

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 17 OF 2018

— BETWEEN —

- | | | |
|-------------------------------------|---|--------------------|
| 1. HON. CYPRIAN AWITI | } | PETITIONERS |
| 2. HON. HAMILTON ORATA | | |

— AND —

- | | | |
|---|---|--------------------|
| 1. INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION | } | RESPONDENTS |
| 2. THE RETURNING OFFICER, HOMA
BAY COUNTY | | |
| 3. HON. JOSEPH OYUGI MAGWANGA | | |
| 4. HON. JOSHUA ORERO | | |

MEDIA SUMMARY

The Homa Bay County gubernatorial election case falls within the last batch of the disputed elections conducted under the umbrella of the General Elections of August 2017.

The unsuccessful candidates, by the outcome as declared by the Independent Electoral and Boundaries Commission, moved to the High Court in Homa Bay, which reversed the outcome, and ordered the conduct of fresh election — a position upheld thereafter by the Court of Appeal in Kisumu.

It was now the sitting Governor's turn to set the Supreme Court in motion, seeking a reversal of the decisions by the first two Superior Courts.

The appellants' case was that they had won the election by a significant margin of more than 21,000 votes, and so, the verdict of the electors is to be upheld, in fulfilment of democratic principles.

The respondents had contested the integrity of the said elections, claiming they had been compromised by irregularities and illegalities — and so they had no validity, and should be nullified. And that is the outcome the two respondents won at the High Court and the Court of Appeal.

Today, the Supreme Court by a unanimous six-Judge bench (*Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu and Lenaola, SCJJ*) has reversed the decisions of the two Courts, and directed that Homa Bay County's Governor and Deputy-Governor shall continue to hold office, on the basis of the proclamation made by the Independent Electoral and Boundaries Commission just after election day, on 8th August, 2017.

The brief history of this matter is that Mr. Magwanga and his running mate challenged Mr. Awiti's win as the duly-elected Governor.

The very foundation of the Supreme Court's decision is that, before the first two superior Courts, only general accusations had served as a basis for the decisions taken – rather than the crucial factual material that would sustain a judicial edict.

The Supreme Court has held that for a gubernatorial election, a typical instance of the exercise of the people's democratic mandate, the two superior Courts ought to have relied on concrete evidence, such as, indeed, came forth from *scrutinies and recounts* which were conducted at the request of the losers in the election. After those parties formally secured Orders for scrutiny and recount, and indeed, these processes were conducted, they sought an informal escape route from the outcomes; and the Court quietly avoided use of the outcome. It was not clear to the Supreme Court that the trial Court did conduct its hearings transparently, while observing principles of fairness and credibility.

In the absence of the findings of the scrutiny report, the trial Court had to reference-point in judging the magnitude of the impact of any electoral irregularity such as may have occurred, during the election. Thus, there was no basis in law for the Order of annulment issued by the Court.

The scrutiny process, in an election, is ever so important because:

- (i) it enables the Court to ascertain whether the allegations, the irregularities, or the breaches of law complained of, are valid;
- (ii) it enables the Court to ascertain the valid votes cast in favour of each candidate;
- (iii) it is not meant to unearth new evidence to sustain a petition: its purpose is to enable the Court to verify the allegations made by the parties;
- (iv) it is a device for enabling the Court to ascertain whether the election has been conducted in accordance with constitutional principles;
- (v) it is a mechanism of proportionate design — for rectifying election results.

The Supreme Court also found it entirely improper, that parallel and competing sets of electoral papers were brought before the trial Court and that Court, without any authenticating evidence, gave more weight to papers of private origin than the official documents emanating from the duly — authorized public bodies.

The Supreme Court found it not possible to sustain the findings of the two superior Courts, as these ran counter to the recognized law — quite apart from constituting an improper compromise to the electoral rights of the voters who came to the polls on 8th August, 2017 and duly cast their votes. These had been no cogent basis for upsetting the electorate's choices as duly made on election day.