REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(*Coram: Mwilu, DCJ & VP, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ*)

PETITION NO. 17 OF 2014

–BETWEEN–

CHRIS MUNGA N. BICHAGE.....APPELLANT

–AND–

1. RICHARD NYAGAKA TONG'I.....
2. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....
3. ROBERT K. NGENY..... RESPONDENTS

An appeal from the Judgment and Orders of the Court of Appeal at Kisumu (Azangalala, Mohamed and Kantai JJA) dated the 11th of December, 2013 in Kisumu Civil Appeal No. 48 of 2013)

JUDGMENT

A. INTRODUCTION

[1] The appellant filed his appeal to this Court pursuant to Article 163 (4) (a) of the Constitution of Kenya 2010, and Section 3 of the Supreme Court Act 2011 (Act No. 7 of 2011). The petition, dated 14th May, 2014, is an appeal from the Judgment and Orders of the Court of Appeal at Kisumu, dated the 11th December, 2013 in *Civil Appeal No. 48 of 2013*.

B. BACKGROUND

[2] The appellant, ran for the position of Member of National Assembly for Nyaribari Chache Constituency under the Orange Democratic Movement (ODM) ticket. He was declared to have won the election, conducted on 4th March, 2013, with a total of 10,706 votes, as against the 1st respondent, who came second, with 10,561 votes.

[3] On 8th April, 2013, the 1st respondent filed a petition, ***Richard Nyagaka Tong'i v. IEBC & 2 Others,*** Election Petition No. 5 of 2013, at the Election Court in Kisii. The appellant and the 2nd and 3rd respondents were the respondents in that matter. On 7th October, 2013, the High Court (*Muriithi J.)* allowed the petition and declared that the appellant was not validly elected, hence nullifying the election.

[4] The appellant was dissatisfied with the decision of the Election Court, and lodged an appeal at the Court of Appeal in Kisumu, ***Chris Munga N. Bichage v. Richard Nyagaka Tong'i & 2 Others,*** Civil Appeal No. 48 of 2013. *During the pendency of the appeal,* the Independent Electoral and Boundaries Commission [IEBC] issued a notice dated 23rd October, 2013 setting 19th December, 2013 as a date for the consequential by-election. The appellant then filed Civil Application No. 39 of 2013, seeking a stay of the by-election, pending the hearing and determination of the appeal. On 22nd November, 2013, the Court of Appeal allowed the application and issued an Order staying the by-election pending the hearing and determination of the appeal.

[5] On 11th December, 2013, the Court of Appeal *dismissed the appeal* and *reserved the reasons for the decision* to be delivered on 21st February, 2014. The reasons were, however, delivered six weeks later than had been scheduled, on 4th

April, 2014. By that time, the by-election had already taken place, on 30th December, 2013; and the 1st respondent had been declared the elected Member of National Assembly for Nyaribari Chache Constituency. He had garnered 10,100 votes, while the appellant came second with 9, 712 votes.

[6] Being aggrieved by part of the Judgment and Orders of the Court of Appeal, the appellant filed a notice of appeal in this Court on 16th April, 2014, and his petition of appeal on 14th May, 2014.

[7] The Appellant relies on the following grounds in support of his petition of appeal:

(a) *the High Court sitting as an election Court pursuant to Article 105(1) of the Constitution, did not have jurisdiction to hear and determine the petition dated and filed on 8th April, 2013 by the 1st respondent;*

(b) *the Proceedings in the High Court and the Court of Appeal arising out of the petition filed on 8th April, 2013 are null and void;*

(c) *the Court of Appeal erred in law in holding that issues not pleaded in the petition but elicited during the course of the hearing, particularly through scrutiny and recount, could be used by the election Court as a basis for setting aside the appellant's election as the Member of Parliament for Nyaribari Chache Constituency held on 4th March, 2013;*

(d) *the Court of Appeal erred in law in holding that the quantitative and qualitative irregularities committed by IEBC's officials in the conduct of the election for Member of National Assembly for Nyaribari Chache Constituency did affect the integrity and result of the election;*

(e) the Court of Appeal erred in law in holding that the Nyaribari Chache Constituency election held on 4th March, 2013 was not carried out in accordance with the provisions of the Constitution and the Elections Act; and

(f) The Court of Appeal erred in law in condemning the appellant to pay the 1st respondent's costs, and in failing to cap the costs payable to the 1st respondent.

[8] The 1st respondent, thereafter brought before this Court an application by way of Notice of Motion, dated 6th June, 2014, founded on Section 21 (2) of the Supreme Court Act, 2011; Rules 23, 31 (1) and 33 (1) of the Supreme Court Rules 2012; and all other applicable provisions of the law. He sought orders that: (i) the appeal before this Court be struck out for being filed out of time; (ii) the appeal be held to have been rendered nugatory by subsequent events which have taken place, such as the by-election; (iii) the appeal be struck out for being anchored on issues not raised in the Election Petition or the appeal stage at the Court of Appeal; and (iv) it be struck out for being an abuse of the Court process.

[9] In a Ruling dated 19th February 2015, this Court (*Rawal DCJ, Tunoi, Ibrahim, Ojwang and Ndungu SCJJ*) held that where a Court reserves reasons for Judgment for a later date, the time for filing the notice of appeal remains the time when the Court makes its first pronouncement in the form of an Order of the Court, as in this case, dismissing the appellant's case. However, the Court dismissed the 1st respondent's application on account of the fact that the appellant's error and delay was, in its special circumstances, excusable. The Court also held that the appellant's delay was occasioned by the Court of Appeal's delay in furnishing reasons for the decision, which incapacitated the appellant in formulating a competent appeal. The Court therefore invoked Rule 3(5) of the Supreme Court Rules to deem the notice of appeal dated 16th April, 2014 and the

petition of Appeal dated 14th May, 2014 as duly filed. The Court did not, however, deal with the issue as to whether the appeal would be rendered nugatory; it was of the opinion that *the issue touches on the merits of the appeal,* and should be determined at a full hearing and not at an interlocutory stage.

[10] On 18th May, 2015, the appellant filed an application before the Court by way of Notice of Motion under certificate of urgency, seeking Orders for leave to lodge a supplementary affidavit annexing the certificate of election results of 4th March 2013 for Member of the National Assembly for Nyaribari Chache Constituency.

[11] On 21st May 2015, this Court (*Ojwang, SCJ)*, having heard counsel for the applicant, certified the application as urgent and directed that the Registrar of the Court assign a suitable hearing date. Later on, *Ojwang'* and *Njoki SCJJ*, heard the application and, in a Ruling dated 16th October 2015, held that the Supreme Court, sitting as a second appellate Court, and exercising its jurisdiction under Article 163(4)(a) of the Constitution, was not inclined to grant leave to file the further evidence by affidavit. The Court disallowed the application, and ordered that a hearing date for the petition be assigned on a priority basis.

[12] Prior to the hearing, learned counsel for the 1st respondent sought this Court's opinion on the question whether the Supreme Court of Kenya sitting as a five-Judge Bench is duly constituted to determine matters raising serious constitutional issues, especially issues that may detract from its earlier decisions. In a Ruling dated 26th February, 2016, this Court (*Mutunga CJ, Rawal DCJ, Ibrahim, Ojwang* and *Wanjala SCJJ*) held that the Supreme Court could properly sit as a Bench of five or more Judges, to reconsider its earlier decision. The Court pronounced itself in the following terms [paragraph 79]:

> ***"We also take into account the reality that the Kenyan Supreme Court has the limited-size Bench of seven, which on occasions may not sit as such, but as a five-Judge or six-Judge Bench. Given the challenge of Bench-size, in a new Supreme Court that is in quest of greater stability, and in the light of the latitude allowed by the Constitution, we would take the position, in these times, that the prescribed minimum Bench-quorum, with the essential research and scholarly assistance, and with the back-up of professionally-competent advocacy from the Bar, will be properly constituted to hear and determine all matters coming up before it. Such a Bench is duly empowered to hear and determine matters as prescribed in Article 163(3),(4),(5),(6) and (7) of the Constitution, and in the relevant legislation and regulations."***

[13] On 21st March 2016, six other persons (Dominic King'oina Sitima, Edwin Ongubo Basweti, Catherine Mong'ina Okari, Edwin K Mokano, Dennis Kioga Obisa and Joyce Nyaboke Otoki), filed a Notice of Motion application under a certificate of urgency, seeking to be enjoined in this matter as interested parties.

[14] Due to procedural shortfalls, the applicants later filed another Notice of Motion application, 26th April, 2016 seeking extension of time to comply with the directions of the Court. On 28th April 2016, *Wanjala SCJ* declined to certify the application as urgent, and instead gave Orders:

(i) declining to grant leave for extension of time; and

(ii) requiring applicants to appear and make their application to be enjoined as interested parties on the date of hearing of the main petition.

[15] The full Bench affirmed the foregoing position by ordering that the petition of appeal be set down for hearing on the basis of priority and the petition was subsequently heard by the Court.

C. SUBMISSIONS OF THE PARTIES

(a) Appellant

[16] The appellant's case as urged by learned counsel Mr. Ochieng Oduol, rested on two pillars: (i) whether there was a valid election petition in the High Court in line with Article 87(2) of the Constitution; and (ii) whether the appeal before this Court had been rendered nugatory by virtue of the by-election held on 30th December, 2013.

[17] On the first issue, counsel submitted that this Court has held in the past that timelines for filing any election petition may not be extended. He therefore urged the Court to adopt the precedent set in the case of ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others,*** Sup. Ct. Petition No. 7 of 2014; [2014] eKLR, and ***Anami Silverse Lisamula v. The Independent Electoral & Boundaries Commission & 2 Others***, Sup Ct. Pet. No. 9 of 2014 – to the effect that an election petition must be filed within 28 days after the date of the declaration of results. He urged that fidelity to precedent bears the

merit of ensuring that there is certainty, predictability and consistency in the Court's decisions.

[18] As to the effect of the by-election of 30th December, 2013, counsel submitted that the by-election was the product of a judicial process, which is now being faulted; and that the election petition which occasioned that judicial process, was filed at the High Court out of time. It was therefore contended that the petition before the High Court was a nullity *ab initio,* and everything that took place thereafter was contrary to the Constitution.

[19] As to when the election results were declared, counsel submitted that the 1st respondent had stated on oath that the declaration was made on 5th March, 2013 and urged that this Court, in its Ruling of 16th October, 2015 had confirmed that Form 38, bearing the declaration of results, was part of the record in the trial Court proceedings – a fact confirmed by the 2nd and 3rd respondents.

(b) 2nd and 3rd Respondents

[20] The 2nd and 3rd respondents, represented by learned counsel, Messrs Magare, Kinyanjui and Musundi, supported the appeal before this Court. The 2nd and 3rd respondents relied on their submissions of 10th February, 2016 – Mr. Magare submitting that this Court should uphold the election of the appellant as Member of the National Assembly for Nyaribari Chache Constituency, pursuant to an election held on 4th March, 2013, which election was not contested in Court within time.

[21] With regards to the remedies available, counsel submitted that once the Court determines that the election petition was filed out of time, the Judgment of the trial Court as well as that of the Court of Appeal are for vacating, and the

parties should revert to the status quo as at 5th March 2013; and consequently, the appeal should be allowed.

(c) 1st Respondent

[22] The 1st respondent was represented by learned Senior Counsel, Mr. Omogeni, who urged that there has been no contest to the election that was held on 30th December, 2013 declaring the 1st respondent as the validly elected Member of the National Assembly for Nyaribari Chache Constituency. This Court, therefore, he submitted, would have no basis for disturbing the outcome of that election. Counsel submitted that the only way to challenge that election, is as provided for under Article 105(1) of the Constitution, namely, by the filing of an election petition at the High Court, which has the jurisdiction to determine such a dispute. Learned counsel invoked paragraph 65 of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & Others,*** Supreme Court Petition No.10 of 2013, in which this Court declared that the decision of a Returning Officer is final in any election, and can only be questioned by way of an election petition.

[23] It was counsel's further submission that this Court has time and again underlined the importance of observing the prescribed timelines for election petitions, stating that the law does not only govern the period within which to file an election petition, but also the period within which a Judgment is to be delivered. He submitted that the time within which a person could challenge the election held on 30th December, 2013 had already lapsed.

[24] The 1st respondent contended that the Returning Officer had not declared the results of the elections held on 4th March, 2013 as alleged by the appellant as well as the 2nd and 3rd respondents, and that the issue as to when the results were

declared, was in contention at the High Court and still is. He submitted that the 2nd and 3rd respondents had not therefore addressed the issue as to when the results were declared, and that since this Court cannot evaluate contested facts, it was handicapped in making any determination on that question. He called in aid Section 75 of the Elections Act, 2011 (Act No. 24 of 2011), which limits appeals to the Court of Appeal on matters of law only. Learned counsel also invoked this Court's decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others,*** Supreme Court Petition No. 2B of 2014, which affirmed that this Court is inclined to move with care not to delve into matters of fact.

[25] Counsel urged that it was a task devolving to the 2nd and 3rd respondents to place evidence before this Court, in the form of Form 38, showing the date when the results were declared. He placed reliance on the case of ***Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others,*** Sup. Ct. Petition No. 12 of 2014; [2015] eKLR, wherein this Court criticized the Returning Officer for failing to annex Form 38 to his reply to the petition in that case. Counsel submitted that, just like in the ***Wetangula*** case, no Form 38 had properly been placed before the Court, and so the date of the declaration of results cannot be ascertained.

[26] On the 'doctrine of mootness', the 1st respondent argued that the dispute at hand is no longer live, on account of the constitutional processes that have subsequently taken place; that the appeal was rendered null, the moment a by-election was held, and attendant processes then took place. Counsel called in aid, on this point, a decision of the Supreme Court of Canada, ***Joseph Borowski v A.G of Canada*** (1989) 1 S.C.R: where it was stated:

> ***"The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The***

general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such, the court will decline to decide the case. The essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no live controversy exists which affects the right of the parties, the case is said to be moot."

[27] On the issue of whether the constitutional process had run its full course, learned counsel urged that this was, indeed, the case, for reasons that;

(i) the Judgment in Kisumu Civil Appeal No. 48 of 2013 was duly delivered on 11th December 2014, to the effect that the appellant's appeal therein had no merit, and that the same stood dismissed;

(ii) in accordance with Article 101(4)(a) of the Constitution, and by extrapolation, Section 86 of the Elections Act, the seat of the Member of the National Assembly for Nyaribari Chache, then occupied by the appellant, was duly declared vacant by the Speaker of the National Assembly;

(iii) in accordance with Article 101(4)(b) of the Constitution, the 2nd respondent duly scheduled a date for the by-election in Nyaribari Chache Constituency for 30th December 2013, in which both the appellant and the 1st respondent participated, and no prejudice had therefore been occasioned to the appellant;

(iv) the appellant, the 1st respondent, and ten other candidates duly sought nomination certificates from their respective political parties, and subsequently participated in the said by-election, conducted by the 2nd and 3rd respondents;

(v) the 1st respondent squarely floored the appellant, and was declared winner of the by-election conducted on 30th December 2013, and duly sworn into office, there being no objection to the said election;

(vi) The appellant must accept that the people duly elected the 1st respondent to office, and must respect the people's will.

[28] It was learned counsel's further contention that, at each and every stage of the above process, the appellant did have the right to stay the constitutional process, but he took no action; and since there was no election petition to contest the election of the 1st respondent, the constitutional processes that had been duly discharged, could no longer be called into question.

[29] Learned counsel submitted that in all other petitions before this Court, the Court has been emphatic that, in order not to render an appeal nugatory, stay of proceedings when sought, ought to be given, to prevent the onset of parallel constitutional processes getting into motion. He urged that, in order to assure predictability, certainty, uniformity and stability in the application of the law and the Constitution, the Court should disallow such appeal as would re-open a concluded case. In the instant case, it was urged, the appellant is seeking to invoke the jurisdiction of the Court, several months after the relevant election had already been concluded, and a repeat-election conducted as directed by the Court of Appeal in its decision of 11th December 2013. Counsel invoked the ***Mary Wambui*** case to reinforce the argument that

'other constitutional processes' had already taken place, and as such, this Court had no jurisdiction to 're-open' the matter.

D. ISSUES FOR DETERMINATION

[30] Flowing from the foregoing submissions, the following issues have crystallized for determination:

*(i) What is the effect of the **Joho** and **Wambui** decisions on this matter?*

(ii) Whether the petition of appeal before this Court is rendered nugatory on account of the by-election held on 30th December, 2013; and is the 'doctrine of mootness' applicable in this case?

(iii) What Orders should be issued?

E. ANALYSIS

(i) What is the Effect of the Joho and Wambui decisions on this Matter?

[31] The appellant's contention is that when the 1st respondent moved the High Court to contest his election as Member of the National Assembly for Nyaribari Chache Constituency, the petition bearing his claim was filed outside the 28-day period allowed following the date of declaration of results – in breach of Article 87(2) of the Constitution.

[32] The general precedent now established by this Court is that non-adherence to the electoral timelines of the Constitution leads to a declaration of invalidity, in a proper case. This pattern of decision-making is clear from the ***Joho*** case, where the mode of application of Article 87(2) of the Constitution was clarified.

[33] ***Joho*** carries the principle that, where a party wishes to institute an election petition before the High Court, claiming that an election contestant has not been validly elected, for purposes of computing the 28-day period under Article 87(2), the date of declaration of balloting results is signified by the issuance of Form 38 by the Returning Officer. The sole issue for determination in the ***Joho*** case, therefore, was *whether Section 76(1)(a) of the Elections Act was unconstitutional, for being inconsistent with the time-frame specified in Article 87(2) of the Constitution.*

[34] This Court, in that case, thus pronounced itself (paragraph 65) as follows:

> *"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.***"[emphasis supplied].

The Court held that Section 76(1)(a) of the Elections Act, 2011 was inconsistent with Article 87(2) of the Constitution, insofar as it provided that the said 28 day-period begun to run from the date of publication of results in the *Gazette*.

[35] The ***Joho*** decision formed the basis for determining subsequent cases entailing the same subject matter of timelines. And in ***Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others*** Sup. Ct. Petition No. 7 of 2014; [2014] eKLR, this Court was called upon to determine whether the election petition at the High Court, and further proceedings therefrom, were a nullity *ab nitio*,

having been premised on a petition filed outside the 28-day period specified in the Constitution. In ***Mary Wambui,*** the petition at the High Court was filed *outside the 28 days prescribed by the Constitution, from the date of issuance of the certificate in Form 38,* though within 28 days of the gazettement, as contemplated by Section 76(1)(a) of the Elections Act (subsequently declared unconstitutional). The Court held that since the filing of the election dispute at the High Court did not conform to the constitutional time-limit, a finding of invalidity had to follow, rendering all subsequent proceedings a nullity.

[36] The principle in ***Joho*** as applied in ***Mary Wambui*** was also followed in the case of ***Anami Silverse Lisamula v. The Independent Electoral & Boundaries Commission & 2 Others*****,*** Sup Ct. Pet. No. 9 of 2014, where the Court had been called upon to determine whether the petition filed in the High Court outside the 28 days prescribed by Article 87(2) of the Constitution was a nullity. At paragraph 120, the Court made the following pronouncement:

> ***"This Court is not about to depart from this pragmatic perception, which endeavours to sustain a right recognised under the operative state of the law. We are of the opinion that such a pragmatic perception, once reflected in judicial interpretation, is to be regarded as a building-block of our jurisprudence under the new constitutional dispensation."***

[37] The Court, in upholding its finding in the ***Mary Wambui*** decision, thus remarked: "*We find that the decision in the* ***Joho*** *Case directly applies in the instant matter and so does the jurisprudence in the* ***Mary Wambui*** *Case."*

[38] The consistency in the Court's standpoints was further demonstrated in the case of ***Hon. Lemanken Aramat v. Harun Meitamei Lempaka & Two Others***, Sup. Ct. Petition No. 5 of 2014. Again, the relevant issue for determination was whether proceedings before the High Court, as an "Election Court", were invalid, having been filed 36 days – instead of the prescribed 28 days– after the declaration of the election outcome. Just like in the previous two cases, the Court held that the High Court lacked jurisdiction to entertain the original petition, on the grounds of breached timelines, and so the Court of Appeal, like the High Court, had no jurisdiction to entertain the matter.

[39] Without a doubt, the *principle* in ***Joho*** as applied in ***Mary Wambui***, ***Lisamula*** and ***Aramat,*** now stands as binding legal authority, to be followed by all Courts in this country, on similar cases of election-dispute timelines. Consequently, we affirm that, an election petition filed outside the 28-day period after the date of declaration of results is *prima facie* invalid, and all proceedings emanating therefrom are null and void *ab initio* subject to what we shall shortly state.

[40] We note that learned counsel for the 1st respondent has contended that the date when the election results were declared remains unknown. He urges that there was no Form 38 on record, and neither has the question of the date of declaration of results ever been a subject of determination before the High Court, or Court of Appeal. In that regard, undoubtedly, the Supreme Court's jurisdiction in relation to the establishment of facts is highly limited. But it is relevant that in an earlier Ruling of this Court, dated 16th October, 2015, the very question herein was the subject, and the following observation was made:

> ***"[I]n the instant matter Form 38 is indeed part of the record, [and] the applicant is in no way prejudiced; and***

an affidavit for the admission of such a document lacks a proper basis."

[41] It follows from the above that the alleged difference between the parties, on this question, is an issue of no moment whatsoever. The question of the date of declaration of results is settled, as is confirmed by the finding of the two-Judge Bench. The question is moreover, overtaken by events. At this juncture, the issue of when the results were declared is not in question. The fact therefore remains that the petition at the High Court was *filed out of time,* that is 35 days after the declaration of results. The matter would have come on end upon that finding but we shall render ourselves with finality later in the judgment.

ii) The By-election of 30th December, 2013 – and the 'Doctrine of Mootness'

[42] In his attempt to show that the appeal has been rendered nugatory, the 1st respondent relies on the observations of this Court in its Ruling in ***Mary Wambui Munene v. Peter Gichuki Kingara & 2 Others***, Sup. Ct. Application No. 12 of 2014; [2014] eKLR. The Court, *via* an interlocutory application in that case, had restrained the IEBC from conducting a by-election pending the determination of the appeal, and stayed the execution of the Judgment of the Court of Appeal. In doing so, it observed thus (at Paragraph 76):

> ***"The critical question to ask ourselves is whether the Appeal which has already been filed would be rendered nugatory should the By-election be allowed to proceed on 29th April, 2014. All things being equal, the electorate of Othaya Constituency should be allowed to exercise their democratic rights by electing a representative of their choice. However, in view of this Appeal, there is an***

apprehension that if the Appeal succeeds, it may lead to a situation where there would be two members of National Assembly for the same constituency. This would definitely create a constitutional deadlock that we would not be in a position to rectify as a Court, because that will be a different constitutional process and we would have become *functus officio* ***in regard to this appeal."***

[43] The 1st respondent submitted that an uncontested constitutional process in the form of a by-election had been concluded and, accordingly, it no longer lies within this Court's jurisdiction to disturb the finding of in vote-count; and only the High Court has the constitutional powers under Article 105 to determine the validity of such an election process.

[44] The appellant's position remains that the by-election conducted on 30th December, 2013 was the product of a judicial process which arose out of an invalid petition, and is in essence a nullity. He therefore perceives the by-election as illegal; according to him, the election arose from an illegality, and nothing can validate such a process.

[45] In response, the 1st respondent invoked ***Mary Wambui,*** to reinforce his argument that a valid constitutional process had been concluded, and this Court cannot re-open such a valid and concluded constitutional operation. The relevant paragraphs of that decision read as follows (paragraphs 89 and 90):

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

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

[46] Paragraph 89 of the ***Mary Wambui*** decision essentially applied the ***Joho*** Ruling, and affirmed that the declaration of invalidity applies from the date of commencement of the Elections Act of 2011. Thus, the invalid provision of the law (Section 76(1)(a) of the Election Act, 2011) was unconstitutional as from the date of its enactment. The ***Mary Wambui*** decision, however, and in its special context, had an exception to the basic statement of principle. For clarity, we shall quote paragraphs 90 and 91:

> ***"We are aware that several constitutional processes have been concluded, and others ensued as a result of the directions of the Courts while handling electoral disputes following the 2013 General Elections. It is our position that, in either of these scenarios, and as a matter of finality of Court processes, parties cannot reopen concluded causes of action…."***
>
> ***"We are of the view that the above principles are sound in law and applicable in this case. As a result, the apprehension that a declaration of nullity and its retrospective effect may trigger a frenzy to re-open concluded or determined election cases, should not arise or be contemplated."***

[47] From the foregoing statements, it is quite clear that the Court had perceived that an inflexible approach in the application of ***Joho*** could precipitate a constitutional crisis. Hence the rational and pragmatic course taken: that where

causes of action are already concluded, such matters are not to be re-opened. Specifically the Court noted that, *several constitutional processes had been concluded, and others had ensued as a result of the directions of the Courts, while handling electoral disputes*.

[48] On those principles, we have to consider whether the matter at hand would fit within the parameters of '*concluded constitutional processes and concluded cause of action.'*

[49] The 1st respondent filed his election petition at the High Court on *8th April, 2013*. The High Court delivered its Judgement on *7th October, 2013,* nullifying the election. Being aggrieved, the appellant filed his appeal in the Court of Appeal at Kisumu on *18th October 2013*. Meanwhile the IEBC issued a notice dated 23rd October, 2013 setting the date of the by-election as *19th December, 2013*. This necessitated the filing of an application seeking stay of the by-election. The application was allowed and a stay granted on *22nd November, 2013*.

[50] The Court of Appeal subsequently heard the appeal and delivered its decision *dismissing the appeal* on *11th December 2013*. It however reserved its reasons which were subsequently delivered on *4th April, 2014*. By that decision of the Court of Appeal on 11th December, 2013, *the stay Orders were vacated*, and consequently, IEBC duly proceeded and conducted a by-election on *30th December, 2014*.

[51] The appellant voluntarily**,** in good faith, and presumably with legitimate legal advice, took part in the said by-election, obviously anticipating a win or a loss. He lost, and the 1st respondent was declared the winner. Interestingly, more than three months after the by-election had been concluded, the appellant filed a notice of appeal, on *16th April, 2014*. Thereafter he filed a petition of appeal

before this Court, on *14th May, 2014*. The primary ground of appeal was that the 1st respondent's petition at the High Court *was filed out of time, hence invalid;* and so, this Court must nullify all the proceedings ensuing from that petition – including the balloting outcome in the by-election itself.

[52] The Court of Appeal gave its decision on *11th December, 2013*. Thereafter, the appellant had 14 days within which to a file a notice of appeal. He did not do so. Presumably on good legal advice, he chose to participate in the resultant electoral process, and indeed, it is not until *16th April, 2014* that he got a revelation to proceed with the 'pending litigation'. It is worth noting that if things had taken a normal course, the final position would be that of the appellate Court save that further motion was possible if the appellant had appropriately filed a notice of appeal, and an application for stay of the by-election to enable this Court to address the issues now being raised.

[53] The appellant indeed had a right to appeal to this Court against the decision of the Court of Appeal, and this Court's Ruling of 19th February, 2015 allowed the petition to be filed out of time, so that the relevant issues could be determined on merit. It is our finding, therefore, that the constitutional process contemplated under Article 105(1) of the Constitution was set in motion by the filing of an election petition on 8th April, 2013; and that process ran up to the point when the Court of Appeal gave its decision on 11th December, 2013, with the effect that a by-election was lawfully held. The initially uncontested Court of Appeal decision, therefore, concluded the first-phase of the constitutional process. With the *green light from the Court of Appeal*, the IEBC went ahead and organized for a by-election, *in accordance with its constitutional mandate*. Arising from that by-election, the 1st respondent was declared and sworn in as the Member of the National Assembly for Nyaribari Chache Constituency.

[54] That scenario calls to mind the course of decision-making by this Court in the case of ***Mary Wambui Munene v. Peter Gichuki Kingara & 2 Others***, Sup. Ct. Application No. 12 of 2014; [2014] eKLR. The Court in that case had observed (at paragraph 76):

> *"However, in view of this appeal, there is an apprehension that if the appeal succeeds,* ***it may lead to a situation where there would be two members of National Assembly for the same constituency. This would definitely create a constitutional deadlock that we would not be in a position to rectify as a Court, because that will be a different constitutional process and we would have become functus officio in regard to this appeal."*** [emphasis supplied.]

[55] The Court, in that case, was forward-looking, when it subsequently gave its decision, holding that, where several constitutional processes have been concluded, and others have ensued, parties must now look forward, rather than reopen settled causes of action. We would affirm the exceptional ratio expressed in the ***Mary Wambui,*** case and hold that a constitutional process had been concluded, followed by another, in the form of the by-election held on 30th December, 2013; and this Court is disinclined, in the circumstances, to make any Order which would invalidate the subsequent electoral process.

[56] In that context, the essence of the 1st respondent's case is that following the Court of Appeal's Judgment of 11th December, 2013, fresh constitutional processes were ushered in, culminating in his election as the Member of National Assembly for Nyaribari Chache Constituency. Consequently, it was urged, no competing constitutional process can be invoked at this stage, to impugn his election, and as thus, the petition herein has been rendered moot, on account of the subsequent constitutional processes.

[57] That is an argument in good standing, juristically, and was thus articulated in the Ugandan case of ***An Application for Judicial Review Between Julius Maganda v. National Resistance Movement*** (HCMA NO. 154 OF 2010) (HCMA NO. 154 OF 2010) [2011] UGHC 4 (11 January 2011):

> *"**Courts of law do not decide cases where no live disputes between parties are in existence. Courts do not decide cases or issue orders for academic purposes only. Court orders must have practical effects. They cannot issue orders where the issues in dispute have been removed or merely no longer exist."***

[58] The foregoing passage touches on the core of the judicial mandate: to sustain the governance process, not by answering to active policy or legislative dynamics often characterised by vagary or mutability, or free-ranging abstraction – but by appreciating and by analyzing the essence of the litigious cause, with a view to upholding constitutionality, legality, certainty, regularity, predictability, equity and justice, for the affected parties.

[59] Further, in the South African case of ***National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others 2000*** (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1, *Ackermann J.* at the Constitutional Court, observed that a case is 'moot' and, therefore not justiciable, if it no longer presents a *live controversy*. 'Live controversy' was also aptly defined by *Hughes, CJ* in ***Aetna Life Ins. Co. v. Haworth*****,** 300 U.S. 227 (1937), where he distinguished it "from a difference or dispute of a hypothetical or abstract

character; from one that is academic or moot". He observed that a live controversy must be "definite and concrete, *touching the legal relations of parties having adverse legal interests*". A live controversy he posited:

> ***"... must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."***

[60] The concept of mootness of a matter before Court, is based on the principle of 'justiciability'. *Black's Law Dictionary* 9th Ed (pp.943-944) defines justiciability as "*proper to be examined in courts of justice*"; or "*a question as may properly come before a tribunal for decision*". The emerging principle is that the Court, as member of the vital governmental trinity, has its proper role when its input is constitutionally required – with no flourish. That is all we need to say on that matter.

E. ORDERS

[61] The foregoing analysis not only restates the applicable principle *prima facie,* where an election petition is filed outside the stipulated timeline; it also examines and rationalises the past decisions of this Court. As regards the instant matter, it is clear to us that the petition must fail. Our specific Orders are as follows:

(a) The petition of 14th May, 2014 is dismissed.

(b) The parties shall bear their own respective costs.

DATED and **DELIVERED** at **NAIROBI** this **24th** day of **February, 2017**

.....	.....
P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**	**M.K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
J.B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. N. NDUNGU **JUSTICE OF THE SUPREME COURT**	**I. LENAOLA** **JUSTICE OF THE SUPREME COURT**

I certify that this is

a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA