REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION NO. 29 OF 2018

(Coram: Maraga CJ & P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ)

–BETWEEN–

APUNGU ARTHUR KIBIRA.....APPELLANT

–AND–

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, LUANDA CONSTITUENCY

SYLVESTER OUMA.....2ND RESPONDENT

OMULELE CHRISTOPHER.....3RD RESPONDENT

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*(An appeal from the judgment and decree of the Court of Appeal of Kenya at Kisumu **(P.N Waki, F. Sichale & Otieno-Odek JJA)** delivered on 19th July, 2018 in Election Petition Appeal No. 11 of 2018)*

JUDGMENT OF THE COURT

A. BACKGROUND

[1] The background to this matter is that in the general election held on 8th August, 2018, the 3rd Respondent was declared the winner in the contest for Member of National Assembly for Luanda Constituency. The Appellant, who was also a contestant in the said elections, and being aggrieved by the declaration

made by the 1st and 2nd Respondents, filed a petition challenging the said election on 6th September, 2017. The election Court (*Mulwa,* J) sitting at Kakamega in ***Election Petition No. 6 of 2017*** heard that the election was conducted contrary to the provisions of Article 81(e) of the Constitution as read with Section 39 of the Elections Act, and regulations thereunder. Upon deliberation, the Court on 16th February, 2018 upheld the election of the 3rd Respondent, finding that the Appellant had failed to substantiate, demonstrate and adduce cogent and credible evidence of irregularities, illegalities and criminal allegations of voter bribery and fraudulent manipulation of ballot papers and/or non-compliance with the Constitution and the law in the conduct of the elections.

(i) At the Court of Appeal

[2] Aggrieved by the decision of the election Court, the Appellant filed his Notice of Appeal dated 16th February, 2018 at the High Court in Kakamega on 19th February, 2018. The same was filed at the Court of Appeal registry in Kisumu on 28th February, 2018 in ***Election Appeal No. 11 of 2018***. The Appellant also filed an application dated 16th March, 2018 pursuant to Rules, 3, 5 & 7 of the Court of Appeal (Election Petition) Rules, 2017 (Court of Appeal Rules, 2017). In the application, the Appellant sought orders that the Notice of Appeal filed at the registry of the High Court on 19th February, 2018 be deemed as properly and duly filed. He also prayed for enlargement of time to file a fresh appeal out of time. The application was objected to by the 1st and 2nd Respondents who, through their Notice of Motion application dated 27th March, 2018 brought under Rule 19 of the Court of Appeal Rules, 2017, sought the striking out of the Notice of Appeal. In a majority judgment dated 19th July, 2018, the Court of Appeal dismissed the Appeal by striking out the Notice of Appeal filed by the Appellant. The Appellate Court held, *inter alia* (per the majority);

> ***"Quite plainly, it [the Notice of Appeal] answers to none of the prerequisites set out in Rule 6 and it cannot therefore be a***

'Notice of Appeal'. It even refers to appealing 'against the whole decision' including factual matters which do not lie in this Court. The applicant and his counsel admit as much and that is why they seek time for filing a fresh Notice of Appeal. Their plea that the Rules were in transition and were hence easily overlooked cannot be a serious assertion as the Rules had been in existence for more than eight months before the election petition was decided. [T]he document filed was a nullity as it purports to be a Notice of Appeal filed under the rules. It follows that no Notice of Appeal was filed in this matter and there is no jurisdiction granted to the Court to consider the extension of time sought. The Court has no business crafting a jurisdiction it does not have, whatever amount of sympathy it may have on the applicant. It has to down its tools....It follows from the above reasoning that there is no merit in the application filed by the Appellant and I would order that it be and is hereby dismissed."

[3] Otieno-Odek, JA dissenting stated *inter alia*:

"[14] [T]he filing of a Notice of Appeal at the wrong registry and within the time stipulated for taking any action should not *per se* ***render the Notice and Record of Appeal null and void. Before striking out a Notice of Appeal filed at an inappropriate registry, I believe there are various considerations to be taken into account. First, whether the Notice of Appeal was filed and served on time. Second, whether a reasonable person being served with the Notice and reading it understands what it means. How would a reasonable person receiving the Notice take it to mean? If, in all the circumstances of the case and***

looking at the Notice as a whole, the person served would say to himself: of course it must mean that the Appellant intended to appeal and has filed a Notice of Appeal then, the purpose of the Notice has been achieved. If, on the other hand, a reasonable person served with the Notice would say, I cannot tell from the document itself whether the Appellant intends to appeal and I shall have to make inquiries, then, the Notice is fatally defective. The third consideration is whether the Respondent or person served has suffered any prejudice by the Notice being filed at a wrong registry. If no prejudice has been suffered, the Notice of Appeal filed at a wrong registry should not be null and void…. Fourth, if the Notice of Appeal that was filed at an inappropriate registry was transmitted and received at the correct/appropriate registry, then the Notice should not be incompetent, null and void. In the instant case, there is no evidence that the Notice of Appeal filed at Kakamega was never received at the appropriate Court of Appeal registry within the time stipulated for filing the requisite Notice of Appeal."

[4] Further, the learned Judge stated:

"[19] [T]he filing of a Notice of Appeal at a wrong or inappropriate registry does not necessarily and automatically affect the competence and validity of the Notice. The rule requiring a party to file a Notice of Appeal at a particular registry or Court is merely directory. An error in designating or filing the Notice at an inappropriate registry should not be fatal to the appeal. The Rule directing a party on where to file a Notice of Appeal is not aimed at creating finality of the Judgment of the trial Court.

[20] Striking out a Notice of Appeal on the basis that it has been filed at a wrong or inappropriate registry annuls, reverses and countermands the right to appeal. The net effect is denial of the right to appeal. The right to appeal, which an intending Appellant has availed him/herself by filing a Notice of Appeal (albeit at an inappropriate registry) is a right not litigated by the appeal. The filing of Notice of Appeal preserves the intending Appellant's right to appeal which he/she has already perfected by filing the Notice of Appeal within the requisite period."

(ii) At the Supreme Court

[5] What is now before us is an appeal from the aforesaid Judgment and decree of the Court of Appeal (*Waki & Sichale, JJA with Otieno-Odek dissenting*) delivered on 19th July, 2018. The Appellant in his appeal dated and lodged on 29th August, 2018 and brought under Article 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act and Rules 9 & 33 of the Supreme Court Rules, 2012 contends that his appeal to the Court of Appeal was not heard and determined on its merits, and therefore seeks to invoke this Court's jurisdiction to hear the present appeal as a matter of right under Article 163(4)(a) of the Constitution. The grounds upon which the appeal is premised upon are as set our hereunder *seriatim*:

1. *That the learned Judges of the Court of Appeal erred in law by striking out the record of appeal dated 12th March, 2018 and thereby violating the Petitioner's right to access to justice as enshrined under Article 48 of the Constitution and right to fair hearing as enshrined under Article 50(1) and 25(c) of the Constitution;*
2. *That the learned Judges of the Court of Appeal erred in law by holding that the filing of the Notice of Appeal at the inappropriate registry was a*

jurisdictional issue as opposed to a deviation from and a lapse in form and procedure curable under Article 159(2)(d) of the Constitution;

3. *That the learned Judges of the Court of Appeal erred in law by failing to take into account and exercise discretion in accordance with Rule 5 of the Court of Appeal (Election Petition) Rules, 2017 which provides that: 'The effect of any failure to comply with these rules shall be a matter of determination at the Court's discretion subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe the timelines set by the Constitution or any other electoral law."*
4. *That the learned Judges of the Court of Appeal erred in law by taking the draconian measure of striking out the entire record of appeal and in so doing failing to determine the appeal on its merits to establish whether the Member of National Assembly elections for Luanda Constituency were conducted in accordance with Articles 81 and 86 of the Constitution; and*
5. *That the learned Judges of the Court of Appeal erred in law by awarding uncapped costs while striking out the record of appeal purportedly filed in the Court of Appeal at Kisumu on 16th March, 2018 when there was no such record with the Petitioner's record of appeal having been filed on 14th March, 2018.*

[6] The Appellant raised nine (9) issues for determination in his petition, summarized as follows; that there was violation of his rights to fair hearing and access to justice as enshrined under Articles 25(c), 48 and 50 of the Constitution; that there was violation of his political rights and those of the people of Luanda Constituency under Article 38 of the Constitution; in that the Court of Appeal, in dismissing his appeal, erred in holding that the filing of the Notice of Appeal at the wrong registry was a jurisdictional issue and that they failed to consider the provisions of Rule 5 of the Court of Appeal Rules 2017; and conversely and by extension, Article 159(2)(d) of the Constitution.

B. PARTIES' RESPECTIVE CASES

i. The Appellant's Case

[7] During the hearing of the appeal, the Appellant relied on his Petition of Appeal dated and lodged on 29th August, 2018, Supplementary Record of Appeal dated 7th September, 2018 and lodged on 10th September, 2018 and the submissions dated and lodged on 21st September, 2018.

[8] In her submissions, Counsel for the Appellant addressed three (3) issues, namely:

> ***a. Whether the Supreme Court has the jurisdiction to hear and determine this appeal;***
> ***b. whether the Court of Appeal erred in law by striking out the Record of Appeal dated 12th March, 2018;and***
> ***c. whether the Court of Appeal violated the Appellant's right to access justice and right to fair hearing;***

a. *Whether the Supreme Court has jurisdiction to hear and determine this appeal.*

[9] On this ground, the Appellant relied on the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others*** SC Application No. 5 of 2014; [2014] eKLR (***Munya 1***) where this Court addressed the issue of its jurisdiction under Article 163(4)(a) of the Constitution. It was submitted in that context that at the core of the Appellant's case was the interpretation of Article 159(2)(d) of the Constitution, as well as Articles 25(c) and 50 of the Constitution on fair hearing and trial. Counsel also submitted that the Court of Appeal violated the Appellant's political rights as enshrined in Article 38 of the Constitution, and that therefore this Court, in exercise of its mandate under the Supreme Court Act, 2011 and particularly Sections 3(a) & (b) thereof, ought to assert the supremacy

of the Constitution and to provide an authoritative and impartial interpretation of the Constitution on the issues at hand.

b. Whether the Court of Appeal erred in law by striking out the Record of Appeal dated 12th March, 2018.

[10] It was submitted that the appellate Court failed to consider the primary prayer in the Appellant's application dated 16th March, 2018, and that even though that Court had appreciated the centrality of the Notice of Appeal and the fundamental purpose that it serves in the litigation process, the Court nonetheless should have considered the issue of the filing of the Notice of Appeal at the inappropriate registry as a technical issue, that could be cured under Article 159(2)(d), and as further provided for under Rule 5 of the Court of Appeal Rules, 2017.

[11] It was further submitted that the failure to file the Notice of Appeal at the appropriate registry did not raise a jurisdictional question, since it was filed within time and that it served its primary purpose, which was, to notify the Respondents of the Appellant's intention to institute an appeal against the decision of the election Court. Reliance in that regard was placed on the decision of ***Joseph Limo & 86 Others v. Ann Merz*** Civil App. No. 295 of 1998 per Omollo, JA as well as ***Lemanken Aramat v. Harun Meitamei Lempaka & 2 others*** SC Petition No. 5 of 2014; [2014] eKLR (***Aramat***) and ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others*** SC Petition No. 23 of 2014; [2015] eKLR.

[12] It was thus the Appellant's case that the mistake made by his Counsel in filing the Notice of Appeal at the wrong registry was curable under Article 159(2)(d) of the Constitution, and that the Court, in considering the rules of

procedure, should not be encumbered to the extent that the Rules do not become handmaidens of justice, and that the Court should also be careful not to make draconian and drastic decisions that would impede access to justice as was pronounced in ***Shabbir Ali Jusab v. Anaar Osman Gamrai & Another*** [2013] eKLR and ***D.T. Dobie (Kenya) Ltd v. Joseph Mbaria Muchina & Another*** Civil Appeal No. 37 of 1978; [1980] eKLR.

c. Whether the Court of Appeal violated the Appellant's right of access to justice and right to fair hearing;

[13] It was submitted that the Appellant's right of access to justice guaranteed under Article 48 of the Constitution had been violated by the decision of the Court of Appeal of striking out the record of appeal. In any event, that the Notice of Appeal was substantially in conformity with the form set out under the Court of Appeal Rules 2017, having fulfilled the purpose of a Notice of Appeal, and that by striking it out therefore, the appellate Court countermanded the Appellant's right to a fair hearing as enunciated in Articles 25(c) and 50 of the Constitution. It was further submitted that no party was prejudiced by the filing of the Notice of Appeal at the wrong registry, and that the Court of Appeal should have exercised more restraint before striking out the Notice of Appeal.

ii. The 1st and 2nd Respondents' Case

[14] The 1st and 2nd Respondents filed their grounds of objection dated 13th September, 2018. In their submissions dated and filed on 26th September, 2018, they submitted that the Appellant had admitted that he had made a mistake in the filing of the Notice of Appeal at the wrong registry and that the admission did not warrant an explanation of any prejudice that would be occasioned on the Respondents as the mistake was in itself fatal to the intended appeal.

[15] The 1st and 2nd Respondents also submitted that as the Notice of Appeal was fatally defective, the Court of Appeal correctly held that there was no appeal that

had been lodged before it. By seeking refuge under Article 159(2)(d) of the Constitution, it was submitted that the Appellant had sought to cure a defective Notice of Appeal that goes to the jurisdiction of the Court of Appeal, which could not be construed as a procedural technicality, and as such there was nothing for the appellate Court to consider as duly filed and served.

[16] On the application to extend time to file a fresh appeal out of time, the 1st and 2nd Respondents submitted that allowing this prayer would have meant that the Record of Appeal was *ipso facto*, incompetent and ought to have been struck out. It was further submitted that if the appellate Court had allowed the application, it would have meant that the Appellant would have had to file a fresh record of appeal outside the thirty (30) days prescribed time for filing an appeal to the Court of Appeal in election appeals provided under Rule 17 of the Court of Appeal Rules, 2017. It was thus submitted that allowing the application would have been in vain as the timelines for filing an appeal had already lapsed.

iii. The 3rd Respondent's Case

[17] The 3rd Respondent filed his grounds of objection dated 13th September, 2018 on even date. Therein, it was argued that the Petition did not raise any issues on the application or interpretation of the Constitution, and that it only contested the laid down principles in the exercise of a Court's unfettered discretionary power. It was further submitted that the application filed in the Court of Appeal dated 16th March, 2018 did not invoke Articles 25(c), 48 or 50 of the Constitution, and that the issues raised at the Supreme Court were not issues that had been canvassed at the appellate Court.

[18] In his submissions dated and filed on 27th September, 2018, the 3rd Respondent submitted on the issues set out herebelow:

> *a. Whether the appeal raises any constitutional matters to warrant an appeal as of right without certification.*

[19] It was the 3rd Respondent's submissions that the appeal by the Appellant relied on the court's exercise of its discretionary power and that the appeal was predicated on the argument that Article 159(2)(d) of the Constitution could be used to cure a defective Notice of Appeal that had been brought under the wrong rules as it was an issue of technicality that did not go to the root of the appeal. It was submitted that in ***Magunga General Stores v. Pepco Distributors Limited*** Civil Appeal No. 24 of 1986; [1987] eKLR, it was held that the appellate Court would not unnecessarily interfere with a discretionary judgment unless it was predicated on the wrong principle or facts. It was also submitted that in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*** SC Application No. 16 of 2014; [2014] eKLR (***Nicholas Salat***) this Court stated that a discretionary power could be contested only if that power was not exercised judicially or was by whim. That the Petition presently before the Court was drafted more of as an appeal on an ordinary leave to appeal out of time and less of an appeal that raises issues of law concerning the application and interpretation of the Constitution. It was thus submitted that the filing of an appeal in a timely manner is a jurisdictional pre-requisite that could not be cured by Article 159(2)(d) of the Constitution.

[20] It was furthermore submitted that the allegations regarding the violation of the Appellant's rights as guaranteed under Articles 25, 48 and 50 of the Constitution were general propositions whose remedies lay in the High Court, and that in any event, they were not issues that had been canvassed in the superior Courts and could not therefore confer a litigant standing in this Court as was pronounced in ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Limited & 3 Others*** SC Petition No. 4 of 2015; [2017] eKLR. It was in that context submitted that the allegations made in that regard did not meet the threshold required under Article 163(4)(a) of the Constitution.

[21] On the issue as to whether the Appellant was accorded a fair hearing, it was submitted that the Court had to consider statutes, case law and regulations that govern the decisions that the Court had made and that there was no evidence that the Appellate Court had misdirected itself in doing so. In support of this argument, the 3rd Respondent relied on the case of ***Obiga v. Electoral Commission & Another*** Election Petition Appeal No. 4 of 2011; [2012] UGCA 29 referred to in the concurring decision of Njoki, SCJ in ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 others*** SC Petition Nos. 18 & 20 of 2014; [2014] eKLR (***Kidero***).

b. Whether this appeal is introducing a constitutional point which was not a vital aspect of the decision in the Court of Appeal.

[22] It was submitted that no appeals lie from the Court of Appeal to the Supreme Court, with Article 163(4)(a) of the Constitution being instructive, and the case of ***Munya 1*** giving an extensive interpretation of that constitutional provision. It was further submitted that an Appellant approaching this Court on an appeal had to be precise and specific on the constitutional provision that he/she sought to be interpreted and state how the same has affected his/her case. It was also submitted that the decision in ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** SC Petition No. 2 of 2012; [2012] eKLR was applicable as the issues at hand had not transmuted from an ordinary issue of appeal to a meritorious petition which involved the application or interpretation of the Constitution. Further reliance was placed on the case of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** SC Petition No. 3 of 2012; [2012] eKLR to emphasize the same point.

c. Whether the Elections Act supersedes the Court of Appeal (Election Petition) Rules, 2017.

[23] The 3rd Respondent on this issue submitted that rules cannot amend statutory provisions, and that Rule 17(2) of the Court of Appeal Rules 2017

expressly acknowledges the limitation to the powers of the appellate Court to extend timelines that have not been set by the Constitution or the Elections Act. It was thus submitted that in his application to the Court of Appeal seeking to extend time to file a fresh appeal out of time, the Appellant only invoked Rules 3, 5 and 17(1) of the Court of Appeal Rules 2017 which in themselves could not override the provisions of Section 85A of the Elections Act, and which required that an appeal ought to be filed timeously as prescribed therein. It was further submitted that if the Motion to extend time had been allowed by the Court of Appeal, it would have effectually extended the time provided under Section 85A of the Elections Act, and would therefore, be in violation of Article 87(1) of the Constitution.

[24] It was furthermore submitted that the Rules which the Appellant had relied upon could not supersede constitutional or statutory provisions, and that in the instance, it would be the reason why the Appellant was not challenging the interpretation or application of Article 87(1) of the Constitution, as doing so would collapse his appeal which is solely anchored on exercise of the court's discretionary powers.

d. Whether the Motion for extension of time, if granted would have been in vain.

[25] It was submitted that the Appellant was indolent, and that he filed his Motion for extension of time only two days to the time limit prescribed by Section 85A of the Elections Act. It was further submitted that pursuant to the strict timelines imposed on election matters, the Motion was bound to fail, regardless of whether it was set down for hearing or not. In relying on the decision of ***Nicholas Salat***, the 3rd Respondent submitted that the Court could not remedy an illegality by recognizing an appeal that was filed out of time.

C. ISSUES FOR DETERMINATION

[26] Having carefully considered the parties' respective pleadings, the submissions, both written and oral, we find that the following issues arise for determination by this Court:

a) *Whether this Court has the requisite jurisdiction to hear and determine the instant Petition brought under Article 163(4)(a) of the Constitution;*
b) *If the answer to (a) is in the affirmative, whether the Court of Appeal properly exercised its discretion in dismissing the appeal by striking out the Notice of Appeal and Record of Appeal filed by the Appellant; and*
c) *Reliefs available to the Parties.*

D. ANALYSIS

a) Whether this Court has the requisite jurisdiction to hear and determine the instant Petition brought under Article 163(4)(a) of the Constitution.

[27] The question of this Court's jurisdiction under Article 163(4)(a) of the Constitution as regards to appeals as of right has been considered broadly in a number of cases before the Court. It is the one question that this Court has to respond to, before it may embark on determining a matter on its merits (or demerits, as the case may be). The question of jurisdiction in this appeal thus has to be settled first, in any event, as the parties before the Court are diametrically opposed on the issue.

[28] That being said, in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others*** SC Petition No. 2B of 2014; [2014] eKLR (***Munya 2***) this Court set out what has been referred to as the '*collating guiding principles'* which the Court would consider before hearing appeals brought before it pursuant to Article 163(4)(a) of the Constitution. Mutunga, CJ (as he then was) in his concurring opinion, stated at paragraph 244 thus:

> ***"In summary, the guiding principles that we have articulated under Article 163(4)(a) are:***

i. ***A Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;***
ii. ***The chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them; and only cardinal issues of law or of jurisprudential moment deserve the further input of the Supreme Court;***
iii. ***The lower Court's determination of an issue which is the subject of further appeal, must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;***
iv. ***An appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy; and***
v. ***With regard to election matters, the Elections Act and the Regulations are normative derivatives of the Constitution and, in interpreting them, a Court of law cannot disengage from the Constitution."***

[29] It has been reiterated in the above context in several previous decisions of this Court that the above '*collating guiding principles*' are to be considered in context alongside Article 87(1) of the Constitution on the enactment of legislation to establish a mechanism for timely settlement of election disputes as well as Article 105(1) which empowers the High Court, as the trial election Court, to determine matters of whether a person was validly elected as a Member of Parliament, with sub-article (3) therefore calling for the enactment of legislation giving effect to that Article. Therefore, pursuant to Article 87(1) as read with Article 105(1) of the Constitution, and as was set out in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others*** SC Petition No. 6 of 2014; [2014] eKLR it would invariably follow that electoral disputes would generally involve the application and determination of the Constitution subject to each case meeting

the expectations of the guidelines aforesaid. In the aforementioned matter, this Court held, *inter alia*:

> "***In adopting this view, we would observe that the Elections Act, 2011 enacts in substantive form the constitutional principle of securing for the Kenyan people a representative democracy, in which the mandate of leadership is attained through popular elective politics, based on the ideals of free and fair election. The realization of this goal is partly attainable through universal franchise, expressed in a voting exercise guided by appropriate legislation, that is derived from the premises and values embodied in Articles 38, 81 and 86 of the Constitution. Thus, it is for certain, that electoral contestations will involve constitutional interpretation or application.*"** [Emphasis added.]

[30] Similarly, in ***Kidero*** it was held at paragraph 144 that:

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

[31] While reiterating the above expressions of the law, it should be clarified that the ***Munya 1 &2*** and ***Kidero*** decisions were never intended to give parties a

carte blanche so that every election dispute must necessarily be equated to a matter of constitutional interpretation and application unless a party squarely places his/her appeal within the 'collating guiding principles'. In that context, the issue that is presently before the Court involves an interpretation of Article 159(2)(d) of the Constitution as expressed under Rule 5 of Court of Appeal Rules, 2017. The Appellant thus seeks from this Court a clarification of the interpretation of the said Article 159(2)(d) as it relates to the exercise of the Court of Appeal's discretion in the decision dismissing the appeal by striking out the Notice of Appeal dated 16th February, 2018 as well as the Record of Appeal filed on 14th March, 2018. The Appellant in that regard contends that the decision of the appellate Court violated his right to fair hearing pronounced under Articles 25(c) and 50 of the Constitution, and the right of access to justice under Article 48 thereof.

[32] In this regard, we have above reproduced the basis for both the majority and minority decisions of the appellate Court. Central to the majority decision was the applicability or otherwise of Article 159 (2)(d) of the Constitution as read with Rule 5 of Court of Appeal Rules, 2017. The learned Judges in the majority stated that, noting the said provisions, Article 159(2)(d) was inapplicable to the appeal and proceeded to dismiss the Appellant's application for extension of time to file a proper Notice of Appeal. Nowhere did they mention, let alone interpret or apply Articles 25(c), 48 or 50 of the Constitution which we find irrelevant to our consideration of the appeal. To the extent therefore that Article 159(2)(d) was in issue, the appeal is properly before us under Article 163(4)(a) of the Constitution and that is the only reason why we shall assume jurisdiction subject to what we shall state later in addressing the next issue herein below.

> *b) Whether the Court of Appeal properly exercised its discretion dismissing the appeal by striking out the notice of appeal and record of appeal filed by the Appellant.*

[33] We note in the above regard that the Court of Appeal issued a composite Ruling on two applications that had been made before the Court; the first application was by the Appellant dated and filed on 16th March, 2018 brought under Rules 3, 5 & 7 of the Court of Appeal Rules 2017. The application sought for the due admission of the Notice of Appeal filed at the High Court registry in Kakamega and subsequently at the Court of Appeal in Kisumu. It also sought an extension of the time to file a fresh appeal out of time. The second application was by the 1st and 2nd Respondents dated 27th March, 2018 and in which they sought to strike out the Notice of Appeal for not being in conformity with Rule 6 of the Court of Appeal Rules, 2017.

[34] Upon considering the two applications before it, the Court in a majority decision, dismissed the appeal by striking out the Notice of Appeal, holding that the same was not in conformity with Rule 6 of the Court of Appeal Rules, 2017. It also determined on the importance of a Notice of Appeal, holding that it forms the foundational centrality in appeals filed before any Court. The Court further held that Rule 5 of the said Rules as read with Article 159(2)(d) of the Constitution could not be used to cure a defective Notice of Appeal that was not filed in compliance with the Rules.

[35] The decision by the Court was made in exercise of its discretionary powers under Rule 5 of the Rules aforesaid. In essence, the Court of Appeal had the mandate to evaluate the matter before it, consider the mitigating circumstances and make a determination that was, in its opinion, just, considerate and fair. The limitation to this Court's interference with the exercise of judicial discretion was well expressed in ***Daniel Kimani Njihia v. Francis Mwangi*** **Kimani & Another** SC Application No. 3 of 2014; [2015] eKLR (***Daniel Kimani***) where this court stated thus [paragraph 21]:

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

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

[36] As regards procedural shortcomings on the other hand and the exercise of discretion in curing them, in ***Aramat*** we stated:

"In most cases, procedural shortcomings will only affect the competence of the cause before a Court without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect and the Constitution requires such exercise of discretion in matters of a technical character." [Emphasis added.]

[37] It is also the law that discretionary power is to be exercised in a manner that is not capricious or whimsical, and that judicial officers to whom this power is donated should exercise the same judiciously. That is why, and we agree, with ***Stanley Kang'ethe Kinyanjui v. Toney Ketter & 2 others*** Civil Application No. Nai 31 of 2012, where it was stated that a responsibility is bestowed upon Courts to ensure that the exercise of the discretionary powers donated to them is not exercised in any manner that would prejudice any party coming before it. In the context of the present appeal, therefore, the Appellant challenges and faults the Court of Appeal in the exercise of its discretionary power under Article 159(2)(d) of the Constitution as read with Rule 5 aforesaid. He thus alleges that the Court of Appeal improperly exercised its powers by dismissing the appeal on a technicality or procedural defect without considering its merits.

[38] In that regard, in dismissing the appeal, the Court of Appeal considered two keys issues; one, was whether the Notice of Appeal was in conformity with Rule 6 of the Court of Appeal Rules 2017, and two, whether it had the jurisdiction to enlarge the time within which to allow the Appellant to file a fresh appeal out of time. To both these questions, the appellate Court gave a negative response, stating that the Notice of Appeal was not in conformity with the Rules and that the Court did not have the jurisdiction to enlarge the time to allow an intended Appellant to file an appeal out of time. This, was an exercise of the discretionary powers of the Court of Appeal, which had in this instance, considered the prevailing circumstances and the issues at hand. The Court, was thus not bound by rules of procedure, but rather guided by them, and in exercise of judicial enterprise and mandate of a just, effective and expeditious determination of matters, dismissed the appeal.

[39] We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of ***Kacem v. Bashir*** (2010) NZSC 112; (2011) 2 NZLR 1 (***Kacem***)where it was held [paragraph 32]:

> "***In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."***

[40] Further, in ***Deynes Muriithi & 4 others v. Law Society of Kenya & Another***; SC Application No. 12 of 2015; [2016] eKLR this court stated *inter alia* that the Court may only interfere with the exercise of discretion by another Court

where there is plain and clear misapplication of the law. It stated thus [paragraph 51]:

> ***"It forms an integral element in the concept of jurisdiction, that whenever it becomes plain that the orders made by other Courts are destined to occasion grave injustice, and this is apparent on the fact of the decision in question, this Court, as ultimate custodian of constitutional integrity, may not turn a blind eye to such a decision, where it stands in conflict with express provisions of the Constitution."***

[41] Furthermore, in ***Teachers Service Commission v. Kenya National Union of Teachers & 3 Others*** SC Application No. 16 of 2015; [2015] eKLR we held [paragraph 36]:

> ***"This Court lacks the jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5(2)(b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court."***

[42] While reiterating the above decisions, we are satisfied that the Appellant has not shown how the decision by the Court of Appeal was arrived at wrongly, or that the same was an exercise of the whims of the Judges of the Appellate Court. As was held in ***Kacem***, which decision we find persuasive, the Appellant has not shown that the appellate Court failed to consider relevant matters, or that it considered irrelevant matters or that it erred in law or in principle in arriving at its decision. We say so because in reaching the majority decision, the Court of Appeal applied the Court of Appeal Rules, 2017 to examine the document filed as a Notice of Appeal, analysed it in the context of Rules 5 and 6 as read with Article 159(2)(d) of the Constitution and concluded that the document was filed out of time and noting the pre-requisite under Rule 5 that '*timelines set by the*

Constitution or any other electoral law' had been violated, declined to extend time to file the Notice of Appeal. Indeed, it is not contested that had the application to extend time been allowed, the resultant appeal would have been filed outside the statutory timeline, a jurisdiction the Court of Appeal did not have hence its finding that "the Court has no business crafting a jurisdiction it does not have, whatever amount of sympathy it may have on the Applicant. It has to down its tools."

[43] Article 159(2)(d) of the Constitution was also never meant to grant a Court jurisdiction denied by a Statute and we are therefore satisfied that in the specific circumstances of the matter before it, whatever our views regarding the place of filing a Notice of Appeal, a matter well regulated by Rule 6 of the Court of Appeal Rules in any event, we are unable to find that the Court of Appeal exercised its jurisdiction whimsically or unreasonably to warrant our interference with its decision.

[44] Having so said however, as the apex Court in the land, we are obligated to give directions where the Court of Appeal renders conflicting decisions as is now a matter of common knowledge regarding Notice of Appeal Rules aforesaid. While it is now clear to us that parties and their advocates may not have been aware of the publication of those Rules, and whereas we have refused to interfere with the exercise of discretion in the circumstances of the appeal before us, the Rules are no longer strange and are in the public domain. Parties in the next elections petitions cycle ought therefore to abide by the Rules and we foresee no conflicting decisions emanating from the Court of Appeal as happened in the 2017 – 2018 cycle.

c) Reliefs available to the Parties

[45] Having found that the Court of Appeal properly exercise its discretion to strike out the Appellant's Notice of Appeal, it follows that no other relief is available save the dismissal of the Appeal.

[46] Costs, in the usual manner, follow the event, subject to the Court's discretion as enunciated in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others*** SC Petition No. 4 of 2012*;* [2014] eKLR. Noting the nature of the appeal before us, we shall therefore exercise discretion and order that each party should bear its costs of the appeal. We however see no reason to interfere with the orders on costs at the High Court and Court of Appeal.

E. ORDERS

1. ***The Appellant's petition is hereby dismissed.***
2. ***Each party shall bear its costs of the appeal.***
3. ***The orders allowing costs to the Respondents both at the High Court and Court of Appeal are hereby upheld.***

[47] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **18th** day of January **2019**

.....	.....
D. K. MARAGA	**M. K. IBRAHIM**
CHIEF JUSTICE/PRESIDENT OF THE THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
J. B. OJWANG	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....	.....
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

THE REGISTRAR
SUPREME COURT OF KENYA