IEBC abandoned the process of electronic voting, the 1st and 2nd respondents state that there is evidence, the 1st respondent reconfigured the server that had been unable to receive results transmitted by the presiding officers. However, at the time of restoration of the server, the presiding officers had already handed over their tallies and phones to the returning officer, in accordance with regulation 73(4) of the *Elections (General) Regulations, 2012*. They also contend that IEBC had engaged the public and the 1st petitioner's political party and his agents on the emerging challenges. They state that RTS was designed to transmit provisional results, in accordance with section 39(2) of the *Elections Act, 2011*, but not the final result. They state that the lessons learnt from the several challenges, will provide a basis for strengthening the electoral process further. Although the technologies used experienced certain impediments, it was urged, EVID and RTS had no effect, material or immaterial, on the validity of the Presidential election. Learned counsel Ms Lucy Kambuni for IEBC, indeed, relies on the same case cited by counsel for the 2nd petitioner, *AC Jose v Sivan Pillai & others* (*supra*),for the contention that, because of the discretion conferred by the *Constitution* and the election laws, the IEBC had plenary powers to decide on its administrative arrangements.

122 Senior counsel Ahmednassir Abdullahi, for the 2nd respondent, complained that the petition before the court was not one that usually arises in the context of Third World countries. He is categorical that this is a 'First World Complaint', mainly dwelling on technological failures, possibilities and challenges. He cites two cases from the Supreme Court of the Philippines. (GR Number 188456, *H Haary L Roque, JR and others v Commission on Election,* 2009 and GR No 194139 *Douglas R Cagas v The Commission on Elections,* 2012). In both cases, the plaintiffs had based their claims on fears which they had, sparked by potential abuse and breakdown of technology, and the effect of this on the integrity of the electoral system. The court remarked:

> "If the machines failed for whatever reason, the paper ballots would still be there for hand counting, and manual tabulation and transmission of the ER's. Further, that the court would not guarantee as it cannot guarantee the effectiveness of the voting machines and the integrity of the counting and consolidation software embedded in them."

(123) Counsel for the 3rd respondent submits that electronic systems failed in the Ghana general elections of 2012; and also in the United States Presidential election in 2000. Indeed some States such as New Mexico have voted to convert from an electronic system back to the paper system. Counsel therefore applauds our laws, as they give IEBC a wide latitude to determine whether to use electronic electoral systems. Thus, the petitioners cannot claim that the use of technology was the essence of the elections.

124 Learned counsel for the 4th respondent, Mr Katwa Kigen, avers that IEBC in various meetings before the elections of March 4, 2013 informed all political parties, including the petitioner's party and its coalition partners, that since it was deploying BVI for the first time across the whole country, a paper- register fallback was available, to ensure that no voter would be disenfranchised, in the event that technology failed. Such an arrangement is validated by the provision of section 83 of the *Elections Act*, 2011, which deals with situations in which there is non-compliance with a written law:

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

125 Mr Kigen submitted that the allegation that there was a plot to ensure failure of the electronic system deployed in the Presidential election, was not supported by evidence.

(iii) Analysis

126 The question of electronic facilitation of the presidential election is the most technical one, raised by the parties. It is governed by a detailed set of legal provisions and regulations. It raises the vital question: What is the act of voting that is the entitlement of every voter, as enshrined in the *Constitution*?

127 Counsel for the petitioners appear to advance the position that the act of voting is the totality of the electoral process. Therefore, a weak link in the chain ensures total collapse. They go further and contend that the chain was made up entirely of weak links, and that this eroded the casting of the ballot, thereby nullifying the electoral process.

128 Counsel for the respondents, by contrast, advance the position that the act of voting is a galaxy, whose central sun is the signifying of one's choice by the marking of the ballot paper, and its subsequent deposition into the ballot box. Every other process before and after, revolves around this procedure, and involves only the ascertaining of the voter's choice, and the sustaining of the voter's right to make that choice. Counsel provides cases from the Philippines, that hold that even if there was a failure of all other support processes (in particular electronic ones), the right to vote and to express one's self in universal suffrage is not defeated. Manual procedures must come into operation, to fulfil the electors' expression of choice.

129 Article 38(3) of the *Constitution* provides safeguards for the right to vote in a free and fair election, and the right to be registered as a voter. These two rights give life to every other subsequent procedure, including the constitutional creation of the IEBC, and the

procedures to be used in registration, voting, transmission, tallying and verification of the results. To concretize this position, article 83 states that administrative procedures to be undertaken by IEBC are to facilitate, and not to deny an eligible voter the right to vote. This consideration must therefore be the foundation of all interpretations made to the law by IEBC, and all Courts sitting in appeal from the decisions taken by IEBC.

130 Is electronic facilitation for the election mandatory, or discretionary? The Indian case of *AC Jose v Sivan Pillai & others* 1984 AIR 921, cited by both the petitioners and the IEBC, is a case in point. The Supreme Court of India defined the concept of "plenary power" (administrative measures in article 83): powers available to a body to create operational rules where none existed. However, where a body of law already regulated the subject, it was not up to the discretion of the public entity to create any additional measures that derogated from the law.

131 An objective reading of the regulations cited, does not reveal a contemplation of elections conducted solely by electronic means. The elections of March 4, 2013, were not envisaged to be conducted on a purely electronic basis. Regulation 60 of the *Elections (General) Regulations, 2012*, illustrates that if the elections are to be facilitated by electronic means only, the relevant guidelines shall be availed to the public. Regulation 59 provides that voting is done by marking the ballot paper, or electronically. Thus, the voting system envisioned in Kenya appears to be manual. Regulation 82, and section 39 of the *Elections Act*, which deal with electronic transmission, operate on the basis that electronically transmitted results are only provisional. Can there, therefore, be an invalidation of final results, because of the non-transmission of provisional results?

132 The petitioners assert that this is so. Provisional results, for them, are the basis of verification of results. The respondents, by contrast, assert that this is not so. Verification, for them, means comparing the final results on Form 34 from a polling centre with Form 36 at the National Tallying Centre. Their contention appears to be supported by article 86(c) of the *Constitution*, describing the procedure of verification as the collation and announcement of results by the Returning Officer (Chair of IEBC), based on results from polling stations.

133 It is rightly argued by the respondents, in our opinion, that the court must be alive to the fact that most polling stations are in the rural areas, where the primary-school polling stations are dilapidated, and the supply of electricity, to-date, is a distant dream. Yet voters still go to such polling stations to exercise their right to vote, and to discharge their civic duty. Of this fact, the court will take judicial notice, in deciding whether Presidential elections can be invalidated due to non-compliance with regulations requiring electronic transmission.

G. Vote Tallying: Did It Reflect Voters' Choice in the Presidential Election?

(i) Petitioners' case

134 The crux of the 1st petitioner's case as expressed in the introduction to his written submissions, is that the 3rd respondent who was declared President-elect by the 2nd respondent, did not meet the threshold set out in article 138(4) of the *Constitution*. The basis of this assertion by the petitioner is that, upon an evaluation of the evidential materials in Forms 34 and 36, used in the final tally of the Presidential election results, there were serious anomalies affecting the final results, as declared by the 2nd respondent.

135 According to the petitioners, the tallying exercise was marred by irregularities, as set out in both written and oral submissions as, follows:

i material alteration of primary documents used in the tallying and verification exercise;

ii. mismatch between the presidential election results tallied and the total number of registered voters in various constituencies and polling stations;

iii inflation of presidential election results of certain presidential candidates, particularly the 3rd respondent;

iv. deflation of presidential election results of certain presidential candidates, particularly the 1st petitioner;

v. exclusion of presidential candidates' agents and accredited observers from the National Tallying Centre;

vi. total failure and inaccuracy of the results-tallying and verification system, occasioned by the departure from the electronic transmission of results to the manual tallying system.

(a) Material Alteration of Primary Documents used in the Tallying and Verification Exercise

136 The issue of tallying was largely dealt with by way of evidence in the depositions and attachments, as regards both Petition No 4 and Petition No 5. In relation to Petition No 5 of 2013, the issue is covered in the affidavit of Janet Ong'era, sworn on March 15, 2013. At paragraph 48 of this affidavit, the deponent avers that one of the glaring anomalies was the alteration of the statutory documents on the files of many constituencies. This evidence is used by counsel to advance the submission that, based on these alterations, the accuracy of the final tally of the Presidential election results also stood in question.

137 In Petition No 5 of 2013, specifically at paragraph 5.9, the petitioner contended that, the final Presidential election results published by IEBC were materially different from results reflected in the county tally. He gives the example of Nakuru County. In other cases, the deponents averred that there were material alterations between the verbal declaration of results made by individual Commissioners of the 1st respondent at the National Tallying Centre, and the final figures issued by the 1st respondent, especially in the following areas: South Imenti, Igembe South, Lagdera, North Imenti, Central Imenti, Bomet East, and Sigor.

138 Counsel for the 1st and 2nd petitioners, submitted that in Makueni Constituency, the number of registered voters differed between the results for the Presidential, Governor, Senator, and Member of National Assembly elections.

(b) Mismatch between the Presidential Election Results Tallied, and the Total Number of Registered Voters in Various Constituencies and Polling Stations.

139 The petitioner, by paragraph 51 of the affidavit of Janet Ong'era, indicates a cluster of 26 polling stations where the number of valid votes cast exceeded the total number of registered voters. In effect, the petitioner was inviting the court to hold that the elections in those polling stations were rendered invalid, on account of the said discrepancy.

(c)Inflation of Presidential Election Results of Certain Presidential Candidates, Particularly the 3rd Respondent

140 The 1st petitioner submitted that there were instances where the 3rd respondent's votes were inflated. Mr Oraro, learned counsel for the 1st petitioner, drew the court's attention to a comparison of entries in Form 34 with the corresponding entries in Form 36, for certain polling stations. At pages 23-24 of the petitioner's written submissions, there is an indication of the polling stations where such variance existed, resulting in a difference of 1,451 votes. According to the petitioner, the 3rd respondent's votes were also inflated by 7,215 votes, going by the final national tally published by the 1st respondent.

141 The 2nd and 3rd petitioners also submitted that the results announced for the respective Presidential election candidates at the County level in Nyeri and Bomet, were different from what was announced at the National Tallying Centre. In support of this allegation, the petitioners relied on a video recording by one Anthony Mathenge in respect of Nyeri County. The audio-visual recording was played in court during the oral submissions by learned counsel, Ms Kethi Kilonzo.

(d) Deflation of Presidential election results of certain presidential candidates, particularly the 1st Petitioner

142 The 1st petitioner also averred that his votes were deflated by 11,000 votes. Details of the affected polling stations were summarized in the 1st petitioner's submissions. However, this evidence was introduced at the submission stage, and did not form part of the primary Petition records – a fact which occasioned valid objection from counsel for the respondents.

(e) Exclusion of Presidential election candidates' agents and accredited observers from the National Tallying Centre

143 Learned counsel for the petitioners submitted that all the Presidential election candidates' agents were asked to leave the tallying room at the National Tallying Centre. The 1st petitioner relied on the affidavit of Prof Lawrence Gumbe, dated March 14, 2013 to advance this assertion. Further, by the 1st petitioner's submissions, the fact that the said agents were allowed twenty minutes of verification had no significance, as verification should have been done using Form 34, and not Form 36 as directed by the 1st respondent. In the submissions, the 1st petitioner states that the party agents were ordered out of the National Tallying Centre and taken to an adjacent boardroom. The 1st and 2nd petitioners in Petition No 4 of 2013, jointly referred to as the 2nd petitioner, also submitted that even accredited observers were not allowed into the National Tallying Centre. However, on the basis of the evidence of Janet Ong'era, it was submitted that Mr Chirchir of URP, and a Ms Winnie Guchu of TNA were periodically allowed access into the National Tallying Centre, to the exclusion of other agents. The overall submission was that the verification process was contrary to law, as it was carried out unilaterally by the 1st respondent.

(f) Failure and Inaccuracy of Results-tallying and Verification System, Occasioned by the Departure from Electronic Transmission of the Results, to Manual Tallying System

144 The 1st petitioner avers that the 1st and 2nd respondents reverted to a manual tallying system, which was a discredit and an abuse of the electoral system, as it lacked transparency, accuracy and accountability, and had been subject to manipulation by officers of the 1st respondent.

145 In the affidavit of Janet Ong'era [at paragraph 36], it is deponed that for purposes of facilitating the process of manual tallying, the political parties' representatives and the IEBC representatives had agreed that they would obtain Form 34 from each Constituency and confirm that: the name of the polling station indicated had been duly gazetted; the form had been signed by the agents and the returning officers; and it had the 1st respondent's stamp. Selected agents from political parties would then verify the figures in terms of registered voters, votes cast and rejected votes, and they would thereafter signify their agreement, with

or without qualification. An aggrieved party was entitled to raise a complaint with the 1st respondent.

146 The 1st petitioner has also relied on the Independent Review Commission ("IREC") Report which recommended that the defunct Electoral Commission of Kenya (ECK) adopts certain safety features in respect of counting and tallying of votes. The recommended safety feature, according to the petitioner, is Form 34; but IEBC has, in addition, introduced Form 36.

147 IREC had also recommended computerized data-entry and tallying at Constituencies, to secure simultaneous transmission of individual polling-station level data, to the National Tallying Centre, as well as the integration of this result-handling system in a progressive election-result announcement.

148 Another recommendation was to allow sufficient time before the declaration of final results. It was anticipated that all parties concerned would have an opportunity to consider the returns made, and to express objection if need be; and thereafter, results would be announced.

149 The petitioners have further submitted that the BVR kit, which the 1st respondent abandoned, was supposed to provide a running tally of votes cast, to prevent multiple voting. They aver that the 1st and 2nd respondents did not put in place sufficient measures to ensure the accuracy of vote-count, after the failure of the electronic results-transmission system.

150 The petitioners have relied on article 138(c) of the *Constitution* which provides that, after the counting of votes at the polling station, the IEBC shall tally and verify the count, and declare the results. Section 44 of the *Elections Act* permitted the 1st respondent to use appropriate technology, as it deemed necessary.

151 Counsel for petitioners, Ms Kethi Kilonzo submitted that the counting and tallying of votes was not open, diligent or responsive, and that Returning Officers, presiding officers and County Returning Officers, were using different numbers of registered voters from that contained in the Principal Register.

(ii) Responses

152 The 1st and 2nd respondents maintain that the counting, tallying, transmission and declaration of results was efficient, accurate, accountable, lawful, and a true representation of the will of the people, based on universal suffrage. The statutory violation and irregularities ascribed to the election outcome are denied; and the allegation of excess numbers of votes cast in favour of the 3rd respondent, is said to be unsubstantiated.

153 The 1st and 2nd respondents maintain that, they went well beyond the thresholds of the *Elections Act*, and regulation 83 of the *Elections (General) Regulations, 2012*, and established

an elaborate audit process, which included: a two-step audit process to examine returns, and a verification team to counter-check the audit findings. In addition, all Returning Officers were required to personally deliver the Presidential election results at the National Tallying Centre in Nairobi.

154 The "regional teams" received from the Returning Officer the Form 34s for presidential election, and Form 36 on both hard and soft copies. The teams would then run a sanity test to ensure that the number of valid votes cast, and the rejected votes amounted to the total vote cast, and that the total number of votes cast for all candidates equalled the total number of valid votes cast; any errors found were rectified.

155 After this 1st review, the 1st and 2nd respondents stated that the returning officer was referred to the verification team, which checked the Form 34 and Form 36. This team made changes if necessary, certified that the results were proper, and forwarded a new Form 36 for signature by the returning officer and the Verification Team leader. The party agents were then given the Form 36 to counter-check. The respondent further stated that a Summary, and the Form 36, was forwarded to the Commissioners, who would check them again before announcing the results.

156 After the announcement by the Commissioners, the Form 36 would be given to a team of two electoral officers who would again verify, and input data from Form 36 into a spread-sheet, for the final Presidential election results.

157 The 1st and 2nd respondents aver that IEBC maintained the use of the primary manual electoral processes, which were not in any way challenged, and constructively engaged the political parties in the process of voting, counting, transmission, tallying and announcement of results.

158 The respondents averred that IEBC had held a consultative meeting with the chief political party agents, and agreed with them on modes of verification of Presidential election results brought to the National Tallying Centre by Returning Officers. Subsequently the chief agents of political parties were, from Wednesday March 6, 2013 indeed, allowed to enter the tallying room and to observe the tallying of the Presidential election results.

159 The 1st and 2nd respondents aver that sometime in the evening of March 6, 2013 the political party agents inside the tallying room became rowdy, and precipitated altercations with the Commission staff undertaking the tallies, and in some instances, threatened to assault the staff. This situation made it impossible for the Commission to continue undertaking its tallying exercise, prompting the Commission to relocate the political party agents to a boardroom in the auditorium, within the National Tallying Centre. Each of the final tallies (Form 36) were presented to the political party agents at the said boardroom, 20 minutes

before the announcement of results to the public. The political parties would then undertake the verification of the Presidential election tallies, before they were announced.

160 The 1st and 2nd respondents' aver that the process of tallying as contemplated under the *Constitution*, the *Elections Act* and the governing regulations, is primarily a manual system, and not an electronic process.

161 The respondents maintain that there are no constitutional or statutory violations, or widespread irregularities and malpractices that occurred; or that the votes were wrongly credited to the 3rd respondent, or any other candidate. They urge that there is no basis for seeking a nullification of the election outcome, as sought by the petitioner, and that the 3rd respondent was lawfully declared President-elect, pursuant to article 138(4) of the *Constitution*.

162 In their submission, the 1st and 2nd respondents state that the allegations made as regards the tallying and tabulation, contained in Janet Ong'era's affidavit, is not factually correct, and disregards the various important elements of the Register. They explain this by stating that the quoted figure of 14,337,399 registered voters was a purely statistical entry, accumulated at the end of the voter registration exercise; that this figure did not include persons whose biometrics could not be captured, or other exceptional cases. Further, the respondents' advocates faulted the petitioner for randomly selecting the 3rd and 4th respondents' strongholds in his data scenario implying irregularity in the electoral process.

163 The 1st and 2nd respondents contend that the petition is premised on a misconception of the Principal Register of Voters, the tallying process, and the legal framework – and would, therefore, not justify the grant of the prayers sought in the petition.

164 The 3rd respondent sought to controvert the deposition of the petitioner in his affidavit of March 14, 2013. He states that, contrary to the petitioner's allegation, the agents were not ejected from the National Tallying Centre, but were relocated to an alternative facility.

165 He avers that under article 86(b) of the *Constitution*, and regulation 83, the 1st respondent has a duty to announce final results on the basis of a physical form, Form 34, which had to be delivered to the National Tallying Centre, and no other method, electronic or otherwise, is contemplated under the law.

166 The 3rd respondent further states that, the process of voting, recording, tallying and declaration of results was conducted in substantial compliance with the electoral laws and the *Constitution*.

167 He also submits that, the counting and tallying of votes was to be conducted manually, in accordance with the provisions of the law, as electronic tallying of votes is not provided for under the law.

168 The 4th respondent also avers that the elections were conducted substantially in accordance with the principles laid down in the *Constitution*, and all governing law; that there was no breach of law such as to affect the results of the elections; and that the said elections do reflect the will of Kenyans.

H. Some Issues of Fact: The Court's Findings

(a) Orders made suo motu

169 On March 25, 2013, the court ordered the scrutiny of all Forms 34 and Forms 36, which were used in the country's 33,400 polling stations. The purpose of the scrutiny was to better understand the vital details of the electoral process, and to gain impressions on the integrity thereof.

170 The court also ordered a re-tallying of the Presidential votes in 22 polling stations, using Forms 34, 36 and the Principal Register, as these stations had featured in the Petitioner's grievance. The purpose of the re-tally was to establish whether the number of votes cast in these stations exceeded the number of registered voters as indicated in the Principal Register.

(b) Data Summary

171 After the re-tally of the votes cast in the said stations was complete, it was found that 5 polling stations, out of the 22, had discrepancies as to the number of votes cast as reflected in Form 34 and Form 36. These were: Lomerimeri Primary School, Tiaty Constituency; Nthambiro Primary School, Igembe Central Constituency; Kabuito Primary School, Igembe Central Constituency; Mugumoini Primary School, Chuka Igambang'ombe Constituency; and NCC Social Hall, Lang'ata Constituency.

172 With respect to the scrutiny of all Forms 34 which were used by the IEBC in tallying the Presidential election votes, from the 33,400 polling stations in the country, only 18,000 polling stations were scrutinized. It was found that Forms 34 were missing in some polling stations such as: Zowerani Primary School, Kilifi North Constituency; Show Ground, Kapenguria Constituency; Nakatiyani Water Point, Loima Constituency; and Mjanaheri Primary School, Magarini Constituency. In addition, the aggregate results of Form 36 voters from 75 constituencies were missing.

173 Reports showing the above discrepancies were availed to counsel, who were asked to comment on the facts and data reflected therein.

(c) Petitioners' Submissions

174 The 3rd petitioner did not expressly comment on the results except to note that the report did not directly address the issue of "rejected votes". The 1st and 2nd petitioners argued in support of the re-tallied results reflected in the court's report. The grounds in support in this regard, may be thus summarized:

1. The report confirmed petitioners' allegations that the 1st and 2nd respondents did not verify the presidential election results as required under the law, and should not have announced the results without accounting for all electoral areas. This is particularly so in light of missing Form 34s from 10 polling stations that were highlighted in the report. The result is that neither the court nor the petitioners were provided with all Form 34s and so the results from IEBC, are unreliable.

2. Since it is the court, on its own motion, which made the order on re-tallying the votes in those 22 polling stations, the results therefrom should now override the results expressly relied on by the 1st petitioner.

3. The court's report shows that in some instances, the number of registered votes was not reflected in Forms 36. In other instances, there were two Forms 36, attributed to the same constituency and both were counted during the tallying process conducted by the 1st and 2nd respondents.

4. Even after the register of voters was closed, there were instances where voters were still being registered.

5. In several polling stations, the number of votes cast exceeded the registered voters as per Forms 34. The results from these polling stations should have been nullified by the 1st and 2nd respondents in accordance with the law, but they were included in the tallying of results.

(d) Respondents Submissions

175 The re-tally results also drew comment from the respondents herein. The grounds for contest can be summarized as follows:

1. The re-tally report confirms the respondents' submissions. The respondents, through their responses, had filed evidence in court answering each and every one of the discrepancies highlighted in the court's report.

2. The delivery of Forms 34 to the court and the petitioners was done voluntarily and not in response to any request. While there were, admittedly, some missing Forms

34, which were not provided, this was not done in bad faith but was a mere oversight, given the limited time-period the respondents had to deliver the documents. In any case, all Forms 34 were used to declare the results.

3. In instances where there were two Forms 36 provided for the same constituency, these were provided in a good faith, and were not used in the tallying of results. In some instances, the 2nd respondent made errors on Forms 36 during the counting process, which he then corrected in a second Form 36. Both Forms were submitted, having been duly signed, in order to show where the errors were in the initial Form 36.

4. In every instance where there were more votes cast than registered voters, the Green Book, which contains the manual register, was availed to the court for scrutiny.

5. The court should guard against the possibility of disenfranchising duly registered voters who voted on election day, simply because there was one extra voter on the register.

6. Most of the allegations that the number of votes cast exceeded the number of registered voters in certain polling stations, were already addressed in the affidavits annexed to the 3rd respondent's response.

7. The 22 constituencies mentioned by the first petitioner are spread across the entire country – showing that no advantage was being sought from a particular candidate's stronghold. Therefore, while the IEBC officials may have made some clerical errors, no mischief or advantage can or should be attributed thereto. Thus, to a substantial extent, the voting, counting and tallying of votes was carried out to a high degree of accuracy. This is all that is required to show that the exercise was carried out well.

I. Reliefs Sought

176 The petitioners entertain the prospect of succeeding in their petitions, and have made prayers for a wide range of reliefs, as follows:

(a) 1st petitioner

i. a declaration that the Presidential election held on the 4th of March, 2013 is invalid;

ii. a declaration that the 1st and 2nd respondents were in breach of articles 10, 81(e), 86 and 88 of the *Constitution of Kenya* in relation to the Presidential election;

iii. a declaration that the 1st respondent was in breach of sections 59, 60, 61, 62, 74, 79 and 82 of the *Election (General) Regulations, 2012*;

iv. a declaration that the 1st and 2nd respondents' were in breach of article 138(3)(c) of the *Constitution of kenya*;

v. a declaration that the 2nd respondent is in breach of article 75 of the *Constitution of Kenya*;

vi. a declaration that the 1st and 2nd respondents are guilty of offences under the *Elections Act, 2011*(Act No 24 of 2011);

vii. a declaration that the 3rd respondent did not receive more than half of the votes cast, at the just-concluded Presidential election and was, therefore, not validly elected and declared as President-elect;

viii. a declaration that the petitioner's fundamental rights under articles 35, 38 and 47 of the *Constitution of kenya* were violated during the President elections;

ix. an order compelling the 1st and 2nd respondents to cancel the Certificate of Election to President-elect issued to the 3rd respondent;

x. an order that there be a fresh election for the President of the Republic of Kenya in strict compliance with the *Constitution of Kenya, 2010*.

xi. costs of the petition.

(b) 2nd petitioner

i. a declaration that the absence of a credible Principal Voters Register vitiates the validity of the Presidential elections of March 4, 2013;

ii. a declaration that the failure to verify the Presidential votes cast at the polling stations vitiates the validity of the Presidential election, thereby rendering it null and void;

iii. a declaration that the proclamation by the 1st and 2nd respondents, of the 3rd respondent as President-elect was invalid and, therefore, the Form 38 Certificate issued to the 3rd respondent is invalid.

iv. costs of the petition.

(c) 3rd petitioner

i. a declaration that during the national election held on March 4, 2013 the percentage of votes received by each candidate in proportion to the total valid votes counted for purposes of article 138(4) of the *Constitution of Kenya* was as follows:

(a) Uhuru Kenyatta 50.51%

(b) Raila Odinga 43.70%

(c) Musalia Mudavadi 3.96%

(d) Peter Kenneth 0.60%

(e) Abduba Dida 0.43%

(f) Martha Karua 0.36%

(g) James Kiyiapi 0.34%

(h) Paul Muite 0.10%

ii. Costs of the petition.

J. Guiding Principles

(i) The context

177 This may not be the most complex case, in terms of the relevant facts and the applicable law; but it is of the greatest importance for the following reasons: (i) it is the first landmark case bearing on the early steps to consolidate and set in motion the gains of a progressive and unique Constitution, which was promulgated on August 27, 2010; (ii) since the promulgation of the *Constitution*, its "non-majoritarian" elements, such as the Judiciary and the Independent Commissions, have assumed their special roles; but the "majoritarian" elements, in the form of a popularly elected Legislature and Executive, were still in abeyance; (iii) transition from the little-regulated Executive set-up of the earlier period, to a new one subject to the established constitutional limitations, is a fateful process which the people must effect through the electoral process; (iv) the cardinal role of implementation of the principles and terms of the *Constitution* of Kenya, 2010 rests with the Executive Branch, acting through laws emanating from the Legislature, and subject to the restraints of the *Constitution* itself and the law, as superintended by the Judiciary; and hence the electoral process which now sets the Presidency afoot, in the provision of national leadership, is all-important to the people of Kenya; (v) although the Supreme Court has been in place for about one year-and-a-half, charged with the obligation to "assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya" [The Supreme Court Act, 2011

(Act No 7 of 2011), section 3(a)], it is only now that it has the first opportunity to consider the vital question as to the integrity of a Presidential election, and, therefore, the scope for the new Constitution to anchor its processes on the operations of a lawful Executive Branch; and (vi), this is the first test of the scope available to this Supreme Court, to administer law and justice in relation to a matter of the expression of the popular will – election of the President. This Judgment, therefore, may be viewed as a baseline for the Supreme Court's perception of matters political, as these interplay with the progressive terms of the new Constitution. It is clear that this Judgment, just as it is important to all Kenyans in political terms, is no less important to the court itself, in terms of the evolution of jurisprudence in the domain of public affairs. It is particularly so, in the light of section 3(c) of the Supreme Court Act, which vests in this court the obligation to "develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth."

(ii) Proof in Election Petition Cases

178 Mr Oraro, Senior Counsel for the 1st petitioner, cited the English case, *Morgan & others v Simpson & another* [1974] 3 All ER 722 in support of his submission, with regard to the standards applicable in cases of this nature. He cited a passage in that decision:

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

179 Counsel submitted that the above standard has been adopted in our laws, and is therefore part and parcel of our local jurisprudence. He cites section 83 of the *Elections Act, 2011*, (No 24 of 2011) which states:

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

180 The 1st petitioner also cited the case of *Magara v Nyamweya* (2010) 4 KLR (EP) in which the Court of Appeal asserted the above principle.

181 The 1st respondent through learned counsel Mr Nyaoga, submitted that the burden of proof lay on the petitioner. He advanced the argument that these election petition proceedings, on the basis of the evidence adduced by the petitioner, were of a "quasi criminal nature". Hence it was his case that the petitioner alleging these "criminal offences", must prove them. The respondent urged that the standard should be higher than the balance of probability, but lower than "beyond reasonable doubt".

182 The 2nd respondent, through learned counsel, Mr Kamau Karori, while responding to the petitioner's case that the Voters' Register was manipulated, submitted that the burden of proof in showing the alleged manipulation lay firmly with the petitioner.

183 The learned Attorney-General, Prof Githu Muigai, in execution of his duty as *amicus curiae* lent some insight in this regard. He first distinguished between the burden of proof and the standard of proof, thus: "burden of proof is concerned with the question, whose duty is it to place evidence before the court; while standard of proof is concerned with, what weight the court should place on the material fact that is placed before it". It was the Attorney-General's submission that, in an election petition, the burden of proof lies on both parties.

184 The Attorney-General cited the Nigerian case of *Abubakar v Yar'Adua* [2009] All FWLR (Pt 457) 1 SC, in which the court held that the burden is on the Petitioner, to prove non-compliance with electoral law, and to show that the non-compliance affected the results of the election. The same jurisprudence was enunciated in *Buhari v Obasanjo* (2005) CLR 7(k) (SC), also cited by the Attorney-General; the various components of burden of proof were distinguished, in their shifting pattern: the burden is on the petitioner to prove non-compliance with the electoral law; and it then shifts to the respondent, or the electoral board, to prove that such non-compliance did not affect the results of the election.

185 In Nigeria, it is noted from the Attorney-General's submissions, the question of the evidential threshold is not in the *Constitution*, but is specified in the statute, the *Elections Act, 2006*, 2006.

186 The Attorney-General also relied on a decision of the Indian Supreme Court, *M Narayan Rao v G Venkata Reddy & another,* 1977 (AIR)(SC) 208 in which the following passage appears:

> " The charge of commission of corrupt practice has to be proved and established beyond reasonable doubt like a criminal charge or a quasi-criminal charge but not exactly in the manner of establishment of guilt in the manner of criminal prosecution giving the liberty of the accused to keep mum. The charge has to

> be proved on appraisal of the evidence adduced by both parties especially by the election petitioner."

In Indian jurisprudence the proof required is beyond reasonable doubt, but not to the level of the criminal standard.

187 That high standards of proof are required in cases imputing election malpractice, appears to be the norm, as is also confirmed in the Zambian case, *Akashambatwa Lewanika & others v Fredrick Chiluba* [1999] 1 LRC 138.

188 Even as learned counsel elucidated the burden of proof in election cases, Mr Abdullahi urged the court to take an additional factor into account, in the case of a Presidential election: the court should be guided by restraint – as the question before it was more political than constitutional-legal.

189 Mr Abdullahi, being guided by the American Supreme Court decision in *Bush v Gore,* 531 US (2000), called for judicial care and restraint in Presidential election disputes.

190 Mr Abdullahi proposed that the standard of proof in claims of impropriety or illegality in the conduct of Presidential election, should be set higher than the criminal-trial requirement of "proof beyond reasonable doubt". Counsel's justification was that judicial intervention ought not, in principle, to be sustained once the electorate had made their choice by casting the vote.

191 Comparative judicial practice on the burden of proof helps to illuminate this court's perceptions, in a case which rests, to a significant degree, on fact. In a Ugandan election case, *Col Dr Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission,* Election Petition No 1 of 2001, the majority on the Supreme Court Bench held:

> "....the burden of proof in election petitions as in other civil cases is settled. It lies on the petitioner to prove his case to the satisfaction of the court. The only controversy surrounds the standard of proof required to satisfy the court."

192 Similarly in the Canadian case, *Opitz v Wrzesnewskyj* 2012 SCC 55-2012-10-256 it is thus stated in the majority opinion:

> "An applicant who seeks to annul an election bears the legal burden of proof throughout....."

193 Such a line of judicial thinking is also found in the Nigerian case, *Buhari v Obasanjo* (2005) CLR 7K, in which the Supreme Court stated:

> " The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result....There must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election."

The Nigerian Supreme Court further stated:

> " He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the court giving judgment in favour of the party."

194 In another Nigerian case, *Ibrahim v Shagari & others* (1985) LRC (Const.) 1, the Supreme Court held:

> " [T]he court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with part II of the Act it will not invalidate it. The wording of section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in court by credible evidence is substantial. Further, the court will take into account the effect if any, which such non-compliance with [the] provisions of part II of the Electoral Act, 1982 has had on the result of the election.... [T]he duty to satisfy the court that a particular non-compliance with the provisions of Part II of the Electoral Act....lies on the petitioner."

195 There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.

196 We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.

197 IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfilment to the people's political rights [article 38 of the *Constitution*]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.

198 To what standard must such initial burden be discharged? The practice in this respect varies from one jurisdiction to another. In some countries, it is held that election petitions are litigation much in the nature of civil proceedings – and that the standard of proof should be the same as in civil causes. Thus in Mauritius, in *Jugnauth v Ringadoo and others* [2008] UKPC 50, the Judicial Committee of the Privy Council affirmed the decision of the Supreme Court of Mauritius, nullifying the election of the appellant, a Member of Parliament and Minister of the Government. The following passage occurs in the judgment of the Privy Council:

> "....the legislature...deliberately chose to approach the matter as one in which the court should adopt the civil standard of proof. There was no question of the court applying anything other than the civil standard of proof and in particular, no question of the application of an intermediate standard. It followed that the issue for the election court was whether the petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition. In practice, as a matter of common sense rather than law, the court was unlikely to be satisfied on the balance of probabilities that there has been bribery without cogent evidence to that effect. In the instant matter the Supreme Court was correct to reach its factual conclusions on the balance of probabilities."

199 In the *Jugnauth* case, the court observed that election petitions are civil in nature, and the proper test should be the balance of probability. The same principle was also stated in the Canadian case, *Opitz* (*supra*).

200 In certain jurisdictions, a higher standard of proof has been required, depending on the specific element in the cause being proved. Thus, in *Shri Kirpal Singh v Shri VV Giri* (1970) INSC 191: AIR 1970 SC 2097; 1971(2) SCR 197; 1970(2) SCC 567 the Supreme Court of India stated:

> "There can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence, not on the mere ground of balance of probability but on reasonable certainty that the persons charged therewith have committed the offence, on the strength of evidence which leaves no scope for doubt as to whether they have done so. Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice."

201 Some jurisdictions have adopted a standard of proof that goes beyond the balance of probability but falls slightly below proof-beyond-reasonable-doubt. Zambia adopted such a standard in *Lewanika and others v Chiluba* (1999) 1LRC 138. Five petitioners challenged the election of the respondent as President, on November 18, 1996 on the ground that he was not qualified to stand as a candidate, as neither he nor his parents were citizens of Zambia by birth or by descent, as required under article 34(3), schedule 2 to the *Constitution* of Zambia Act, 1991 as amended in 1996. The petitioners also alleged electoral flaws, including bribery and corruption, irregularities and flaws in the electoral system; they sought the nullification of the elections for having been rigged, and being not free and fair. The court thus held, on standard of proof:

> "[W]e wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore, that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."

202 But in another Zambian case, *Anderson Kambela Mazoka & 2 others v Levy Patrick Mwanawasa & 2 others* SCZ/EP/01/02/03/2002, the Supreme Court held that the court, in determining the standard of proof, should take into account the facts of the particular case:

> " We accept that the issue of standard of proof may turn out to be more a matter of words than anything else. There can be no absolute standard of proof. The degree must depend on the subject matter. In the case under consideration, the standard of proof must depend on the allegations pleaded."

203 The lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the *Constitution*, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the *Constitution* [article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in article 138(4) of the *Constitution*, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.

(iii) The Supreme Court's Jurisdiction in a Presidential-Election Petition

204 The court's jurisdiction in the consolidated petitions was not an issue for determination per se. That the parties chose to move the court to determine the validity of the Presidential election was an indication that they had no doubts as to the court's jurisdiction. However, the gist of some of the prayers in the petition, and of the submissions made in support, raised a question as to the nature and extent of the court's jurisdiction.

205 It is clear that the Supreme Court's jurisdiction in a Presidential election is both original and exclusive – a position well clarified in our Advisory Opinion No 2 of 2012, In the Matter of an Application for Advisory Opinion under article 163(6) of the *Constitution of Kenya* of Kenya. No court other than the Supreme Court has the jurisdiction to hear and determine disputes relating to an election for the office of President.

206 This jurisdiction, however, is not boundless in scope: it is circumscribed in extent and in time. Limited in extent, in that it relates only to an inquiry into the legal, factual

and evidentiary questions relevant to the determination of the validity or invalidity of a Presidential election.

207 The Supreme Court cannot roll over the defined range of the electoral process like a colossus. The court must take care not to usurp the jurisdiction of the lower courts in electoral disputes. It follows that the annulment of a Presidential election will not necessarily vitiate the entire general election. And the annulment of a Presidential election need not occasion a constitutional crisis, as the authority to declare a Presidential election invalid is granted by the *Constitution* itself.

208 A petitioner against the declaration of a candidate as President-elect, under articles 163(3)(a) and 140 of the *Constitution* as read together with the provisions of the Supreme Court Act, 2011 (Act No 7 of 2011) and the Supreme Court (Presidential Elections) Rules, 2013, is required to present a specific, concise and focused claim which does not purport to extend the Supreme Court's jurisdiction beyond the bounds set out in the *Constitution*. It follows that the court will only grant orders specific to the Presidential election.

209 The Supreme Court's jurisdiction is also limited in time-span. A petition contesting the election of a President does not set off an open-ended course of litigation without time-frames. The applicable time-frame, within which any challenge to the election must be filed, served, heard and determined, is prescribed under the . Article 140(1) and (2) of the *Constitution* provide as follows:

> "(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election.
>
> (2) 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."

210 Applying the foregoing provision, and in exercise of powers conferred by article 163(8) of the *Constitution* and section 31 of the Supreme Court Act, 2011 the court has recently made and published the Supreme Court (Presidential Election Petition) Rules, 2013. These Rules constitute the court's detailed norms for operationalising the terms of article 140 of the *Constitution*.

211 The fourteen-day limit within which the court must hear and determine a Presidential election petition, starts counting immediately upon filing. By rule 7, the petitioner has a period of three days within which to serve the respondent, after filing. Rule 8 allows the respondent three days within which to file a response, following the service. Rule 9 provides

for a pre-trial conference, nine days from the date of filing the petition. The court, thus, has three days within which to examine the pleadings, before the pre-trial conference takes place.

212 It is our perception that an intending petitioner will utilize the seven-day window given by the *Constitution*, following the declaration of election-outcome, to prepare the pleadings. Likewise, a respondent will utilize the three days afforded by the rules, to lodge a response to the petitioner's allegations.

213 The purpose of the pre-trial conference is set out in rule 10: this is a preparatory forum to lay the ground rules for the expeditious, fair and efficient disposal of the petition. The pre-trial conference enables the court, upon hearing the parties and, if need be, on its own motion, to make appropriate orders and give directions for ensuring fair determination of the dispute. By rule 10(1)(f), the court is empowered to give preparatory directions touching on the scheme of evidence: the filing and service of any further affidavits, or the calling of some particular kind of evidence. The issuance of such directions is attuned to the constitutional imperatives of the forthcoming proceedings: efficiency, expedition, fairness, finality. By rule 11, the court "shall within two days of the pre-trial conference commence the hearing of the petition."

214 The requirements of such a disciplined trial-framework fully justifies the unlimited exercise of the court's discretion in making orders that shape the course of the proceedings. Thus, in the instant case, the court did dismiss two applications, in rulings made during the pre-trial conference. One of these was for an order of production of certain documents; the other was in respect of a "Notice to Produce" a marked voter register found at the numerous polling stations right across the country. The court also made an order to exclude from the proceedings a "further affidavit" which had just been filed by the 1st petitioner; the said affidavit sought to introduce new material well after the filing of the petition.

215 The reasons for the court's decision to disallow such new matter are set out in the ruling, as delivered and signed. The 2nd respondent had declared the results of the Presidential election on March 9, 2013. By article 140 of the *Constitution*, any intending petitioner had up to seven days to prepare and file the petition. The 1st petitioner elected to file his petition on March 16, 2013 and, thenceforth, the fourteen-day period for the hearing and conclusion of the proceedings, started running. Yet, six days later, on March 23, 2013, just two days before the pre-trial conference, the 1st petitioner filed the "further affidavit" in question. It emerged as a fact, that the further affidavit, as the respondents averred, was attempting to introduce new matter into the original petition – by way of averments. The merits of this belated move were canvassed at the pre-trial conference on March 25, 2013; and the court ruled on this question on March 26, 2013, excluding the "further affidavit."

216 The primary justification for the rejection of the "further affidavit" lies in the requirements of the disciplined trial process required under the *Constitution*. The court, besides, had taken into account all the relevant circumstances. Were the court to admit the new evidence, then ends of justice would demand that the respondents be granted reasonable time to file a response to the "further affidavit". The respondents urged that they needed the same length of time it had taken the 1st petitioner to file the "further affidavit," to make a response – six days as from March 27, 2013. Even had the court granted only half that time, the main hearing of the petition would not have started before March 30, 2013: and the Supreme Court would, consequently, have failed to hear and determine the petition within 14 days as required by the *Constitution*. Allowing the "further affidavit" would have led to consequences not only subverting the *Constitution* itself, but most significantly, precipitating a crisis in the operations of the Executive Branch.

217 The rigid time-frame for the resolution of Presidential-election disputes was not, in our opinion, conceived in vain at the time of the constitution-making process. From the terms of article 140 of the *Constitution*, it is clear that expedition is of the essence, in determining petitions relating to Presidential elections. As the electoral process had, in this case, led to the declaration of a winner, but one who could not assume office pending the determination of the petition, the protracted holding-on of a President-elect, as well as a retiring President, would, in our opinion, present a state of anticipation and uncertainty which would not serve the public interest. Expedition in the resolution of the dispute was all-important: if the Court affirmed the election of the President-elect, then the transition process would be responsibly accomplished; and if the court annulled the election, the electorate would pacifically attune itself to the setting for fresh election – to be held within sixty days.

218 Notwithstanding such considerations of merit, which led the court to exclude belatedly-introduced papers, counsel argued on the basis of article 159(2)(d) of the *Constitution*, which thus provides:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles –
>
> .....
>
> (d) justice shall be administered without undue regard to procedural technicalities...."

The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of

the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course. The time-lines for the lodgement of evidence, in a case such as this, the scheme of which is well laid-out in the *Constitution*, were in our view, most material to the opportunity to accord the parties a fair hearing, and to dispose of the grievances in a judicial manner. Moreover, the *Constitution*, for purposes of interpretation, must be read as one whole: and in this regard, the terms of article 159(2)(d) are not to be held to apply in a manner that ousts the provisions of article 140, as regards the fourteen-day limit within which a petition challenging the election of a President is to be heard and determined.

(iv) Judicial Restraint

219 Learned counsel, Mr Ahmednasir Abdullahi has called for the adoption of restraint by the court, in this Presidential-election matter. He urges that the facts and special circumstances of this case require restraint, in the judicial approach.

220 Counsel proceeded from the following foundation of fact: the Presidential election took place in a context of perfect peace; as many as 86% of the electorate – a high turnout by any standards – did vote; no case of loss of life in the course of the election was reported. So, the will of the electorate, by which the 3rd respondent was entrusted with the Presidential mandate, ought to be upheld.

221 In such conditions, Mr Abdullahi urged, the court should in principle desist from intervention, but should instead affirm the principle of restraint. Learned counsel submitted that Kenya is at a sensitive stage of establishing the institutions of democracy and constitutionalism, and that this requires a certain degree of public confidence which, for the judicial process, is a treasure, that can only be nurtured through restraint, where the electoral will has been made known.

222 Counsel recalled, as a comparative perspective, that judicial restraint had similarly been urged in the American case, *Bush v Al Gore* 531 US (2000), in aid of the argument that even though the Supreme Court has jurisdiction to invalidate a Presidential election by virtue of article 140 of the *Constitution*, restraint was paramount. For, the issues involved are essentially political in nature. Counsel invoked the following passage in the American case:

> "None are more conscious of the vital limits on judicial authority than are the members of this court, and none stand more in admiration of the *Constitution*'s design to leave the selection of the President to the people...and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues which the judicial system has been forced to confront."

223 To the same effect, learned counsel cited the South African case, *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), in which it was thus held:

> " Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The *Constitution* contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications.... In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."

224 It was counsel's argument that, by such restraint, the court would be contributing to national stability by preserving its "political capital" for those rare occasions when, as history unfolds, it may become appropriate to deploy it. And so, for day-to-day situations, the Supreme Court ought to limit the "number of major principled interventions" it can make [see A*M Bickel in Harvard Law Review, Vol 75 (1961), pp.40, 75*].

225 In agreement with the foregoing line of reasoning, learned counsel Mr Ngatia, for the 3rd respondent, submitted that: "what is before the court is a political contest"; "for all politicians, their business is to offer themselves for elections; that of IEBC is to conduct elections; that of the people is to decide." Counsel submitted that in an electoral contest such as the instant one, "the court should have a very limited role."

226 In this inaugural Supreme Court which is barely two years old, and which is at the centre of the governance processes established under the *Constitution of Kenya, 2010*, it is the first time the Judges are called upon to declare their perception of their role in a fundamentally political-cum-constitutional process. It is particularly significant that the organ which is the subject of dispute is the most crucial agency of the Executive Branch, namely the Presidency. The new Constitution will not be fully operational, without the Presidential office being duly filled, as provided by the *Constitution* and the ordinary law.

227 But the *Constitution* not only represents a special and historic compact among thepeople; it expressly declares all powers of governance to emanate from the people, and to be for service to the people. Article 1 of the *Constitution* thus provides:

> " (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
>
> (2) The people may exercise their sovereign power directly or through their democratically elected representatives."

228 What is now before the court is a case in which the people, as makers and main beneficiaries of the *Constitution*, have employed the prescribed machinery, and cast their votes, in exercise of their political will to elect the leading member of the Executive Branch.

229 What principle ought to guide this court in its attempts to resolve the electoral question?

230 Without as yet deciding the main question in the contest, we express the opinion that, in the special circumstances of this case, an insightful judicial approach is essential. There may be an unlimited number of ways in which such an approach is to guide the court. But the fundamental one, in our opinion, is fidelity to the terms of the *Constitution*, and of such other law as objectively reflects the intent and purpose of the *Constitution*.

(v) Technology in Kenya's Electoral Process

231 The main petition before this court is founded, significantly, on the contention that the petitioner was prejudiced by an inconsistent application of electronic devices and, in particular, by IEBC's abandonment of such technology and resort to the manual electoral procedure. While there is sufficient evidence to guide the court in this matter, it is apposite to set out relevant principles on the application of electronic technology in elections.

232 Failure of technology is relied upon by the petitioners, on the footing that it disrupted the transmission of election results, and so, these results ceased to be in keeping with the secure standards required by law. The petitioners contend that section 39 of the *Elections Act, 2011* as read with regulation 82 of the *Elections (General) Regulations, 2012* creates a mandatory obligation to provide for the electronic transmission of the results.

233 We take judicial notice that, as with all technologies, so it is with electoral technology: it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice.

234 In the instant case, there is evidence that the EVID and RTS technologies were used in the electoral process at the beginning, but they later stalled and crashed. Different reasons explain this failure but, by the depositions of Dismus Ong'ondi, the failure mainly arose from the misunderstandings and squabbles among IEBC members during the procurement process – squabbles which occasioned the failure to assess the integrity of the technologies in good time. It is, indeed, likely that the acquisition process was marked by competing interests involving impropriety, or even criminality: and we recommend that this matter be entrusted to the relevant State agency, for further investigation and possible prosecution of suspects.

235 But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done.

236 We note from the evidence that the said manual system, though it did serve as a vital fall-back position, has itself a major weakness which IEBC has a public duty to set right. The ultimate safeguard for the voter registration process, namely "the Green Book", has data that is not backed-up, just in case of a fire, or other like calamity. We signal this as an urgent item of the agenda of the IEBC, and recommend appropriate redressive action.

237 From case law, and from Kenya's electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the petitioner's contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the petitioner's case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable.

(vi) Institutional Independence, Discharge of Public Responsibility, and Exercise of Discretion

238 A major element in the petitioner's case turns on the *Constitution*'s conferment upon IEBC of institutional independence, as a basis for the discharge of its public, electoral responsibility. How ought the responsibility to be exercised, and what is the role of discretion in this?

239 The petitioners impugn the manner in which IEBC conducted the tallying of votes at the National Tallying Centre, and in particular, the fact that the Commission had, at some stage, restricted the operations of political party agents during the tallying. The 1st and 2nd respondents admitted having imposed certain limitations on the said agents, but averred that such action was taken in exercise of essential discretion. These respondents aver that, sometime in the evening of March 5, 2013, the political party agents inside the tallying hall became rowdy and quarrelsome, and engaged IEBC staff in paralyzing confrontations. IEBC responded to the mischief by taking the decision to relocate the party agents to a boardroom in the auditorium at the National Tallying Centre, where they were regularly supplied with the forms and documents necessary for the verification of vote-tallies.

240 Was this a lawful exercise of discretion by IEBC? Did such exercise of discretion vitiate the quality of tallying, and of the electoral process, so as to lead to the conclusion that the electoral process was not lawfully conducted?

241 The *Constitution*, by article 138(3)(c), takes cognizance of the fact that the counting of votes takes place at the polling stations, after which IEBC tallies, verifies and declares the results. On this basis, it is clear that IEBC has the mandate to count, tally and verify the voting results. However, regulation 85(1)(e) of the *Elections (General) Regulations, 2012* allows political party agents to be present at the Tallying Centre.

242 What is the legal and public standing of the party agents at the National Tallying Centre? In our opinion, it is all about the public perception, and legitimacy, which are of the essence in a distinctly political process such as a Presidential election. IEBC is expected to operate transparently, without retreating from the public forum of visibility, and without disengaging from the stakeholders of the electoral process. However, as there is no sharp definition of the mode of such engagement, IEBC is to be guided by the "national values and principles of governance" declared in the *Constitution*, namely "good governance, integrity, transparency and accountability" [article 10(2)(c)].

243 Such values, in the context of a large-scale exercise such as the Presidential election, will operate optimally only in conditions of good order,peace and security; and it is in the first place the responsibility of the machinery of IEBC to ensure that such conditions prevail. Discretion is of the essence, in the exercise of such responsibility: and it follows, as the basic evidence of the state of affairs at the National Tallying Centre was not contested, that IEBC, indeed, had an obligation to resolve any kind of impasse afflicting the tallying of Presidential-election votes.

244 This court has had occasion, in the past, to pronounce itself on the proper functioning of the various independent Commissions and agencies established under the *Constitution*. The following two passages in the court's ruling, from *In the Matter of the Interim Independent Electoral Commission*, Sup ct Const Application No 2 of 2011, are apposite:

> "i. [It is] a matter [of] which we take judicial notice, that the real purpose of the 'independence clause' with regard to [the] Commissions and independent offices established under the *Constitution*, was to provide a safeguard against undue interference with such Commissions or offices by other persons, or other institutions of government."
>
> "ii. [While] bearing in mind that the various Commissions and independent offices are required to function free of subjection to 'direction or control by any person or authority', we hold that this expression is to be accorded its ordinary and natural

meaning and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit."

245 From the principles we have set out, and from the evidence on record, we are able to dispose of the issue regarding the tallying of votes at the National Tallying Centre. We must come to the conclusion that tallying was indeed conducted in accordance with the law, and the relocation of political party agents did not undermine the credibility of the tallying, nor provide a basis for annulling the outcome of the Presidential election.

246 A related claim by the petitioner is that there were instances in which the vote-tallying operation inflated the 3rd respondent's votes, while deflating the petitioner's. What is offered as proof of this assertion is only the apprehension that the initial electronic vote-transmission had maintained a suspect, steady differential between the two sets of tallies – and that this suggested manipulation and impropriety on the part of IEBC. The petitioner, besides, sought to introduce belatedly, during the submissions, certain information suggesting mismatches between the contents of Forms 34 and 36 used at the National Tallying Centre. Hardly any matter of significance, at this stage, came before the court such as would alter the thrust of the overall evidence and the submissions on law; and we must hold that no challenge to the tallying process has been made such as to lead to an order of annulment.

(vii) The Voter Register: Accuracy, Credibility, Verifiability – and Implications for Validity of Election

247 This court will not, as already stated, make such orders or grant such reliefs as would have the effect of precipitating conflicts between its jurisdiction and that of other courts. However, as regards elections that run on common voter rolls and common management settings, the court may inquire into any allegations of voter-registration malpractices, where such are said to affect the validity of a Presidential election. Such, indeed, are the allegations by the 1st petitioner, regarding the credibility of the voter register that was used during the elections of March 4, 2013.

248 The 1st and 2nd petitioners' cases turn on the validity or invalidity of the "Principal Register of Voters." The point was taken up in evidence, and was substantially canvassed in the submissions. What is the "Principal Register of Voters"? In the light of the provisions of the *Constitution* [articles 38(3) and 83] and of the *Elections Act, 2011*, [sections 2, 3, 4], and of the evidence adduced in court, we must conclude that such a register is not a single document, but is an amalgam of several parts prepared to cater for divers groups of electors. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country's population. The register can

also take several forms, as contemplated by section 2 of the *Elections Act*, which stipulates that such a register "includes a register compiled electronically."

249 The multiplicity of registers is a reality of Kenya's voter registration system which is recognized in law and widely acknowledged in practice. The register once developed and finalized, is disaggregated and dispersed to various electoral units, to facilitate the process of voting. Such units include the polling stations, the wards, the constituencies, the counties, and even the Diaspora voting centres.

250 It is plain to the court that the argument of the petitioners that the Presidential elections of March 4, 2013 could only have been based on the BVR element of the Principal Register of Voters, is not tenable; nor is it tenable to contend that the BVR Register all by itself, was the Principal Register of Voters.

251 To guarantee the credibility of the voter register, the agency entrusted with responsibility (IEBC) for voter registration must ensure as follows:

(a) all those who turn out to register are qualified to be registered, in accordance with the constitutional and legal requirements;

(b) all those who turn out to register are actually registered and their particulars accurately captured;

(c) the administrative arrangements put in lace to facilitate the registration process are simple, transparent and accessible;

(d) the public and political actors are kept informed of the various steps in the register-preparation process;

(e) the resultant register is verifiable.

252 We are inclined to accept the explanations given by the 1st and 2nd respondents, of the mode of compilation of the voters' roll. The depositions of the 2nd respondent and of Immaculate Kassait, and especially when taken alongside the submissions of learned counsel, Mr Nyamodi, have conveyed a credible account on the manner in which the voters' register used in the March 4, 2013 Presidential election, was prepared. The legal burden of showing that the voters' register as compiled and used, was in any way in breach of the law, or compromised the voters' electoral rights, was not, in our opinion, discharged by the petitioners.

253 An intriguing point about the integrity of the voters' register was as regards a "Special Register", which shows different numbers of voters at different times (31,318 at one remove, and 36,236 at another remove). It was deponed in the affidavit of Winifred Guchu, that the "Special Register" had been created to provide for persons whose features could not

be captured by the BVR device. Counsel for the 1st petitioner had urged that the "Special Register" was not only irregular in character, but that it had been used exclusively in the stronghold voting areas of the 3rd respondent. This serious allegation, which could well taint the credibility of the election, was stoutly contested by learned counsel, M/s Nyaoga, Nyamodi and Nani for the 1st and 3rd Respondents who relied on the affidavit evidence of Dismus Ong'ondi and Immaculate Kassait.

254 On the basis of the evidence on record, and of the merits of the submissions by counsel, we find no mystery about the "Special Register", which was indeed used throughout the country, in diverse electoral areas. We also found no proof that the Special Register served any improper cause, in favour of any of the candidates.

255 It was urged for the 1st petitioner, that the 1st and 2nd respondents had compiled the "Green Book" which was not provided for in the law – and that the Green Book undermined both the credibility and the legality of the registration process. In our finding, from the evidence, the "Green Book", though not provided for in law, is a primary document that was used by the 1st respondent to originate the primary register of voters, which later evolved into a Provisional Register, and then a Final Principal Register. It is not apparent to us that such an original record, the "Green Book," employed by IEBC, required to be provided for by law.

256 The 1st petitioner also cited variations in the numbers of registered voters, as a factor of illegality in the conduct of the Presidential election. Learned counsel, Mr Oraro submitted that at the close of the register on December 18, 2012 the total number of registered voters was 14,333,339; but that at the time of gazettement, the number was shown as 14,352,455. We have, however, found no major anomalies between the total number of registered voters and the total tally in the declaration of Presidential-election results made by the 2nd respondent on March 9, 2013. Although, as we find, there were many irregularities in the data and information-capture during the registration process, these were not so substantial as to affect the credibility of the electoral process; and besides, no credible evidence was adduced to show that such irregularities were premeditated and introduced by the 1st respondent, for the purpose of causing prejudice to any particular candidate.

257 These findings lead us to the conclusion that the voter registration process was, on the whole, transparent, accurate, and verifiable; and the voter register compiled from this process did serve to facilitate the conduct of free, fair and transparent elections.

(viii) The Question of "Rejected Votes"

258 From the submissions of counsel, it emerged that "rejected votes" are marked ballot papers that fail to comply with the approved marking format, or in some way infringe the prescribed vote-casting standards. Such votes, at the time of counting, are not tallied to the advantage

of any candidate, but are accumulated separately and numbered in the category of "rejected votes".

259 Yet, by article 138(4) of the *Constitution* it is provided:

> " A candidate shall be declared elected as President if the candidate receives –
>
> (a) more than half of all the votes cast in the election; and
>
> (b) at least twenty-five per cent of the votes cast in each of more than half of the counties."

260 What are "all the votes cast"? Do these include even the "rejected votes", which, of course, were cast? Or are they limited to the properly-marked ballots which figured in the vote-tally for the individual candidates?

261 The expression "all the votes cast," presents a problem of interpretation – because the court has to consider the prevailing position under the earlier instrument, the *Constitution of Kenya, 1969*. The corresponding provision in that Constitution provided as follows [section 5(5)(e)]:

> " the candidate for President who receives a greater number of valid votes cast in the presidential election than any other candidate who, in addition, receives a minimum of twenty-five per cent of the votes cast in at least five of the eight provinces shall be declared to be elected as President".

262 Is it intended, in the *Constitution of Kenya, 2010* that the expression "more than half of all the votes cast" should mean, literally, all theballot papers that were marked and cast into the ballot box? Or should it mean only all the valid votes that were cast, and were counted in favour of one candidate or another?

263 This question became contentious because the 3rd petitioner raised it; but other parties then latched on to it. Counsel for the 3rd respondent contested all expansive interpretation of the phrase "all the votes cast," on the basis that his client would be the loser, while the petitioner would gain. It was significant to the 3rd respondent for the reason, as he believed, that if all the "rejected votes" were included in the computation of vote-tally percentages, then it would raise the 1st petitioner's percentage-tally towards the 50% mark, and lower his own tally to a figure below 50% – the direct effect being that the court would have to order a run-off election between the two leading candidates. Not surprisingly, a petitioner in Petition No. 3 of 2013 had moved the court not only to exclude the "rejected votes" in the Presidential-election tally, but to go further and, on that basis, order a re-calculation and re-tally of the votes properly attributable to each of the candidates. His hopes were that the court would,

in this way, reach a finding that the 3rd respondent's percentage vote-tally was significantly above 50%. We have already held, however, that such a process of re-tallying of votes, re-computing and re-assignment of value, falls beyond the election-contest mandate of this court, and is excluded by the "rule of remoteness".

264 The petitioners in Petition No 3 of 2013 argued their case on the basis of the *Elections (General) Regulations, 2012* – regulations 71, 73, 77 and 78. They urged that these Regulations draw a distinction between the words "ballot", and "vote", even though these were sometimes used interchangeably. Counsel urged that the terms "ballot" and "ballot paper" describe the paper containing the names of the candidates in relation to which the voter expresses a preference through the vote – so that the "vote" is a ballot paper that has been marked to show a preference. On the basis of regulation 78(2), learned counsel, Mr. Regeru, urged that a "rejected ballot paper" is null and void: and so, all rejected ballots should not give the basis for determining the winner of an election, at any stage whatsoever.

265 The petitioners in Petition No 3 of 2013 relied on the terms of the *Elections Act, 2011*; these define ballot paper as –

> " (a) paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for the purposes of voting."

They submitted that a ballot paper becomes a vote only once it expresses a preference for, or against a candidate; and the term "rejected vote" is, therefore, a misnomer: what the law contemplates is a "rejected ballot paper," and not a "rejected vote"; a ballot paper once rejected, or declared void by law, is incapable of expressing any preference for, or against a candidate. On this account, it was urged, invalid ballot papers cannot be introduced into the percentage-vote tallying process.

266 Learned counsel for the petitioners in Petition No 3 of 2013 introduced the comparative judicial practice in electoral matters, in support of their case. They invoked the Seychelles case, *Popular Democratic Movement v Electoral Commission* Const Case No 16 of 2011 which had come up before the Court of Appeal of Seychelles; and Burhan, J held that:

> " rejected ballot papers are not to be counted as 'votes'; and therefore the term 'votes cast' cannot and will not include 'rejected' ballot papers."

267 The 1st and 2nd respondents' answer was that, in using the "rejected votes" in the calculation of threshold-percentages in the Presidential election vote-tally, they had acted in good faith, in particular as the relevant provisions of the *Constitution* (articles 86(b) and 138(4)) did

not expressly provide that "rejected votes" should not be counted or considered in the computation of percentages as envisaged.

268 Conceding that there is an uncertainty as to the effect of the expression "all the votes cast" in article 138(4) of the *Constitution*, the 1st and 2nd respondents called upon this court to provide a guiding interpretation.

269 One line of submissions made in court is that the expression "all votes cast", as used in article 138(4) of the *Constitution* as read together with the *Elections Act*, 2011 and the Elections (General) Regulations, 2012 requires a broad, purposive interpretation in the context of constitutional principles; and that this will lead to the exclusion of "rejected votes" in the computation of the percentage-vote requirement.

270 There is a contrasting line of submission by the 4th and 5th petitioners: that article 138(4) of the *Constitution* entails no ambiguity, and that a literal interpretation is to be preferred; and the consequence is an inclusion of the "rejected votes" in the computation of the winning percentage-threshold.

271 Neither the *Constitution* nor the *Elections Act, 2011*, 2011 defines the term "rejected votes". The *Elections (General) Regulations, 2012*, while providing for the "spoilt ballot paper" and the "disputed vote", does not define the term "rejected vote": but it sets out the criteria upon which a ballot may be "rejected"; and although a regulation bears the rubric "rejected ballot papers" in the marginal note, its provisions only indicate the circumstances in which a vote becomes invalid.

272 The interpretation section of the *Elections Act* states that 'ballot paper' "means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting". The Elections (General) Regulations, 2012 defines 'rejected ballot paper' as a ballot paper rejected in accordance with regulations 77 and 78.

273 Regulation 77 of the Elections (General) Regulations, 2012 which relates to the rejection of ballot papers, thus provides:

> "(1) At the counting of votes at an election, any ballot paper –
>
> (a) which does not bear the security features determined by the Commission;
>
> (b) on which votes are marked, or appears to be marked against the names of, more than one candidate;

(c) on which anything is written or so marked as to be uncertain for whom the vote has been cast;

(d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or

(e) is unmarked, shall... be void and shall not be counted."

274 The expression "rejected ballot paper" may be considered alongside "spoilt ballot paper" which is provided for in regulation 71:

> " A voter who has inadvertently dealt with his or her ballot paper in such a manner that it cannot be conveniently used as a ballot paper may, on delivering it to the presiding officer and proving to the satisfaction of such officer the fact of the inadvertence, obtain another ballot paper in the place of the ballot paper so delivered and the spoilt paper shall be immediately cancelled and the counterfoil thereof marked accordingly."

275 The law, thus, is clear: the "spoilt ballot paper" will not find its way into a ballot box – and so, it does not count as a vote.

276 Regulation 78 provides for yet another category of votes, known as the "disputed vote". It is thus provided [reg 78(2)]:

> " The presiding officer shall mark every ballot paper counted but whose validity has been disputed or questioned by a candidate or an agent with the word 'disputed' but such ballot paper shall be treated as valid for the purpose of the declaration of election results at the polling station."

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.

278 The most striking example of a departure from the foregoing line of reasoning is found in the *Constitution of Croatia*, article 95 of which provides that "the President shall be elected by a majority of all electors who voted", thus in the tallying of votes, invalid votes are taken into account.

279 By article 82(d) of the *Constitution of Kenya*, Parliament is empowered to enact legislation to provide for the conduct of elections and referenda, and for the regulation and efficient supervision of elections. Parliament did enact the *Elections Act, 2011*,(Act No 24 of 2011), which confers upon IEBC the power to make regulations for the conduct of elections. The Act (section 109(1)(p)) provides that IEBC may make regulations to:

> "prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid".

280 The regulations made by IEBC have no provision for "rejected votes", though they provide for "rejected ballot papers", "spoilt ballot papers", and "disputed votes". It is clear that "spoilt ballot papers" are those which are not placed in the ballot box, but are cancelled and replacedwhere necessary, by the presiding officer at the polling station. This differs from the "rejected ballot papers" which, although placed in the ballot-box, are subsequently declared invalid, on account of certain factors specified in the election regulations – such as fraud, duplicity of marking, and related shortfalls.

281 No law and no regulation brings out any distinction between "vote" and "ballot paper", even though both the governing statute and its regulations have used these terms interchangeably. We have to draw the inference that neither the Legislature, nor IEBC, had attached any significance to the possibility of differing meanings; which leads us to the conclusion that a ballot paper marked and inserted into the ballot-box, has consistently been perceived as a vote; thus, the ballot paper marked and inserted into the ballot-box will be a valid vote or a rejected vote, depending on the elector's compliance with the applicable standards.

282 Since, in principle, the compliant ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, will not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate.

283 In that sense, the rejected vote is void. This leads to the crucial question in Petition No 3: why should such a vote, or ballot paper which is incapable of conferring upon any candidate a numerical advantage, be made the basis of computing percentage accumulations of votes,

so as to ascertain that one or the other candidate attained the threshold of 50% + 1 – and so such a candidate should be declared the outright winner of the Presidential election, and there should be no run-off election?

284 We can only answer such a logical question by adverting to the Judiciary's mandate as specified in article 259(1)(d) of the *Constitution*: to interpret the *Constitution* in a manner that "contributes to good governance". Beyond that, article 259 requires an interpretation that:

> " (a) promotes [the *Constitution*'s] purposes, values and principles;
>
> (b) advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;
>
> (c) permits the development of the law....."

The instrument of implementation of the above provisions is the *Supreme Court Act, 2011* (Act No 7 of 2011), which thus provides in section 3:

> " The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things –
>
> (a) assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya;
>
> (b) provide authoritative and impartial interpretation of the *Constitution*;
>
> (c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth...."

285 Taking into account the progressive character of the *Constitution*, and in particular its declared "national values and principles of governance" [article 10], we hereby render the interpretation that the provision of article 138(4),

> " A candidate shall be declared elected as president if the candidate receives –
>
> (a) more than half of all votes cast in the election; and
>
> (b) at least twenty-five per cent of the votes cast in each of more than half of the counties" –

refers only to valid votes cast, and does not include ballot papers, or votes, cast but are later rejected for non-compliance with the terms of the governing law and regulations. We are,

in this regard, guided by a purposive approach, founded on the overall design and intent of the *Constitution*. We respectfully agree, on this point, with the position taken by the Court of Appeal of Seychelles in *Popular Democratic Movement v Electoral Commission* (see para 266, *supra*).

(ix) Possible Reliefs: A "Fresh Election?"

286 The Attorney-General, as amicus curiae, invited the court to give directions on a line of relief declared by the *Constitution*, depending on the finding on merits. Article 138(5) of the *Constitution* stipulates that if after the hearing of the petition, the court finds no candidate to have been duly elected, "a fresh election shall be held within thirty days after the previous election and in that fresh election the only candidates shall be –

(a) the candidate, or the candidates, who received the greatest number of votes; and

(b) the candidate, or the candidates, who received the second greatest number of votes."

287 The expression "a fresh election" appears also in article 140(3), which thus provides:

> "If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination."

As the phrase "fresh election," as used in article 140(3), does not tally with its application in article 138(2) and (3), the amicus curiae sought the court's answer to the following question: "Does the fresh election anticipated by article 140(3) mean an entirely new Presidential election (including the nomination process), or does [it] mean a similar election as that anticipated under article 138(5) and (7) – with the same candidates as in the earlier poll?"

288 Article 138(4) provides that a candidate shall be declared elected if the candidate receives: (a) more than half of all the votes cast in the election; and (b) at least 25% of the votes cast in each of more than half of the counties. article 138(5) provides that if no candidate is elected, a fresh election shall be held within 30 days following the previous election, and in this later election the candidates shall be: (a) the candidate, or the candidates, who received the greatest number of votes; and (b) the candidate, or the candidates, who received the second greatest number of votes. Article 138(6) provides that if more than one candidate receives the greatest number of votes, then article 138(5)(b) shall not apply and the only candidates in the fresh election shall be those contemplated in article 138(5)(a). Article 138(7) provides that the candidate who receives the most votes in the fresh election shall be declared elected as President.

289 It is clear that a fresh election under article 140(3) is triggered by the invalidation of the election of the declared President-elect, by the Supreme court, following a successful petition against such election. Since such a fresh election is built on the foundations of the invalidated

election, it can, in our opinion, only involve candidates who participated in the original election. In that case, there will be no basis for a fresh nomination of candidates for the resultant electoral contest.

290 Suppose, however, that the candidates, or a candidate who took part in the original election, dies or abandons the electoral quest before the scheduled date: then the provisions of article 138(8)(b) would become applicable, with fresh nominations ensuing.

291 Barring the foregoing scenario, does the "fresh election" contemplated under article 140(3) bear the same meaning as the one contemplated under article 138(5) and (7)? The answer depends on the nature of the petition that invalidated the original election. If the petitioner was only one of the candidates, and who had taken the second position in vote-tally to the President-elect, then the "fresh election" will, in law, be confined to the petitioner and the President-elect. And all the remaining candidates who did not contest the election of the President-elect, will be assumed to have either conceded defeat, or acquiesced in the results as declared by IEBC; and such candidates may not participate in the "fresh election."

292 Such, indeed, is the situation in the instant case. It follows that if this court should invalidate the election of the 3rd and 4th respondents, only the 1st petitioner would participate as a contestant in the "fresh election" against the President-elect. And the candidate who receives the most votes in the fresh election would be declared elected as President.

293 But suppose a successful petition challenging the President-elect were filed by more than one candidate who had participated in the original election. The only candidates in the fresh election, in such a case, in our opinion, would be the petitioners as well as the declared President-elect whose election had been annulled.

294 Suppose further, that the election of a declared President-elect is annulled following the petition of a person who was not a candidate in the original election. In such a case, in our opinion, each of the Presidential-election candidates in the original election would be entitled to participate in the "fresh election" – and no fresh nominations would be required.

K. Determination of the Petitions

295 The evidence in the consolidated petition has been laid out in detail, and is the primary basis for disposing of the several prayers. The court has also considered various questions of law and of general constitutional principle, upon which the petitioners rely in their prayers. As such broader foundations to the cases concerned specific prayers, and as the relevant issues were squarely canvassed by counsel, we were able to make our findings, and embody the same at various stages in this Judgment.

296 But, ultimately, the primary issue is the claim made by the petitioners in Petitions No 4 and No 5; and these resolve into the issue in Petition No 5, namely: Must the certificate of election as President-elect, issued to the 3rd respondent, be cancelled; and should an order be made for a fresh Presidential election to take place in Kenya?

297 The evidence laid before the court has to be considered on the basis of relevant principles of law. From the case law, it is clear that an alleged wrong in the electoral process cannot be rectified on the basis of the conventional yardsticks of civil or criminal law. In criminal law, proof must be "beyond any reasonable doubt", as the liberties of the subject are at stake and, failing absolute proof, an accused person must be set at liberty. By contrast, in civil law, which is private matter between two individuals, a wrong only needs to be proved on a balance of probability.

298 An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the Presidential election which has led to this petition, takes different considerations. The office of President is the focal point of political leadership, and therefore, a critical constitutional office. This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.

299 As a basic principle, it should not be for the court to determine who comes to occupy the presidential office; save that this court, as the ultimate judicial forum, entrusted under the *Supreme Court Act, 2011* (Act No 7 of 2011) with the obligation to "assert the supremacy of the *Constitution* and the sovereignty of the people of Kenya" [s.3(a)], must safeguard the electoral process and ensure that individuals accede to power in the presidential office, only in compliance with the law regarding elections.

300 It follows that this court must hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of that office, if there is any major breach of the electoral law, as provided in the *Constitution* and the governing law.

301 We take judicial notice that Kenya, thanks to the relentlessness of the people's democratic struggles, has recently enacted for herself the current Constitution, which assures for every citizen an opportunity for personal security and for self-actualization in a free environment. The Judiciary in general, and this Supreme Court in particular, has a central role in the protection of that Constitution and in the realization of its fruits so these may inure to all within our borders; and in the exercise of that role, we choose to keep our latitude of judicial authority unclogged: so the Supreme Court may be trusted to have a watchful eye over the play of the *Constitution* in the fullest sense. Even as we think it right that this court should not be a limiting factor to the enjoyment of free political choices by the people, we hold

ourselves ready to address and to resolve any grievances which flow from any breach of the *Constitution*, and the laws in force under its umbrella.

302 It is in this context that we have given careful consideration to the special facts of the instant case. We have set out the facts in detail, so these may show us how the grievances arose, and what electoral problem there has been. We moved suo motu to have a re-tallying of some of the data generated in the Presidential-election proceedings.

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

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

305 We have already considered the foundations of the main grievance: as regards the acquisition of electronic technology for the electoral process; with regard to the partial employment of such technology, before reverting to the manual process; as regards the maintenance of a Voter Register; and in relation to the tallying of votes. Firstly, we have considered the extent to which any breach of the law would have been occasioned in the several areas of operation, and whether such, would disclose reprehensible conduct having the effect of negating the voters' intent.

306 Secondly, we have considered the evidence which came by way of depositions, and which was vigorously canvassed by the parties. In summary, the evidence, in our opinion, does not disclose any profound irregularity in the management of the electoral process, nor does it gravely impeach the mode of participation in the electoral process by any of the candidates who offered himself or herself before the voting public. It is not evident, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.

307 We will, therefore, disallow the petition, and uphold the Presidential- election results as declared by IEBC on March 9, 2013.

308 Each of the parties coming before us has sought orders as to costs. This, of course, is an adversarial system of litigation; and therefore, parties will invariably be asking for costs, at the conclusion of a matter such as this.

309 Yet we have to take into account certain important considerations, in relation to costs. It is already clear that the nature of the matters considered in a presidential-election petition is

unique. Although the petitions are filed by individuals who claim to have moved the court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.

310 Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel.

311 We do, however, greatly appreciate the outstanding contribution of all counsel appearing before us in these historic proceedings. We acknowledge them for their ingenuity and enterprise, in urging before us the vital questions of law and evidence.

L. Orders

312 In unanimity on the matters brought before us in these proceedings, we make orders as follows:

1. Petition No 5 of 2013 in the consolidated petitions be and is hereby dismissed.
2. Petition No 4 of 2013 in the consolidated petitions be and is hereby dismissed.
3. Petition No. 3 of 2013 in the consolidated petitions, and with regard to the prayer for orders for the re-computation of vote-tally percentages by the 2nd respondent, is declined, for want of jurisdiction.
4. Each party shall bear their own costs.

Aluochier v Independent Electoral and Boundaries Commission & 19 others (Civil Application 2 of 2013) [2013] KESC 25 (KLR) (26 March 2013) (Ruling)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 25 (KLR)

The court dismissed an application for joinder as a co-petitioner in a presidential election petition. It held that the applicant's intended participation in the proceedings would be an academic exercise with a focus on constitutional principles and it was not one that would raise practical electoral grievances that amounted to issues that required judicial intervention or dispute settlement.

***Electoral Law** - presidential election petitions - applications for joinder - whether an application for joinder that did not raise a direct electoral grievance could be allowed - Supreme Court (Presidential Election Petition) Rules, 2013, cap 9B Sub Leg, rule 17*

Brief facts

The applicant sought to be joined as a co-petitioner to Petition No 4 of 2013, which had been consolidated with other petitions concerning the presidential election held on March 4, 2013. The application was anchored on the Constitution and rule 17 of the Supreme Court (Presidential Election Petition) Rules, 2013, which allowed a person entitled to be a petitioner to apply for joinder before the conclusion of the hearing.

The application was opposed by the respondents who contended, among others, that its purpose was to delay the expeditious prosecution of the petition.

Issues

Whether an application for joinder that did not raise a direct electoral grievance could be allowed.

Relevant provisions of the Law

Supreme Court (Presidential Election Petition) Rules, 2013, cap 9B Sub Leg

Rule 17

(2) Any person who was entitled to be a petitioner in the petition may apply and be joined as a co-petitioner at any time before the conclusion of the hearing of the petition.

Held

1. The applicant's submissions were focused more on constitutional principles than on any electoral grievances, leading the court to view his application as academic rather than practical.
2. Settlement of disputes of a practical nature, was the primary purpose for which the judicial establishment was conceived, and must be regarded as the real justification for any proceedings that may be lodged.
3. Perceived against such a context of judicial engagement, the applicant's case had an improbable ring. There was no practicality or sincerity in the applicant's claim.

Application disallowed.

Orders

No order as to costs.

Citations

Statutes

Kenya

1. Constitution of Kenya- In general - (Interpreted).
2. Supreme Court (Presidential Election Petition) Rules, 2013 (cap 9B rule 17) - (Interpreted).

Advocate

Mr Regeru

M/s Oraro, Ngatia and Kigen

March 26, 2013, the Court delivered the following Ruling:

Application by Mr. Aluoch Polo Aluochier for Joinder in the Petitions

1. Mr Aluoch Polo Aluochier yesterday appeared before this court, for the purpose of canvassing the prayer that he be enjoined in Petition No 4 of 2013 which is already lodged and has now been consolidated with the other Petitions concerned with the Presidential election of March 4, 2013.

2. However, none of the counsel having the conduct of the said petition agrees that the applicant has a proper case to be enjoined as prayed for.

3. Learned counsel, Mr Regeru submitted that the said application has only recently been served upon him, and the prospect of joinder as prayed, in the circumstances, cannot but be for the purpose of delaying the dutiful prosecution of the cause. Learned counsel thus expressed concern:

> " There must be a reason why he zeroes in on Petition No 4. He says he wants to advance brand new issues. [There will be] little benefit in admitting him."

4. Counsel submitted that the applicant had not complied with the rules regulating the lodgement of causes in respect of a Presidential election; and that his issues were by no means related to the petitioner's issues in Petition No 4 of 2013. Counsel submitted that the applicant's motion was prejudicial to the petitioners, and that, therefore, there was no basis for allowing it.

5. Such was also the common position among other counsel in the series of petitions as now consolidated. Learned counsel, M/s Oraro, Ngatia and Kigen opposed the application for joinder; as did also Mr Abdullahi, who submitted that the applicant's grievance bore no relation to the matter in the consolidated petitions.

6. Mr Aluochier for his part, maintained that the Petitions in hand were a requisite foundation for constitutional deliberations of great public interest, which he ought to be allowed to canvass under the umbrella of those Petitions.

7. It is clear that the applicant believes his joinder-intent to be squarely supported by both the libertarian design of the *Constitution of Kenya, 2010* and specifically by rule 17 of the *Supreme Court (Presidential Election Petition) Rules, 2013* which thus provides:

> "(2) Any person who was entitled to be a petitioner in the petition may apply and be joined as a co-petitioner at any time before the conclusion of the hearing of the petition."

8. The applicant in his submissions, did not specifically address the question of his entitlement to be enjoined as a petitioner in respect of the Presidential election, but devoted his attention to important issues of constitutional principle which he was seeking to have adequately ventilated. In this respect, the applicant's cause appeared more distinct by its academic element than by the object of securing the righting of an electoral wrong. It is not surprising, in these circumstances, that the parties who had in the first place moved the Court, perceived the instant application as a sheer encumbrance upon the setting of their causes towards expeditious disposal.

9. Settlement of disputes of a practical nature, is the primary purpose for which the judicial establishment was conceived, and must be regarded as the real justification for any proceedings that may be lodged.

10. Perceived against such a context of judicial engagement, the applicant's case herein, in our view, has an improbable ring, just as learned counsel have urged; and, necessarily, all counsel will not welcome the applicant by way of joinder, as he seeks.

11. This court finds no practicality or sincerity in the applicant's claim, and so, cannot allow it. The application, consequently, is disallowed.

12. There will be no order as to costs.

13. Orders accordingly.

Kuria & 5 others v Hassan & 4 others (Petition 3, 4 & 5 of 2013 (Consolidated)) [2013] KESC 24 (KLR) (26 March 2013) (Ruling)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 24 (KLR)

Election Law *- presidential election petition - parties to a presidential election petition - amicus curiae - court's consideration in admitting a party to the status of an amicus curiae - requirement for the applicant to be non-partisan in the petition - allegations that the applicant had previously released a biased report on the President-elect - whether the application had merit in the circumstances.*

Brief facts

Katiba Institute (applicant) made an application seeking admission to the status of *amicus curiae* in the presidential election petition proceedings at the Supreme Court. The applicant submitted that the institution had been admitted to the status of *amicus curiae* in the past by the courts and further that the Institute had carried out research on matters of interpreting the Constitution and had great and singular expertise in constitutional law.

The application was opposed on grounds, *inter alia*, that a party seeking to be enjoined as *amicus curiae* must have been non-partisan and neutral. Further, a report which was co-written by the Katiba Institute titled "Implications of Kenyatta/Ruto Presidency" was submitted to court and was alleged that it implied the deep-seated resentment the applicant held towards the President-Elect and his Deputy.

Issues

Whether the applicant should be admitted to the status of *amicus curia*e in the presidential election petition despite allegations of previous bias and partisanship.

Held

1. While it was true that the applicant had previously enjoyed the status of *amicus curiae* before the court, the adversarial nature of the presidential election petition was different from that of an advisory opinion hearing by the court to which the applicant had previously enjoyed audience.
2. Where in adversarial proceedings parties had alleged a proposed applicant for *amicus curiae* was biased or hostile to one or more of the parties; or where the applicant through previous conduct appeared to be partisan on an issue before the court, the court had to consider such an objection seriously.
3. The court, though unable to ascertain the veracity of every claim that was made in the application, was convinced of the perception of bias and partisanship with regard to the applicant in the presidential election petition.

Application disallowed.

Citations

Statutes

1. Constitution of Kenya — In general — Cited

Advocates

Mr Regeru for the 3rd petitioner

Mr Rubello for the 1st respondent

Mr Karori for the 2nd respondent

Mr Katwa Kigen for the 4th respondent

March 26, 2013, the Court delivered the following Ruling:

1. An application has been made before this court by the Katiba Institute seeking admission to the status of *amicus curiae*. Professor Yash Ghai and Mr Waikwa Wanyoike made both oral and written representations for the purpose of this application.

2. Prof Ghai narrated the objectives of the Institute and submitted that the Institute has been admitted to the status of amicus curia in the past by this court and in other courts. He states that it carries out research on matters of interpreting the *Constitution*, commenting on all matters of law and has great and singular expertise in constitutional and comparative constitutional law.

3. The Application is opposed by several counsel - the 3rd petitioner and the all of the respondents - in this matter.

4. Mr Karori for the 2nd respondent, and who has filed written grounds of opposition to the application, submits that a party seeking to be enjoined amicus curiae must be non partisan and neutral. He states that the applicant does not meet these requirements and has previously adopted positions adverse to both the 1st and 2nd respondents. He submits several documents and articles written by the Institute and Prof Ghai, to support this. Mr Regeru for the 3rd petitioner also submits documents to emphasise the same point.

5. Further, Mr Karori, states that the Application has not been brought in good faith as the Applicant had a duty to disclose to the court that he has a personal grudge against the 2nd respondent and that the applicant did not disclose this nor his position previously taken on the subject matter of this case, and on some of the other parties involved in it.

6. Mr Karori also states that the Institute has failed to show any special knowledge of the law which it will bring to this matter and there are no special circumstances that would necessitate its admission to the status of amicus curia.

7. Mr Ngatia, for the 3rd respondent, opposes this application, stating that the Institute is partisan in this matter. He submits to the court a report co-written by the Katiba Institute entitled: Implications of Kenyatta/Ruto Presidency, which he suggests shows deep seated resentment by the Applicant towards the 3rd and 4th respondent.

8. These grounds for opposition to the Application are also supported by Mr Katwa Kigen for the 4th respondent and Mr Rubello for the 1st respondent.

9. While is true that the Katiba Institute has enjoyed the status of amicus curiae before this court, it is clear to us that the adversarial nature of this matter, is different from that of an advisory opinion hearing of this court, to which the Institute previously enjoyed audience.

10. We are of the opinion that where in adversarial proceedings, parties allege a proposed applicant for amicus curiae is biased or hostile to one or more of the parties or where the applicant through previous conduct appears to be partisan on an issue before the court, then we must consider such an objection seriously.

11. Having perused the authority submitted by the Applicant on the issue of impartiality and admission of amicus curiae, we find that the test established in that matter has no direct correlation to the kind of case which is before us, a contested and highly adversarial election petition.

12. Having listened to all arguments from counsel and studied the documentation submitted to the court with regard to this Application, and even though we are unable to ascertain the veracity of every claim, the court is convinced of the perception of bias and partisanship with regard to the Applicant in this matter exists.

13. In view of the foregoing, the court's position is:

14.

    a. That the application by the Katiba Institute for admission to the status of *amicus curiae* is disallowed.

    b. Orders accordingly.

Odinga v Independent Electoral and Boundaries Commission & 3 others (Petition 5 of 2013) [2013] KESC 2 (KLR) (26 March 2013) (Ruling)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 2 (KLR)

Election Law *- presidential election petition – disputes arising out of a presidential election – procedure applicable to filing, service and production of documents – timelines in production of documents – whether the Supreme Court was time bound in the determination of the election petition - whether the filing, serving and production of further documents subsequent to filing the petition could interfere with the court's timelines in the determination of the election petition - whether a pre-trial conference could have been used as a forum to make applications for production of further documents - Constitution of Kenya, 2010 article 140.*

Brief facts

Subsequent to filing of a presidential petition challenging the declaration of the results of the 2013 presidential election, the petitioner filed an application seeking orders for the court to direct the respondents to produce further documents in court within twenty – four hours after the court granted of the orders sought.

Issues

i. Whether the Supreme Court was time bound in the determination of the election petition.
ii. Whether the filing, serving and production of further documents subsequent to filing the petition could interfere with the constitutional timelines applicable to the determination of the election petition by the court.
iii. Whether a pre-trial conference could have been used as a forum to make applications for production of further documents.

Held

1. The Supreme Court was constitutionally time bound as follows;

a. The presidential election petition was to be filed within seven days after the declaration of the presidential election results and the Supreme Court was to hear the petition within fourteen days after filing of the petition. The fourteen days began running immediately after the filing of the petition.

b. The petitioner should serve the respondent within three days after filing the petition.

c. The respondents were to file their response within three days after the filing of the petition.

d. The pre-trial conference was to be held nine days after the filing of the petition.

e. The court was also allocated three days to familiarize itself with the pleadings before scheduling the pre-trial conference.

2. Intending petitioners ought to have utilized the seven day window period afforded by the Constitution following the declaration of the results to fully prepare their pleadings. Likewise, the respondents should have utilized the three days afforded to them to mount a comprehensive response to all allegations made in the petition.

3. The purpose of a pre-trial conference was a preparatory forum to lay ground rules for the expeditious, fair and efficient disposal of petitions. It allowed the court either on its own motion or upon hearing the parties to make certain orders and issue directions to ensure a fair determination of the petition.

4. Any directions that were made by the court in regard to filing and service of any further affidavits or the giving of additional evidence should have been made taking into account the strict constitutional timelines within which the petition should have been determined.

5. The orders sought by the applicant could not be complied with within the strict constitutional timelines provided without seriously jeopardizing the hearing of the petition. Indeed, had the petitioner filed the application at the time of filing the petition and proceeded to serve the same upon the respondent, it would have been possible for the court to issue appropriate orders during the first mention of the petition.

Application dismissed.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya articles 140(1)(2); 159(2)(d); 163(8) - (Interpreted)
2. Supreme Court (Presidential Election Petition) Rules, 2013 (cap 9B Sub Leg) rules 7, 8, 9, 10(1)(f); 11 - (Interpreted)
3. Supreme Court Act, 2011 (cap 9B) section 31 - (Interpreted)

Advocates

Mr Oduol for the applicant

Mr Abdullahi for the respondent

March 26, 2013, the Court delivered the following Ruling:

Background

1 This application is made by the petitioner in what was known as Petition No 5 before the order for consolidation made by this court on the March 25, 2013. The application was filed on the March 19, 2013 and served upon the respondents on diverse dates after the date

of filing. The application seeks an order by the court directing the first respondents, their servants or agents to deliver to the court and to all the parties herein, within Twenty Four (24) Hours of making of the orders (emphasis ours) all information, electronic and hard copy, in relation to the just concluded presidential elections within their power, possession, control and/or custody and to facilitate a forensic audit of the first respondent's IT System prior to the hearing of the petition.

2. The application also seeks an order by this court, directing the first respondent's servants, contractors, agents and/or service providers including Kencall EPZ Limited, LANtech (Africa) Limited, Face Technologies, Next Technologies and Google Kenya Limited to deliver to the court and all the Parties herein within Twenty Four (24) Hours of making of the order, all information, electronic and hardcopy in relation to the just concluded presidential elections that are within their power, possession, control and/or custody and more specifically the information, devices and appliances listed to facilitate a forensic audit of the first respondent's IT system prior to the hearing of this petition. The specific devices and appliances to be produced are listed in sub- paragraphs "a" to "u" of paragraph two (2) of the application.

3. The application was strenuously opposed by all the respondents herein including the petitioner in what was Petition No 3 before the order for consolidation. The application was however, supported by the petitioner in what was formerly Petition No 4. The grounds for opposition can be summarized as follows:

    1. The application was filed long after the filing and service of the petition on which the application is anchored. Coming at the pre-trial conference that is essentially meant to prepare for the actual hearing of the petition, the application is hopelessly out of time and can only derail the fair, effective and expeditious hearing and determination of the case by the court.

    2. The orders being sought by the applicant, if granted, would require the production of the entire IT Infrastructure of the first respondent (IEBC); a monumental undertaking which is impossible to effect in a span of twenty four hours.

    3. The orders being sought are directed not only to the first respondent, but also to its contractors. The latter are not parties to this petition and as such no order can be directed at them. The court should not issue extant orders whose reach affects persons that are not parties to this petition.

    4. The application is at best a mere fishing exercise in which the applicant is looking for evidence through the backdoor.

5. The application is too wide and vague as the applicant both within the pleadings and oral submissions does not answer critical questions such as; who should undertake the forensic audit, how long the audit will take and which modalities are to be used to secure the delivery of all that is sought to be produced.

6. The applicant amounts to an abuse of the process of court as the same application has been canvassed by the applicant at the High Court.

4. The applicant also strenuously argued in support of the application. The grounds in support and response can be summarized as follows:

1. The application is an integral part of the petition as it seeks the production of information which is critical to the petitioner's case.

2. What is being asked for is not as monumental as the respondents make it to appear. The critical information being sought are the logs to be found in the central server system which is located in Nairobi and its environs.

3. The information being sought will go towards providing the answers as to why the entire technology deployed in the management and conduct of the elections failed. Such answers will then provide proof of the applicant's assertion that the whole system was designed by the first respondent to fail from the very beginning.

5. We have carefully considered the arguments of counsel for the applicant and respondents in support of and opposition to the application. It is important to note at the very outset that all the petitions as consolidated are to be heard and concluded within a strict and rigid time-frame. This time frame has been decreed by article 140 of the *Constitution*. Article 140(1) and (2) of the *Constitution* provide as follows:

1. A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election. (Emphasis ours).

2. Within fourteen days after the filing of petition, under clause (1), the Supreme Court shall hear and determine and determine the petition and its decision shall be final.

6. Pursuant to this constitutional edict, and pursuant to the powers conferred upon it by article 163(8) of the *Constitution* and section 31 of the *Supreme Court Act*, this court made and published The *Supreme Court (Presidential Election Petition) Rules, 2013*. These *Rules* were meant to operationalise article 140 of the *Constitution*. The fourteen day time-limit within which the court must hear and determine an election petition begins to run immediately a party files a petition. This timeline is constitutional and not negotiable. Taking cue from the *Constitution*, rule 7 allows a petitioner a period of three days within which to serve the

respondent after filing the petition. Rule 8 in turn allows the respondent(s) three days within which to file a response from the date of service of the petition. Rule 9 provides that there shall be a pre-trial conference nine days after the filing of the petition. The court is therefore also allocated three days within which to scrutinize and familiarize itself with the pleadings before scheduling the pre-trial conference. Pursuant to these *Rules*, the court scheduled the pre-trial conference to last for two days as from the March 25, 2013. Before, then, the court mentioned all these petitions on March 20, 2013. During the mention, the court issued a number of directions with which parties had to comply.

7. Ideally, an intending petitioner must utilize the seven day window afforded by the *Constitution* following the declaration of results to fully prepare his/her pleadings. Likewise, a respondent must utilize the three days afforded him/her by the *Rules* to mount a comprehensive response to all the allegations made in the petition. The purpose of the pre-trial conference is clearly set out in rule 10. Generally speaking, the pre-trial conference is a preparatory forum to lay the ground rules for the expeditious, fair and efficient disposal of the petition. It enables the court either on its own motion or upon hearing the parties, to make certain orders and issue directions to ensure a fair determination of the petition. Rule 11 provides that the court shall within two days of the pre-trial conference commence the hearing of the petition. While rule 10(1)(f) empowers the court to give directions in regard to the filing and service of any further affidavits or the giving of additional evidence, such directions cannot be made without taking into account the strict constitutional timelines within which the petition must be heard and disposed of.

8. Applying these principles to the application at hand, it becomes clear that the court cannot grant the orders sought without seriously jeopardizing the hearing of the petition. The application was filed on the March 19, 2013, four days after the filing of the petition. Although Mr Oduol for the applicant in urging the application stated that what was sought could be produced in a fairly short time. The body of the application indicates otherwise. As argued by the respondents, what the applicant seeks at this time in the day is the production of what amounts to the complete IT infrastructure of the first respondent. We are not persuaded that such an order as is sought by the applicant can be fully complied with before the hearing of the petition which is set to commence on the March 27, 2013. Indeed, if the petitioner had filed the notice of motion at the time of filing the petition and proceeded to serve the same upon the respondent, it would have been possible for the court to issue appropriate orders during the first mention of the petitions. The time for filing, service, hearing and determination of a petition under article 140 of the *Constitution* is indeed limited. The intention of the "framers" of the *Constitution* (if such a phrase is indeed applicable in the Kenyan context), must have been to hasten the determination of a presidential petition given the high stakes involved and the great public interest that would ensue from such a petition.

9. Our attention has repeatedly been drawn to the provisions of article 159 (2) (d) of the *Constitution* which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality.

10. In his submissions while opposing the application, Mr Abdullahi contended that the application amounted to an abuse of the process of court since the same had been canvassed at the High Court by the applicant. Mr Oduol did not specifically respond to Mr Abdullahi's assertion. We hasten to point out that if indeed the petitioner did canvass the application at the High Court and proceeded to file the same application before this court without disclosing the fate of the earlier application, such action would amount to a serious abuse of the process of court. As we have not made any finding of fact on this particular issue, we shall let it to rest.

11. In view of the foregoing reasons, the application is hereby declined. We make no order as to costs.

Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 1 (KLR) (26 March 2013) (Ruling)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 1 (KLR)

Election Law *- presidential election petition - procedure for filing of documents in a presidential election petition - affidavit - affidavit evidence – time prescribed for determination of a presidential election petition – where the petitioner had filed a further affidavit after the respondents had filed their replying affidavits - limitation of time due to the strict time lines in determination of presidential election petitions – admissibility of a further affidavit or additional evidence filed without leave of court in a presidential election petition – context, nature and extent of the affidavit - where the affidavit was lengthy and introduced new issues - whether such an affidavit would be admissible in the circumstances – whether the further affidavit in a presidential election petition would have been prejudicial to the respondents and therefore occasioned a miscarriage of justice - Supreme Court Act section 31 (d), Supreme Court (Presidential Election Petition) Rules, 2013 rule 9.*

Brief facts

The petitioner had filed a petition to which the respondents in the matter responded to by filing their respective replying affidavits. Subsequently, the petitioner filed what he referred to as the 'petitioner's affidavit in reply' and served the respondents with the exception of a few who complained of lack of service. Several parties in the petition took issue with the filing of the subsequent affidavit and raised objections to it while others had no objections and even supported the reasons for filing of the further affidavit by the petitioner.

Issues

i. Whether the affidavit in reply that the petitioner had filed was admissible in court in a presidential election petition which had strict time constraints.

ii. Whether the nature, context and extent of the new evidence in the affidavit that was intended to be produced by the petitioner in the presidential election petition could have been prejudicial to the respondents and therefore it amounted to a miscarriage of justice.

iii. Whether the electoral laws had provided for a procedure for filing further affidavits or additional evidence which was available to the petitioner.

Held

1. The petitioner had used an unusual way of availing affidavits as annexures or evidence as there were various further affidavits filed through the affidavit in reply which were not independent affidavits filed to stand on their own as evidence in the particular proceedings. Such affidavits evaded payment of the filing fees and their probative value was questionable.

2. The operative term in section 31 (d) of the Supreme Court Act was the word "shall" which meant that it was mandatory to comply with any requirement within the prescribed time. The Supreme Court Act had provided for the manner in which the petition challenging the election of the President-Elect would be filed and prosecuted.
3. The Supreme Court Act had no provision relating to any further response. The principal pleadings in a presidential election under the Act were the petition and the response (just like a plaint and defence were the main pleadings in civil litigation or action). The next stage after pleadings had closed in a presidential election petition was the Pre–trial Conference which under rule 9 (1) of the Supreme Court (Presidential Election Petition) Rules, 2013 would be held 9 days after the filing of the petition.
4. It was not mandatory for the petitioner to annex an affidavit to the petition. However, a respondent was required to annex a replying affidavit to the response.
5. At the Pre–trial Conference, the Supreme Court, under the provisions of rule 10 (f) of the Supreme Court (Presidential Election Petition) Rules, could give directions in regard to the filing and service of any further affidavits or the giving of additional evidence.
6. The Supreme Court could only exercise its powers or discretion to allow further affidavits or additional evidence if it was specifically applied for, and it could allow or decline such an application. It was therefore not a matter of right and there was no provision for further affidavits in the Supreme Court Act.
7. The Supreme Court considered each case within the context of its peculiar circumstances and therefore, the exercise of the discretion of the court to apply the principle of substantial justice, rather than technicalities particularly in a petition relating to a presidential election which was a matter of great national and public interest ought to be done sparingly. The law and rules relating to the Constitution when implemented by the Supreme Court must be taken with seriousness and the appropriate solemnity. The rules and timelines established therein were made with special and unique considerations.
8. The period for the filing, prosecution and determination of a Presidential Election was only 14 days from the time of filing the petition which was a very tight, short and limited period. The background to the setting of the strict timelines ought to be known to most Kenyans as there was a purpose for it and the intention of the people of Kenya and of Parliament ought to be respected.
9. The parties in the petition had a duty to ensure that they complied with their respective timelines, and the court ought to adhere to its own. There must be a fair and level playing field so that no party or the court lost the time that they were entitled to and no extra burden should be imposed on any party or the court as a result of omissions or inadvertence which were foreseeable or could have been avoided.
10. If the further affidavit was small or limited so that the other party was able to respond to it, then the court would be considerate, taking into account all aspects of the matter. However, where the new material introduced was so substantial involving not only a further affidavit

but massive additional evidence so as to make it difficult or impossible for the other party to respond effectively, the court would exercise caution and care in the exercise of its discretion to grant leave for the filing of the further affidavit and admission of additional evidence.

11. The affidavit contained 839 pages all inclusive and the further statements, in particular the intended additional evidence (exhibits), were so detailed that the remaining time before the trial was not reasonably adequate for the respondents to file any reasonable answer.
12. The additional facts and evidence tended to introduce new matters that would change the character and nature of the petition which could lead to the amendment of the petition and possibly give rise to significant new facts and allegations leading to a serious departure from the original case.
13. If the court had allowed the affidavits to remain on record, it would have been prejudicial to the respondents and it would have amounted to a miscarriage of justice.
14. Rule 31 (h) Supreme Court (Presidential Election Petition) Rules permitted the petitioner to apply for leave to be allowed to file further affidavits and additional evidence at the Pre-trial Conference. It would therefore have been prudent to file such an application before the date of the Pre–trial Conference so that it was before court, in time. However, in the instant case, the petitioner proceeded to file an affidavit in reply which had six additional and substantial affidavits, without any application for leave to do so.
15. The request for leave had been made at the end of the petitioner's submissions in response to the objection and appeared to be almost reluctantly made. It was probably due to the pressure emanating from the kind of petition that was before the court and the time constraints. However, the court could not shoulder the burden of the consequences of such omissions and inadvertence.

Affidavit in reply by the petitioner, annexures and all other accompanying affidavits expunged from the court record.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya articles 86, 140, 156 - (Interpreted)
2. Supreme Court (Presidential Election Petition) Rules, 2013 (cap 9B Sub Leg) rules 9(1); 10(f) - (Interpreted)
3. Supreme Court Act, 2011 (cap 9B) sections 6, 7, 8, 31(d)(h) - (Interpreted)

Advocates

None mentioned

March 26, 2013, the Court delivered the following Ruling:

1. Petition No 5 was filed by the petitioner, Raila Odinga on the March 16, 2013. The respondents in the petition are:

    1. Independent Electoral and Boundaries Commission;

    2. Ahmed Isaack Hassan;

    3. Uhuru Kenyatta; and

    4. William Samoei Ruto.

2. Upon service of the petition on them, the respondents filed their respective replying affidavits. The petitioner on the March 23, 2013 filed what he referred to as "petitioner's affidavit in reply" and is sworn on the March 22, 2013. The petitioner served the respondents in Petition No 5. The only parties in respect of the other petitions who complained of lack of service were the petitioners in Petition No 3, through their counsel Mr Regeru.

3. As indicated earlier, the said affidavit in reply was filed on March 23, 2013 which was last Saturday. At the pre-trial conference on March 25, 2013, several counsel for various parties in the now consolidated petitions, took issue with the filing of the said affidavit and raised objections, while others had no objections and even supported the reasons for filing of the said affidavit of the petitioner.

4. Mr Ngatia for the third respondent, Mr Uhuru Kenyatta, stated that:The said affidavit was inordinately lengthy, running to 900 pages.The new affidavit contained a schedule of alleged inflated votes in 58 new constituencies.The affidavit introduced 122 new electoral areas with specific complaints. Mr Ngatia wondered whether the court would allow complaints amplified by new complaints out of time.It was a scientific impossibility for the respondents to respond within a day, before the hearing, or even by the end of the week.There was a right of fair trial for both the petitioner and the respondents.The filing of the affidavit was prejudicial to the respondents, as it would occasion delay in the trial.It was impossible to provide the material sought within time.Parties must be held to their bargain as represented in their pleadings.The petitioner filed the affidavit without the leave of the court, and as such there was no courtesy or decorum on the petitioner's part.

5. Mr Ngatia asked the court to disallow the affidavit.

6. Mr Ahmed Nassir Abdullahi for the second respondent, Mr Ahmed Isaack Hassan, questioned the filing of the affidavit by the petitioner. He asked whether the case will

stop "mutating" so that parties can proceed with the hearing. He referred to article 140 of the *Constitution* and the *Supreme Court (Presidential Election Petition) Rules 2013* which provides the framework for responses. He added that:There was no provision to respond to the respondent's response before the pre-trial conference.There was a laid down procedure for the filing of responses.The affidavit amounted to a flooding of evidence and was a flagrant abuse of the rules.The petition has now changed significantly by the introduction of 152 new areas.He inquired whether amendment of the petition can be done through an affidavit.Finally, he concluded that the "original" petition can be prosecuted without the new affidavit.

7. The Independent Electoral and Boundaries Commission, through one of its counsels, Mr Mohamed Nyaoga, also opposed the filing of the petitioner's affidavit in reply. He said that:There was no dispute that the petitioner and all parties had been served with forms 34 and 36.The affidavit is filed at the eleventh hour, raising fresh issues through the back-door. This, he argued forms a different cause of action.

8. Mr Kigen for the fourth respondent, Mr William Ruto, submitted that:The petitioner had filed the affidavit without leave of the court.There is no law which allows the petitioner to file the further affidavit.The petitioner had manipulated the timelines. They now have more than 7 days yet they had been allowed enough time.If the court allows the affidavit, it will be re-writing the governing law.The petitioner has not given reasons for the filing of the affidavit.The petitioner is presenting the petition in instalments.

9. Mr Regeru for the petitioner in Petition No 3 stated that:The first requirement had not been fulfilled, as he had not been served with the affidavit.The *Rules* do not allow the further affidavit to be field.The petitioner did not seek leave of the Supreme Court, as a matter of courtesy.The time-table was being scuttled, and the court ought not to countenance this.There was a brand new petition, in the shape of the affidavit.There must be fairness to all the parties.

10. Mr Deya, on behalf of the fourth petitioner, accused the Independent Electoral and Boundaries Commission for the manner in which it had gone about discharging its duties by virtue of articles 86 and 156 of the *Constitution*. In effect, he blamed the Independent Electoral and Boundaries Commission for delays that must have necessitated the Petitioner filing the affidavit.

11. Mr Oraro, for the petitioner, stated and argued as follows:The petitioner had to go to court to obtain orders for production of various documents.Under rule 10(f), there was the expectation of filing and serving any further affidavit, or the giving of additional evidence.The petitioner chose the approach contemplated, ie to file the further affidavit and apply for leave subsequently.There was no new pleading where data in form 34 had been

supplied before.They did not ask for particulars earlier, as the Independent Electoral and Boundaries Commission had in its response said that the manual tallying was accurate.The affidavit is in respect of the application for disclosure of facts by one Mr Nesbitt.The evidence is not additional.The petition shows in one instance, that 11,000 votes had been deducted from the total.

12. Mr Ngatia and Mr Nyaoga made brief replies.

13. We have considered the objections raised by the respondents, in the now consolidated petition, and supported by the petitioner in Petition No 3, who is now petitioner No 2.

14. We have also considered the submissions in response. The net effect is that the respondents are asking the court to expunge the petitioner's affidavit sworn on March 22, 2013 and filed on March 23, 2013.

15. We have carefully looked at the record and found that, in fact, there are still further affidavits placed on the record by the petitioner through the "affidavit in reply".

16. We found the following further affidavits:

    1. Affidavit in reply sworn by Raila Odinga on March 22, 2013 and filed on March 23, 2013;

    2. Replying affidavit sworn by Oduor Ong'wen on March 22, 2013. It is not formally filed, but annexed as exhibit "RO – 1" in the affidavit in reply by the petitioner;

    3. Further affidavit sworn by Janet Ongera on March 22, 2013. It is not formally filed, but annexed as exhibit "RO – 2".

    4. Replying affidavit sworn by Prof Lawrence Gumbe on March 22, 2013. It is not formally filed, but annexed as Exhibit "RO -3"

    5. Replying affidavit of Andrew Mwambogo Mwarua sworn on March 22, 2013. It is not formally, but annexed as exhibit – "RO- 4.".

    6. Affidavit of John Walubengo sworn on March 22, 2013. It is not formally filed, but annexed as "Exhibit - RO5".

    7. Affidavit of Raj Pal Senna sworn on March 22, 2013. It is not formally filed, but annexed as exhibit – "RO- 6".

17. The true position, therefore, is that there is not one "petitioner's affidavit in reply", but 7 affidavits in total. This aspect was not addressed by any of the parties.

18. This is an unusual way of availing affidavits as "annexures" or "evidence"; they are not independent affidavits filed to stand on their own, as evidence in the particular proceedings.

We would understand if an affidavit is sworn in other proceedings in the past, is annexed as evidence of that affidavit. However, to have several affidavits sworn for the purpose of current proceedings and annexed as evidence is most unusual, if not strange, in our view.

19. Firstly, such affidavits evade payment of the filing fees and, secondly, their probative value come into question. Be that as it may, as the matter was never raised by the parties, we will say no more in respect of this anomaly.

20. It follows that the attacks on the affidavit in reply by the respondents are to be deemed to apply to each of the affidavits, distinctly and separately.

21. We now wish to turn to the relevant law regarding further affidavits and additional evidence, as provided in the *Supreme Court Act* and *Supreme Court (Presidential Election Petition) Rules, 2013*. Section 31 of the *Act* provides *inter alia* that:

> "without limiting the generality of article 163(8) of the *Constitution*, the rules made by the Supreme Court under that article may make provisions for .... (d) prescribing the time within which any requirement of the rules shall be complied with;..."

22. We note that the operative term in section 31(d) is the word "shall". This suggests that it shall be mandatory to comply with any requirement within the prescribed time. The *Supreme Court Act* provides for the manner in which the petition challenging the election of the President-elect shall be filed and prosecuted.

23. Section 6 provides for the filing of the election petition-section 7 for the service of the petition; and section 8 deals with the response. There is no dispute that the petitioner and respondents complied with these provisions, and there is no need to dwell on them for the purposes of the objections herein.

24. Upon careful perusal of the *Supreme Court Act*, there is no provision therein relating to any further or other response. We emphasize the foregoing because it is our view that the principal pleadings in a presidential election under the act are the petition and the response/s (just like a plaint and defence are the main pleadings in civil litigation or action). The next clear stage after pleadings close in a presidential election petition is the pre– trial conference. The pre-trial conference under rule 9 (1) shall be held 9 days after the filing of the petition.

25. It should be noted that it is not mandatory for the petitioner to annex an affidavit to his/her petition. However, a respondent is required to annex a replying affidavit to the response. At the pre– trial conference, the court, under the provisions of rule 10(f), may:

> "give directions in regard to the filing and service of any further affidavits or the giving of additional evidence;"

Upon careful consideration of the said rule and submissions by counsel, we are of the view that the court can only exercise its powers and/or discretion to allow further affidavits or additional evidence if it is specifically applied for, and may allow or refuse such an application. It is not a matter of right. As stated earlier, there is no provision for further affidavits in the *Supreme Court Act*, whatsoever.

26. The Supreme Court is a creature of the *Constitution of Kenya*, the supreme law of the land. The *Supreme Court Act* was enacted by Parliament on the basis of the provisions of the *Constitution*. The Supreme Court is given the powers to make the *Supreme Court (Presidential Election Petition) Rules* by the Act. So, everything flows from the *Constitution*. It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and rules relating to the *Constitution*, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.

27. The period for the filing, prosecution and determination of a presidential election is only 14 days from the time the results are declared. This is a very tight, short and limited period. The background to the setting of the strict time – lines must be known to most Kenyans. There was a purpose to this and the intention of the people of Kenya and of Parliament must be respected.

28. The parties have a duty to ensure they comply with their respective time – lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

29. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the

court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.

30. In the present case, the affected respondents have submitted that they are unable to respond within next remaining period (which is only today), before the hearing starts.

31. We have gone through the affidavits and exhibits and find that the bundle contains 839 pages all inclusive. We find that the further statements, and in particular the intended additional evidence (exhibits), are so detailed that the remaining time before the trial is not reasonably adequate for the respondents to file any reasonable answer.

32. Secondly, from what has been deponed by Mr Ong'wen and Mrs Ongera in their respective affidavits, the additional facts and evidence, in our view, tend to introduce such new matters as would change the character and nature of the petition. This may lead to amendment/s of the petition thereby possibly giving rise to significant new facts and/or allegations leading to a serious departure from the original case.

33. We hold that if we allow the 7 affidavits to remain on record, the same will be prejudicial to the respondents. This will amount to a miscarriage of justice, and we cannot allow it in the circumstances.

34. As indicated earlier, under rule 31(h), the petitioner could have applied for leave to be allowed to file further affidavits and/or additional evidence at the pre – trial conference. Of course it would be prudent for one to file such an application before the date of the pre-trial conference, so that it is before the court, in time. However, in this case, the petitioner proceeded to file an affidavit in reply bearing on its back six substantial affidavits, without any application for leave to do so!

35. Senior counsel, Mr Oraro submitted, to our understanding, that it was the intention to ask for such leave at the pre – trial conference. We understand that he would have made such request orally. The request for leave was made at the tail-end of the petitioner's submissions in response to the objection. It was almost reluctantly made, if we may say so. We however give the benefit of the doubt to counsel on the allegations or suggestions of lack of courtesy or decorum. From what we know of the senior counsel, he is the last one to show disrespect to any court of whatever level. We only deem that it was a judgment or decision which was not founded on foresight, or was taken due to pressures emanating from the kind of petition that was before the court, and the time constraints. But the respondents and the court should not shoulder the burden of the consequences of such omissions or inadvertences.

36. As a result of the forgoing, we hereby expunge from the court records the petitioner's affidavit sworn on March 22, 2013 together with all its annexures, which include the other affidavits. The petitioner shall bear the costs of the objection proceedings relating to the affidavits in reply.

Orders accordingly.

Aluochier v Independent Electoral and Boundaries Commission & 19 others (Civil Application 2 of 2013) [2013] KESC 16 (KLR) (Election Petitions) (25 March 2013) (Ruling)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 16 (KLR)

Election Law *- presidential election petition – joinder of parties in a presidential election petition – application to be enjoined as a party in an existing presidential election petition – entitlement for joinder in the petition – provision under the Supreme Court (Presidential Election Petition) Rules - court consideration of the applicant's entitlement for joinder in the petition – whether the applicant was entitled to be enjoined as a party in the presidential election petition in the circumstances – Supreme Court (Presidential Election Petition) Rules, 2013 rule 17.*

Brief facts

The applicant made an application to be enjoined in the presidential election petition proceedings which had been lodged and consolidated with various other petitions with regard to the presidential election. However, none of the advocates having conduct of the presidential election petition supported the application to be enjoined as a party to the petition. Counsel for the respondents submitted that the application for joinder could only have served the purpose of delaying the dutiful prosecution of the petition and further, that the applicant had not complied with the rules regulating the lodging of a presidential election petition and his issues were by no means related to the petitioner's issue in the petition he had applied to be enjoined as a party. It was therefore submitted that the applicant's motion was prejudicial to the petitioners in the said petition and there would be no basis for allowing it.

Issues

i. Whether the applicant was entitled to be enjoined as a co-petitioner in another existing presidential election petition under the electoral laws.

Relevant provisions of the Law

Supreme Court (Presidential Election Petition) Rules, 2013

Rule 17

(2) any person who was entitled to be a petitioner in the petition may apply and be joined as a co-petitioner at any time before the conclusion of the hearing of the petition.

Held

1. The applicant had not addressed the question of entitlement to be enjoined as a petitioner in respect of the existing presidential election petition but had devoted his attention to important issues of constitutional principle which he sought to have adequately ventilated.

2. The applicant's case appeared more distinct by its academic element than by the object of securing the 'righting' of an electoral wrong. It was therefore not surprising that the petitioners in the petition that the applicant sought to be enjoined perceived the application as an encumbrance upon the setting of their case towards expeditious disposal.

3. Settlement of disputes of a practical nature was the primary purpose for which the judicial establishment was conceived and must have been regarded as the real justification for any proceedings that may have been lodged.

4. The applicant's case as perceived against a context of judicial engagement had an improbable ring and by necessity, all the advocates in the petition would not welcome the applicant by way of joinder as the applicant sought.

5. There was no practicability or sincerity in the applicants claim and therefore the court could not have allowed it.

Application dismissed.

Citations

Statutes

None referred to

Advocates

None mentioned

March 25, 2013, the Court delivered the following Ruling:

Application By Mr. Aluoch Polo Aluochier for Joinder in the Petitions

1. After giving this application due consideration, we have come to the conclusion that it cannot be allowed at this stage. While we have a commitment to hear and determine the three petitions on the basis of which the court has been moved, time is of the essence – and judicial notice is to be taken of this fact. In our assessment of the present setting for the resolution of the issues before us, the belated application now being brought can only cause unnecessary delay. Accordingly, we hereby disallow the application.

2. There shall be no order as to costs.

Kuria & 5 others v Hassan & 5 others (Petition 3, 4 & 5 of 2013 (Consolidated)) [2013] KESC 26 (KLR) (25 March 2013) (Ruling)

Supreme Court of Kenya

WM Mutunga, CJ & P, MK Ibrahim, PK Tunoi, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 26 (KLR)

Three presidential elections filed in respect of the 2013 presidential elections were consolidated and were to be heard and determined as one consolidated petition. The court explained that there was need for the expeditious disposal of the petitions.

***Electoral Law** - presidential election petitions - consolidation of presidential petitions with similar issues - petitions challenging the validity of the 2013 presidential elections - whether presidential election petitions could be consolidated in so far as the petitions were in respect of the same respondents and with regard to the validity of the Presidential Election.*

Brief facts

Presidential Election Petition Nos 3, 4, and 5 of 2013 were filed before the Supreme Court of Kenya challenging the validity of the March 4, 2013 presidential election. The instant matter was a determination on whether the three petitions should be consolidated.

Issues

Whether presidential election petitions should be consolidated as they were in respect of the same respondents and with regard to the validity of the presidential election.

Held

1. Time was of the essence in the disposal of petitions which related to matters that touched on great public interest and the Constitution which was the supreme law of the land.
2. Although Petition No 3 of 2013 raised distinct and separate questions that were to be determined and was a 'stand alone' petition, there was need for expeditious disposal of the petitions and determination of the many complex matters.
3. The three petitions were to be consolidated as one petition. However Petition No 3 of 2013 would be heard within the consolidated petition and the questions therein determined without prejudice to the parties.
4. The file for Petition No 5 would be deemed to be the pilot file in which all the proceedings would be recorded and the final decision made therein. The petitioner therein would be referred to as the petitioner.
5. The petitioners in Petition No 4 of 2013 would be jointly referred to as the 2nd petitioner. The petitioners in petition No. 3 of 2013 would be jointly referred to as the 3rd petitioner. The respondents would remain as in Petition No 5.

Presidential Election Petition Nos 3, 4, and 5 of 2013 were consolidated as one petition.

Citations

Statutes

1. Constitution of Kenya, 2010

Advocates

None mentioned

March 25, 2013, the Court delivered the following Ruling:

1. We have considered the question of the possible consolidation of the three Petitions namely: Petitions 3, 4 and 5 of 2013. We have carefully considered the submissions by Counsel regarding this issue.

2. All these Petitions are in respect of the same respondents with regard to one matter; the validity of the Presidential Election of 4th March 2013.

3. As we have indicated time is of the essence in the disposal of these Petitions which relate to matters that touch on great public interest and on the *Constitution* of Kenya which is the supreme law of the Land.

4. We agree with Counsel that Petition No 3 of 2013 raises distinct and separate questions to be determined and is a stand alone Petition. However we note the need for expeditious disposal, the time constraints, pressure on the Court and many complex matters to be determined.

5. We are of the view that the three Petitions should be consolidated as one Petition. This means that Petition No 3 of 2013 will be heard within the consolidated Petition and the questions therein determined without prejudice to the parties.

6. We hereby order the consolidation of the three Petitions.

7. The file for Petition No 5 shall be deemed to be the Pilot file in which all proceedings shall be recorded and the final decision made therein.

8. The Petitioner in Petition No 5 of 2013 shall be referred to as the 1st Petitioner. The petitioners in Petition No. 4 of 2013 shall be jointly referred to as the 2nd Petitioner. The petitioners in Petition No 3 of 2013 shall be jointly referred to as the 3rd Petitioner. The respondents shall remain as in Petition No 5.

   Orders accordingly.

Kuria & 5 others v Hassan & 4 others (Petition 3, 4 & 5 of 2013 (Consolidated)) [2013] KESC 14 (KLR) (25 March 2013) (Ruling)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 14 (KLR)

Civil Practice and Procedure *- parties to a suit - amicus curiae - whether allowing the Attorney General to participate in a presidential election petition as an amicus would be prejudicial to the scope of the Supreme Court's authority.*

Brief facts

Two applications were made before the court both seeking admission to the status of *amicus curiae* by the Attorney-General and the Law Society of Kenya (LSK) in a presidential election petition. The Attorney-General submitted that the importance of presidential election, based on the terms of the Constitution of Kenya, 2010 (Constitution) justified the participation of his office as protector of the public interest, in the capacity of *amicus curiae*. The Attorney-General submitted that his office had no partisan interest in the matter.

While not doubting that the Attorney-General would remain non-partisan as *amicus*, the petitioners submitted that as the case was essentially evidentiary and not concerned with the interpretation of the Constitution, there was no special contribution which the Attorney-General could make, in the capacity sought. The petitioners further urged that the Government needed not participate in the petition proceedings as *amicus*, since its role was like that of a respondent, via the agency of the Independent Electoral and Boundaries Commission (IEBC).

Issues

Whether allowing the Attorney General to participate in a presidential election petition as an *amicus* would be prejudicial to the scope of the Supreme Court's authority.

Held

1. The State Law Office, the chief officer of which was the Attorney-General, was the custodian of the legal instruments of the Executive branch, and the recognised advisor of the State in matters of public interest. That office was the main player in the performance of the Executive's role *vis-a-vis* the operationalization of the Constitution of Kenya, 2010 (Constitution). The Constitution expressly provided that, in certain instances, the Attorney-General could obtain the court's permission to appear as *amicus*. The court, which was the custodian of rules of validity, propriety and fair play under the Constitution and the law, remained in charge, in regulating such precise role as the Attorney-General could play if admitted as *amicus curiae*.
2. It would be improper to exclude the Attorney-General from the role of *amicus* in the proceedings and admitting the Attorney-General to such a role would not present a

condition prejudicial to either the scope of the court's authority, or the best interests of the parties to the several petitions. The position of the LSK was entirely different.

3. The submissions of the counsel in favour of admitting LSK to the status of *amicus* were by no means the most powerful. The effect of counsel's submission was that since, by section 4 of the Law Society of Kenya Act, LSK was mandated to assist the Government in matters related to law-making, that was a typical case in which LSK deserved to be admitted to the status of *amicus curiae*. However, the argument to the contrary was more powerful.

Attorney-General admitted to the status of amicus curiae in the petitions before the court; application by the LSK for admission to the status of amicus curiae dismissed.

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya, 2010 article 166 — (Interpreted)
2. Law Society of Kenya Act, 2014 (Act No 21 of 2014) section 4 — (Interpreted)

Advocates

Mr Oraro and Ms Kilonzo for the pettioners

Mr Regeru, Mr Abdullahi, Mr Ngatia, Mr Rebello and Mr Kigen for the respondents

March 25, 2013, the Court delivered the following Ruling:

1. Two applications were made before this court earlier in the day, both seeking admission to the status of *amicus curiae*. The first was by the Attorney-General, while the second was by the Law Society of Kenya (LSK).

2. The learned Attorney-General submitted that the importance of presidential election, based on the terms of the *Constitution of Kenya, 2010* justified the participation of his office as protector of the public interest, in the capacity of *amicus curiae*. The Attorney-General submitted that his office had no partisan interest in the matter, and would in any case limit itself to such role as the court zx do no more than highlight legal questions, and in this way provide guidance to the court.

3. Most of the several counsel in the petitions – Mr Regeru, Mr Abdullahi, Mr Ngatia, Mr Rebello, Mr Kigen – supported the Attorney-General's application. However, learned counsel for the petitioners, Mr Oraro and Ms Kilonzo opposed the application.

4. While not doubting that the Attorney-General would remain non-partisan as *amicus*, Ms Kilonzo submitted that as the case was essentially evidentiary and not concerned with the interpretation of the *Constitution*, there was no special contribution which the Attorney-General could make, in the capacity sought. Counsel urged that the Government needed not participate in the petition proceedings as *amicus*, since its role was like that of a respondent, via the agency of the Independent Electoral and Boundaries Commission (IEBC).

5. Learned counsel, Mr Oraro submitted that if the Attorney-General was seeking admission to *amicus curiae* status by virtue of article 166 of the *Constitution*, then the application is inappropriate, since the proceedings are of a sui generis kind and are not civil proceedings.

6. Counsel urged further that by current statute law, the Attorney-General has an advisory role in the transfer of power from one state officer to another – and it is precisely this function which is contested in the petitions.

7. After considering the several lines of submission by counsel, we have taken note of certain governing scenarios which lead us to a final decision. Firstly, the state law office, the chief officer of which is the Attorney-General, is the custodian of the legal instruments of the executive branch, and the recognised advisor of the state in matters of public interest. Secondly, and interlinked with the foregoing point, the said office is the main player in the performance of the Executive's role *vis-a-vis* the operationalization of the *Constitution*. Thirdly, the *Constitution* expressly provides that, in certain instances, the Attorney-General may obtain the court's permission to appear as *amicus*. Fourthly, the court, which is the custodian of rules of validity, propriety and fair play under the *Constitution* and the law, remains in charge, in regulating such precise role as the Attorney-General may play if admitted as *amicus curiae*.

8. These considerations have led this court to the conclusion that it would be improper to exclude the Attorney-General from the role of *amicus* in these proceedings; and that admitting the Attorney-General to such a role will not present a condition prejudicial to either the scope of the court's authority, or the best interests of the parties to the several petitions.

9. We find the position of the Law Society of Kenya (LSK) to be entirely different.

   The submissions of learned counsel AB Shah, in favour of admitting LSK to the status of amicus were by no means the most powerful. But our position has been conditioned more by the common direction and focus of the submissions made by learned counsel.

10. The effect of Mr Shah's submission is that since, by s 4 of the *Law Society of Kenya Act* LSK is mandated to assist the Government in matters related to law-making, this is a typical case in which LSK deserves to be admitted to the status of amicus curiae.

11. But the argument to the contrary is more powerful. Learned counsel, Mr Regeru submitted that an affidavit in aid of one of the petitions, sworn by the vice-chairperson of LSK, left little doubt that LSK had taken a partisan position; and this same point has featured in the submissions by other counsel as well. LSK's application is opposed by learned counsel, Ms Kilonzo, who perceives the applicant's role as partisan; Mr Oraro, for the same reason; Mr Kamau Karori, for the same reason; Mr Rebello, for the same reason; Mr Ngatia, for the same reason; Mr Kigen, for the same reason.

12. The court's position is now expressed in the following orders:

    (a) The Attorney-General is admitted to the status of *amicus curiae* in the petitions before the court.

    (b) The application by the Law Society of Kenya for admission to the status of *amicus curiae* is disallowed.

    (c) Orders accordingly.

Kuria & 5 others v Hassan & 4 others (Petition 3, 4 & 5 of 2013 (Consolidated)) [2013] KESC 15 (KLR) (Election Petitions) (25 March 2013) (Directions)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 15 (KLR)

Brief facts

The instant application sought orders of scrutiny and retallying of results of some polling stations in the 2013 presidential elections.

Orders

i. *There was to be a scrutiny of all form 34 which were used by the IEBC in tallying the presidential votes from each of the 33400 polling stations in the country including the form 34 used by IEBC in tallying the diaspora votes.*

ii. *The scrutiny was to aim at establishing the number of registered voters, the number of valid votes cast and the number of rejected votes as indicated on each form.*

iii. *There was to be scrutiny of all form 36 which were used by IEBC in aggregating the tallies of presidential votes from all form 34s.*

iv. *The scrutiny would aim at establishing the accuracy or otherwise of the total tallies of the presidential votes as indicated on the form 34s.*

v. *The scrutiny was to also aim at comparing the number of registered voters indicated in form 34 and the number of registered voters on the principal register.*

vi. *There was to be a re-tallying of the presidential votes in the following 22 polling stations [list annexed], using forms 34, 36 and the principal register.*

vii. *The re-tally was to aim at establishing whether the number of votes cast in each of the 22 polling stations exceeded the number of registered voters as indicated in the principal register.*

viii. *The principal register that was to be used in the exercise was the external hard drive presented by IEBC in their annexture AIH.9 in the replying affidavit of the 1st respondent.*

ix. *The exercise was to be carried out on the March 26, 2013, from 8.00 am. at a designated venue. The parties would be notified of the venue by the Registrar.*

x. *The results of the exercise were to be filed in the Supreme Court Registry by latest 4.00 pm on Wednesday the March 27, 2013.*

xi. *The petitioner(s) were to each jointly appoint 10 agents to act as observers during the scrutiny exercise as per orders i – vi.*

xii. *The respondents were to each jointly appoint 10 agents at act as observers during the scrutiny exercise as per orders i – vi.*

xiii. *An oath of secrecy and confidentiality was to be administered to each and every one of the designated agents referred to in order x and xi, for the purpose of carrying out the exercise. The*

oath was to be administered by a Registrar of the court on the March 26, 2013 at 7.30 am. The venue of the oath would be communicated by the Registrar.

Citations

Cases

None referred to

Statutes

None referred to

Advocates

None mentioned

March 25, 2013, the Court delivered the following Directions:

1. Having been seized of the 3 petitions challenging the presidential election of 2013 and having carefully studied the pleadings therein, the court hereby makes the following orders:

   (1) There shall be a scrutiny of all Form 34 which were used by the IEBC in tallying the presidential votes from each of the 33400 polling stations in the country including the form 34 used by IEBC in tallying the Diaspora votes.

   (2) The scrutiny shall aim at establishing the number of registered voters, the number of valid votes cast and the number of rejected votes as indicated on each form.

   (3) There shall be scrutiny of all Form 36 which were used by IEBC in aggregating the tallies of presidential votes from all Form 34s.

   (4) The scrutiny will aim at establishing the accuracy or otherwise of the total tallies of the Presidential votes as indicated on the Form 34s.

   (5) The scrutiny shall also aim at comparing the number of registered voters indicated in form 34 and the number of registered voters on the principal register.

   (6) There shall be a re-tallying of the presidential votes in the following 22 polling stations [list annexed], using Forms 34, 36 and the principal register.

   (7) The re-tally shall aim at establishing whether the number of votes cast in each of these 22 polling stations exceeds the number of registered voters as indicated in the principal register..

   (8) The principal register that shall be used in this exercise is the external hard drive presented by IEBC in their annexture AIH.9 in the replying affidavit of Ahmed Isaac Hassan.

(9) This exercise shall be carried out on the March 26, 2013, from 8.00 am. at a designated venue. The parties will be notified of the venue by the Registrar.

(10) The results of this exercise shall be filed in the Supreme Court Registry by latest 4.00 pm on Wednesday the March 27, 2013.

(11) The petitioner(s) shall each jointly appoint 10 agents to act as observers during the scrutiny exercise as per orders 1 – 6 above..

(12) The respondents shall each jointly appoint 10 agents at act as observers during the scrutiny exercise as per orders 1 – 6 above.

(13) An oath of secrecy and confidentiality shall be administered to each and every one of these designated agents referred to in order 10 and 11 above, for the purpose of carrying out this exercise. The oath shall be administered by a Registrar of this court on the March 26, 2013 at 7.30 am. The venue of the oath shall be communicated by the Registrar.

It is so ordered.

Otieno & 2 others v Hassan & 5 others (Petition 4 & 5 of 2013 (Consolidated)) [2013] KESC 17 (KLR) (25 March 2013) (Order)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 17 (KLR)

Held

It emerged that the supplicant did not have party status in any of the petitions. There was no impression that the supplicant's prayers will operate in aid of the trial process for the petitions before the court, which, it was apparent, had a clear urgency.

Orders

The prayers in question were not entertained, but remitted to the Registrar for appropriate orders on Tuesday, March 26, 2013 at 9.00 am.

Citations

Cases

None referred to

Statutes

None referred to

Advocates

None mentioned

March 25, 2013, the Court delivered the following Order:

Two Prayers by Nazlin Umar

1. It emerges that the supplicant does not have party status in any of the petitions herein. We do not gain the impression that the supplicant's prayers will operate in aid of the trial process for the petitions before the court, which, it is apparent, have a clear urgency.

2. Consequently, we order that the prayers in question shall not be entertained now, but shall be remitted to the Registrar for appropriate orders on Tuesday, March 26, 2013 at 9.00 am.

3. Orders accordingly.

Mbugua & another v Attorney General & 21 others (Petition 3 of 2013) [2013] KESC 10 (KLR) (20 March 2013) (Ruling)

Supreme Court of Kenya

Lucy Njora, DR

Neutral citation: [2013] KESC 10 (KLR)

Civil Practice and Procedure *- pauper briefs - application for leave to file petition as a pauper in the Supreme Court – matters which the registrar of the supreme court should consider in such an application – Supreme Court Rules, rule 50.*

Brief facts

The applicants in the application sought to be allowed to file the petition challenging the swearing in of the President-elect as paupers.

Issues

Supreme Court Rules

Proceedings in forma pauperis

50. *(1) A party may apply in any proceedings in the court to proceed in forma pauperis.(2) Where the Registrar of the court is satisfied in any proceedings that a party lacks the means to pay the required fees, the Registrar may by order direct that the matter be lodged*

(a)Without prior payment of fees of Court, or on payment of any specified amount less than the required fees; and

(b)On condition that the applicant undertakes to pay the fees or the balance of the fees out of any money or property that may be recovered in or as a consequence of the proceedings.

(3) In considering an application under sub-rule (2), the Registrar shall consider—

(a) whether the person has the capacity to pay the costs;

(b) whether the suit in the court below was instituted in forma pauperis.

(c) the affidavit of means deponed by the party;

(d) the objective merit of the case; and

(e) any practice directions made by the Chief Justice.

(4) No fee shall be payable on the lodging of an application under sub-rule (1).

(5) Any expenses arising from waiver of fees under this Rule shall be charged on the Judiciary Fund.

Held

1. The threshold of proving that an applicant deserved the leave of the court to be pronounced as one capable of filing *in formapaupers* was extremely high.
2. The prayers sought called for the exercise of the court's discretion which was in terms unfettered. But as in all cases where the court had to exercise its discretion, there must be

some reasonable basis in fact or in law to warrant the orders made. The court's discretion had to be exercised judiciously at all times under any given circumstances.

3. The applicants had failed to;
    a. provide the court with sufficient evidence to persuade the court to find in their favour.
    b. meet the threshold of proving and providing full disclosure
    c. provide an inventory of their assets and liabilities by merely stating that they have none.
4. The onus in pauper briefs lay squarely on the applicant to candidly and in extreme openness reveal all about his status to the court. Failure to provide disclosure in its strict sense would knock out the matter and would render a matter as uncreditworthy.
5. The court must be satisfied on the application of an applicant that he lacked the means to pay the required fees or to deposit the security for costs and that the matter is not without reasonable possibility of success. *Court of Appeal Civil Application number 228 of 2004*
6. A court was entitled to reject such an application where the court was satisfied that the applicant could not recover more than nominal damages, the court might well be justified in refusing permission because it would be unjust to the other party who would have to incur substantial costs which might not be recoverable. *Ali Suleman Mandeviavs Rongwe African Co-operative Union Ltd. (1958) EA 524,*

Application dismissed.

Citations

Cases

Kenya

Aluochier v Independent Electoral and Boundaries Commission (IEBC) & 19 others Petition 2 of 2013; [2013] KESC 13 (KLR) - (Explained)

Regional Court

Ali Suleman Mandevia v Rongwe African Co-operative Union Ltd [1958] EA 524 - (Explained)

Statutes

None referred to

Advocates

None mentioned

March 20, 2013, **Lucy Njora, DR** delivered the following Ruling:

1. The application before me is the one dated March 16, 2013. The applicants in this application state that they are without means; they sought orders to be allowed to file the petition challenging the swearing in of the President-elect.

2. The prayers sought herein call for the exercise of the courts discretion which is in terms unfettered. But as in all cases where the court has to exercise its discretion, there must be some reasonable basis in fact or in law to warrant the orders made. The courts discretion has to be exercised judiciously at all times under any given circumstances.

3. The threshold of proving that an applicant deserves the leave of the court to be pronounced as one capable of filing *in forma* paupers is extremely high. The court has seen a lot of paper work, volumes of paperwork that has mentioned that the applicants are internally displaced persons. I have also seen a court order from the High Court granting leave to the applicants to file matters in the High Court in forma paupers status.

4. The court has looked at the applicants' affidavit as well as the voluminous bundle of exhibits that the applicants have presented to this court in support of their application. The court, having so critically applied its mind to this matter, finds as follows:

    1. That the applicants have failed to provide this court with sufficient evidence to persuade this court to find in their favour.

    2. The applicants failed to meet the threshold of proving and providing full disclosure. The applicants failed to provide an inventory of their assets and liabilities by merely stating that they have none.

    3. The applicants stated that they rely on well wishers for their daily upkeep. To what extent, they did not show the court. To whom they depended on was also not disclosed. The duty falls squarely on the applicants to provide all pertinent and material information to the court.

    4. The onus in briefs such as this, is as held by this court in *Isaack Aluochier v IEBC & 19 others* lies squarely on the applicant to candidly and in extreme openness reveal all about his status to the court. Failure to provide disclosure in its strict sense would knock out the matter. It would and does render a matter as uncreditworthy.

        The court is fortified in its arriving at this decision by the following authorities –

a) In the Court of Appeal Civil Application Number 228 of 2004, the Court of Appeal held that.....

> "the court must be satisfied on the application of an applicant that he lacks the means to pay the required fees or to deposit the security for costs and that the matter is not without reasonable possibility of success"

b) In the case of *Ali Suleman Mandevia v Rungwe African Co-operative Union Ltd* [1958] EA 524, it was held that

> "a court was entitled to reject such an application where....the court was satisfied that the applicant could not recover more than nominal damages, the court might well be justified in refusing permission because it would be unjust to the other party who would have to incur substantial costs which might not be recoverable."

5. Reasons wherefore this court is not satisfied that the applicants have demonstrated that they are worthy of this court exercising its discretion in their favour.

6. In the result, I decline to grant the applicants the relief sought. The upshot therefore is that the applicants' application dated the March 16, 2013 does fail in its entirety and is hereby dismissed. I make no orders as to costs.

7. For the purposes of clarity and for the avoidance of doubt, this order does not preclude the applicants from appealing if they can obtain resources for doing so.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH, 2013.

In the presence of:

1st Applicant

2nd Applicant

Court clerk, Ismael.

HON. LUCY NJORA

SUPREME COURT OF KENYA

Kuria & 5 others v Hassan & 5 others (Petition 3, 4 & 5 of 2013 (Consolidated)) [2013] KESC 3 (KLR) (Election Petitions) (20 March 2013) (Directions)

Supreme Court of Kenya

WM Mutunga, CJ & P, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala & N Ndungu, SCJJ

Neutral citation: [2013] KESC 3 (KLR)

Electoral Law *- election petitions - presidential election petitions - what was the role of advocates in relation to the conduct of their clients in presidential election petitions - what was the role of the media in relation to their conduct in presidential election petitions.*

Brief facts

Three petitions challenging the validity of the March 4, 2013 presidential elections were filed in the Supreme Court. The petitions had elicited immense public interest and generated endless media coverage and commentary. The court issued directions to be followed before the petitions were determined.

Issues

i. What was the role of advocates in relation to the conduct of their clients in presidential election petitions.

ii. What was the role of the media in relation to their conduct in presidential election petitions.

Held

1. The court was ready and prepared to hear and determine the petitions on the basis of the Constitution, the applicable law, and the evidence. In the interests of justice and for the efficient, effective, transparent and impartial determination of the petitions, the court issued the following directions:

1. The court was fully seized of the petitions challenging the presidential elections. Towards that end, the petitioners and respondents, and their agents, supporters or advisors were directed to desist from prosecuting the merits of their cases in any forum other than the court.

2. It was the responsibility of the advocates on record to advise their clients in the cases about the consequences of conduct or statements that could undermine the authority of the court.

3. While the media had to, in keeping with its constitutional mandate, continue to keep the public informed about the progress of the petitions, media houses and individual journalists and commentators were to perform their functions in a fair, impartial and responsible manner. The media was required to strictly adhere to the code of conduct for the practice of journalism in Kenya at all times.

4. A comprehensive checklist of documents and relevant matters would be prepared and issued by the court to the advocates on record, in time for the pre-trial conference, scheduled to take place on the March 25, 2013. Upon receipt of the checklist, parties would be required

to prepare and file their responses in the Supreme Court Registry on or before the March 23, 2013.

Directions issued.

Citations

Cases

None referred to

Statutes

Kenya

Constitution of Kenya In general - (Cited)

Advocates

None mentioned

March 20, 2013, the Court delivered the following Directions:

1. Three petitions challenging the validity of the just concluded presidential elections have been filed in the Supreme Court. The petitions have, not surprisingly, elicited immense public interest and generated endless media coverage and commentary. The court is ready and prepared to hear and determine the petitions on the basis of the *Constitution*, the applicable law, and the evidence. In the interests of justice, and for the efficient, effective, transparent and impartial determination of the petitions, the court hereby issues the following directions.

    1. The court is now fully seized of the petitions challenging the presidential elections. Towards this end, the petitioners and respondents, and their agents, supporters or advisors are directed to desist from prosecuting the merits of their cases in any forum other than this court.

    2. It is the responsibility of the advocates on record to advise their clients in these cases, about the consequences of conduct or statements that can undermine the authority of this court.

    3. While the media must, in keeping with its constitutional mandate, continue to keep the public informed about the progress of these petitions, media houses and individual journalists and commentators are to perform their functions in a fair, impartial and responsible manner. The media is required to strictly adhere to the code of conduct for the practice of journalism in Kenya at all times.

    4. A comprehensive checklist of documents and relevant matter will be prepared and issued by the court to the advocates on record, in time for the pre-trial conference,

scheduled to take place on the March 25, 2013. Upon receipt of the said checklist, parties shall be required to prepare and file their responses in the Supreme Court registry on or before the March 23, 2013.