REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ & V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ.)

PETITION NO. 5 OF 2014

-BETWEEN-

HON. LEMANKEN ARAMAT.....APPELLANT

-AND-

1. HARUN MEITAMEI LEMPAKA
2. ISAAC RUTO
3. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
.....RESPONDENTS

(Being an appeal from the Judgment of the Court of Appeal sitting at Nairobi (Waki, Musinga & Gatembu, JJA.) dated 28th March, 2014 in Nairobi Civil Appeal No. 276 of 2013)

JUDGMENT

A. INTRODUCTION

[1] This is an appeal against the Judgment of the Court of Appeal, setting aside the decision of the High Court (of 5th September, 2013) sitting at Nakuru *(Emukule J.),* in *Election Petition No.2 of 2013*. The Court of Appeal decision substituted the Judgment of the High Court with an *order for recount* of the votes cast in *all the 69 polling stations in Narok East Constituency.*

B. BACKGROUND

[2] The appellant and nine others were candidates contesting the National Assembly seat for Narok East, in the 4th March, 2013 General Elections. After the

counting and tallying of votes, the appellant was declared to be the winner, and issued with a Certificate of Results (Form 38) on *4th March, 2013*. He was, besides, gazetted as the Member of the National Assembly for Narok East (*Gazette Notice* No. 3155 of *15th March, 2014)*. He garnered *5,615 votes*, as against the 1st respondent's *5,174 votes*, thus winning the election by *441 votes*. Aggrieved by the outcome as thus declared, the 1st respondent filed an *election petition* in the High Court in Nakuru, *Election Petition No. 2 of 2013* of *10th April, 2013*.

[3] The 1st respondent sought various reliefs, *inter alia*: an order for *scrutiny and recount* of the votes cast in *all the 69 polling stations*. The trial Court heard the petition and delivered its Judgment on 5th September, 2013 *dismissing* the same with costs to the appellant herein, and the 2nd and 3rd respondents.

[4] Dissatisfied with the Judgment and decree of the High Court, the 1st respondent filed an appeal. On 28th March, 2014, the Court of Appeal *allowed the appeal,* and made the following orders (at paragraph 42):

> ***"(a) The judgment and decree dated 5th September, 2013 are hereby set aside and substituted with an order for recount of all the votes cast in all the 69 polling stations in Narok East Constituency for election of the area Member of Parliament.***
>
> ***"(b)*** *The recount shall be carried out in the High Court of Kenya at Nakuru* ***where the petition had been filed. The exercise shall be supervised by the Court's Deputy Registrar and the results thereof shall be forwarded to*** *any judge in that station, except Emukule, J. for declaration in terms of Section 80(4) of the Elections Act.*

"(c) To facilitate the recount as ordered hereinabove, the third respondent (IEBC) is hereby ordered to deliver all the ballot boxes for election of member of Parliament for Narok East Constituency in the 2013 general elections to the High Court of Kenya at Nakuru within ten (10) days from the date hereof.

"(d) Subject to *determination of the winner following the recount of votes* ***as ordered, as between the appellant and the 1st respondent, the costs of the election petition in the High Court, which shall not exceed Kshs.1,500,000/=, shall be paid by the loser to the winner and to the 1st and 2nd respondents jointly.***

"(e) The costs of this appeal are capped at Kshs.300, 000/= and shall be paid to the appellant by the respondents"[emphases supplied].

[5] It is these orders that prompted the instant appeal, lodged on 3rd April, 2014. The appellant, on the same date, filed an application under certificate of urgency seeking interlocutory orders staying the execution of the Judgment and Orders of the Court of Appeal.

[6] The application was heard *ex parte* on 3rd April, 2014 by *Ibrahim, SCJ* who certified the matter urgent, and granted interim orders staying execution of the Judgment and Orders of the Court of Appeal, pending *inter partes* interlocutory proceedings.

[7] *The 1st respondent lodged a preliminary objection: that the Supreme Court lacked jurisdiction under Article 163(4)(a) of the Constitution, to hear and determine the Notice of Motion of 3rd April, 2014; that the appellant had no right*

of appeal under Article 163(4)(a) of the Constitution against the Judgment of the Court of Appeal; and that the application of 3rd April, 2014 offended, and sought to circumvent, Articles 81 and 86 of the Constitution, and was thus an abuse of the Court process.

[8] At the hearing of the Notice of Motion, *Rawal DCJ* and *Ibrahim SCJ* directed that the objection be integrated into the application, and disposed of accordingly. On 14th May, 2014, after hearing the parties on the application and the preliminary objection, the learned Judges ordered a stay of execution of the Judgment and orders of the Court of Appeal, pending the hearing and determination of this appeal. The appeal was heard before a full Bench on 27th May, 2014.

C. THE PARTIES' RESPECTIVE CASES

(i) The Appellant's Case

[9] Learned counsel for the appellant, Prof. Ojienda summarised the 11 grounds set out in the Petition of Appeal to six grounds, as follows:

(a) the learned Judges of Appeal misdirected themselves when they ordered the High Court at Nakuru to recount the votes cast for the Narok East Parliamentary seat, thereby *purporting to extend that Court's jurisdiction beyond the prescription in Article 105(1) and (2) of the Constitution;*

(b) the learned Judges of Appeal misdirected themselves when they assigned the duty to hear and determine the appeal to a High Court which had become *functus officio,* upon delivery of its Judgment on 5th September, 2013 – *yet another jurisdictional question*.

(c) the learned Judges of Appeal misdirected themselves when they purported to confer the status of "Election Court" upon *any Judge* in the High Court at

Nakuru, and to further confer upon such Judge powers of an "Election Court", under Section 80(4) of the Elections Act, 2011 (Act No. 24 of 2011) – *still a jurisdictional question.*

(d) the learned Judges of Appeal misdirected themselves on a matter of law, when they held that an election petition filed under Section 80(4) of the Elections Act, and Rule 32 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 can be disposed of *summarily without the benefit of a trial*; that *to require such a petition to undergo full-scale trial would render the said provisions of the law otiose and inefficacious*; and that the petitioner *need not lay a basis, or give sufficient reason* for an order for recount of votes to issue;

(e) the learned Judges of Appeal misdirected themselves when, after erroneously holding that a petition filed under these provisions should not proceed to full trial, they proceeded to apply this interpretation to the instant case, when the said petition had in fact been filed under the provisions of *Section 75 of the Elections Act*; even as they held that a party who questions the validity of an election, and makes adverse allegations regarding the electoral process must *satisfy the Court that there is sufficient reason to warrant scrutiny or recount,* they failed to apply this in the appeal before them, notwithstanding that the petition gave rise to these very questions; and

(f) the learned Judges of the Court of Appeal acted in breach and disregard of the provisions of Article 50(1) of the Constitution as read together with Article 25(c) thereof, which require that a dispute that can be resolved by the application of law, be decided in a fair hearing before a Court – when they held that to require a petition filed under Section 80(4) of the

Elections Act and Rule 32 of the Election Petition Rules to go to trial, would render the said provisions of the law otiose.

The Issue of Jurisdiction

[10] Counsel for the appellant submitted that the 1st respondent filed the election petition at the High Court *out of time*; and therefore, the High Court had *no jurisdiction* to hear and determine the same. He urged that the 1st respondent had filed the petition on 10th April 2013, *thirty-six days* after the declaration of the results *via* Form 38 which was issued on 4th March, 2013. Hence it was filed out of time. In support of this argument, counsel cited Article 87(2) of the Constitution which provides that:

> ***"Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission."***

Counsel submitted that the petition had been filed pursuant to Section 76(1)(a) of the Elections Act which was enacted to give effect to Article 87(2) of the Constitution, but which thus provides:

> ***"(1) A petition –***
>
> ***(a) to question the validity of an election shall be filed within twenty eight days after the date of*** *publication of the results of the election in the Gazette* ***and served within fifteen days of presentation…"*** [emphasis supplied].

[11] He submitted that the said statutory provision went contrary to the time-frame set out under Article 87(2) of the Constitution, by which election petitions are

to be filed within *28 days* after the declaration of the election results. In support of this contention, counsel cited the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** S.C. Petition No. 10 of 2013;[2014] eKLR (the ***Joho*** case), in which this Court defined with finality what constitutes "declaration of results". Counsel submitted that in that case, this Court held (at paragraph 84), that the final declaration of election results is through the issuance of the Certificate in Form 38 to the winner of the election. This Court declared Section 76(1)(a) of the Elections Act to be unconstitutional, by its extension of time beyond 28 days following the declaration of the election result.

[12] Counsel submitted that following the ***Joho*** case, this Court has pronounced itself on the effect of the declaration of the unconstitutionality of Section 76(1)(a) of the Elections Act, in ***Mary Wambui Munene v. Peter Gichuki King'ara Others*** S.C. Petition No. 7 of 2013; [2014] eKLR. In this case, this Court held (at paragraph 89) that the declaration of invalidity must apply from the date of commencement of the Elections Act, that is, *2nd December, 2011*. Counsel submitted that, in arriving at its decision in the ***Mary Wambui*** case, this Court considered relevant comparative judicial experience, and relied on the persuasive authority of ***A v. The Governor of Arbour Hill Prison*** [2006] IESC 45;[2006] 4 IR 88. This Court cited with approval the following *ratio* from that case (at paragraph 36):

> *"A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations.* ***It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined"*** [emphasis supplied].

[13] Senior Counsel, Prof. Ojienda argued that the High Court had no jurisdiction to hear and determine the election petition since the same was filed outside the constitutionally-prescribed timeline, and the appeal ought to be disallowed.

Appellate Court's Recount Order: What Legal Standing, in the light of Article 105(1), (2) of the Constitution?

[14] Counsel submitted that the learned Judges of Appeal wrongly interpreted the provisions of Articles 105(1) and (2)and 159(2)(e) of the Constitution, when they ordered the High Court in Nakuru to *recount the votes cast* in all 69 polling stations in Narok East Constituency, thereby purporting to *extend the jurisdiction of the High Court* set out in Article 105 of the Constitution. He urged that, by Article 159(2)(e) of the Constitution, the Court of Appeal ought to exercise judicial authority guided by the principle that the *purpose and principles of this Constitution* shall be protected and promoted; he invoked Article 105(1) and (2) which provides as follows:

> ***"(1) The High Court shall hear and determine any question whether—***
> ***(a) a person has been validly elected as a member of Parliament; or***
> ***(b) the seat of a member has become vacant.***
> ***"(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition."***

[15] In response to the 1st respondent's submission that Article 105(2) of the Constitution does not deal with jurisdiction, learned counsel submitted that the use of the word 'shall', in this provision, sets mandatory timelines regarding the jurisdiction of the High Court.

[16] Counsel submitted that the election petition dated 10th April, 2013 was filed at the High Court, which delivered its decision within the constitutionally-prescribed period of six months; and hence the jurisdiction of that "Election Court" had been exhausted. In support of this argument, counsel cited this Court's decision in ***In Re The Matter of the Interim Independent Electoral Commission*** S.C. Constitutional Application No. 2 of 2011; [2011] eKLR, where it was held (at paragraph 3) that the jurisdiction of a Court flows from statute or the Constitution – a decision reiterated in the case of ***Samuel Kamau Macharia &Another v. Kenya Commercial Bank Limited & 2 Others*** S.C. Application No. 2 of 2012; [2012] eKLR (at paragraph 50).

[17] Counsel further invoked the Ruling of this Court in ***Raila Odinga v. Independent Electoral and Boundary Commission & Others*** [2013] eKLR (the ***Raila Odinga*** case), on an application for an order compelling the delivery-up of all electronic and hard-copy information pertaining to the 2013 Presidential election, to facilitate a full-scale forensic audit of the Independent Electoral and Boundaries Commission's information technology system. This Court ruled that the constitutional timelines for hearing and determining the petition were stringently demarcated, and were for compliance.

[18] Counsel submitted that the order of the Court of Appeal directing the High Court to recount votes for the entire Narok East Constituency, would have the effect of *extending the constitutional timelines* set for the High Court to hear and determine election petitions. To depict the essence of *time* within which to hear and conclude election petitions, counsel referred to the Nigerian case, ***Senator John Akpanudoedehe & Others v. Godswill Obot Akpabio & Others*** S.C of Nigeria Appeal No. 154 of 2014, in which the Supreme Court of Nigeria thus held:

> ***"Once 180 days elapsed*** *the hearing of the matter fades away along with any right of fair hearing. There is no longer a live petition*

*left. There is nothing to be tried even if a retrial order is given. It remains extinguished forever…**If this Court extends time provided in Section 285 (6) for the hearing of election petitions it would amount to judicial legislation and that would be wrong. The National assembly is to make law and that includes amending existing laws and the Constitution"*** [emphasis supplied].

[19] Counsel further cited as persuasive authority, the Supreme Court of Nigeria pronouncing itself on the effect of the *lapse of constitutional timelines,* in the case of ***Chief Doctor Felix Amadi &Anor v. Independent National Electoral Commission (INEC) & Others*** S.C. of Nigeria Appeal No. 476 of 2011:

"There is no room for the exercise of any discretion in relation to the allotted time. Everything needed to deliver the judgment must be done and the judgment delivered within sixty (60) days of the date of delivery of judgment on appeal. The appeal in question has lapsed by one day as at 7th December 2011 when the same was listed for hearing. That means that as at that date the appeal had ceased to exist in law and could therefore not have been heard–it was dead in the eyes of the law and the Constitution."

[20] Counsel countered the 1st respondent's argument that this Court should not rely on cases from the Nigerian Supreme Court, because the Nigerian Constitution does not have similar provisions to Article 10,24, 27 and 259 of the Constitution of Kenya. He submitted that Article 38(5) of the Nigerian Constitution was in similar terms to Article 105 of the Constitution of Kenya, 2010.

*Did the High Court become **functus officio,** upon delivery of the Judgment?*

[21] Learned counsel submitted that the Judges of Appeal, in their Judgment of 28th March, 2014 wrongly interpreted and applied the provisions of Article 87(1) of the Constitution as read together with Section 85A of the Elections Act, when they "delegated the duty of determining the appeal" to the High Court, which had become *functus officio* upon delivery of its Judgment on 5th September, 2013.

[22] Counsel submitted that Article 87(1) of the Constitution enjoins Parliament to enact legislation establishing mechanisms for timely resolution of electoral disputes; and that Parliament indeed had enacted Section 85A of the Elections Act which provides that:

> ***"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be–***
> ***(a) filed within thirty days of the decision of the High Court; and***
> ***(b)*** *heard and determined* ***within six months of the filing of the appeal"*** [emphasis supplied].

[23] Counsel submitted that, by ***Black's Law Dictionary,*** a determination is ***"a final decision by a Court;"*** and Judgment is ***"a court's final determination of the rights and obligations of the parties in a case"***. It was urged that the Court of Appeal is required to hear and determine the appeal from the High Court, and failing to do so was a violation of Article 87(1) of the Constitution, and Section 85A of the Elections Act – violation by purporting to turn over its jurisdiction to the High Court, to determine the matter.

Status of "Election Court": Could the Appellate Court confer this upon the High Court, in such General Terms?

[24] Counsel submitted that the Judges of the Court of Appeal misdirected themselves when they purported to confer the status of an "Election Court" upon *any Judge* of the High Court in Nakuru, and to further confer upon such Judge the powers solely attributable to an "Election Court" under Section 80(4) of the Elections Act. Section 80(4) provides that:

> ***"An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—***
>
> ***(a) upon recount of the ballots cast, the winner is apparent; and***
> ***(b) that winner is found not to have committed an election offence."***

[25] It was further submitted that the Court of Appeal issued an order that the recount shall be carried out by the High Court at Nakuru, and that the Deputy Registrar was to supervise the results which were to be forwarded to any Judge in the station except *Emukule, J* for declarations in terms of Section 80(4) of the Elections Act. Counsel submitted that this order of the Court of Appeal usurped the exclusive power of the Chief Justice, in violation of Article 87(1) of the Constitution as read together with Section 96 of the Elections Act, which mandates the Rules Committee to develop procedural and practice Rules such as the Election Petition Rules. Rule 6 of the said Rules provides that:

> ***"(1) A court shall be properly constituted, for purposes of hearing—***

(a) an election petition in respect of an election to Parliament or to the office of governor, if it is composed of one High Court Judge; or

(b) an election petition in respect of an election to a county assembly, if it is composed of a Resident Magistrate designated by the Chief Justice under section 75 of the Act.

"(2) The Chief Justice may—
(a) in consultation with the Principal Judge of the High Court, designate such judges; and

(b) designate such magistrates, as are necessary for expeditious disposal of election petitions.

"(3) The Chief Justice shall publish the name of the Judge or Magistrate designated under sub-rule (2) in the Gazette and in at least one newspaper of national circulation."

Disposing of Petition filed under Section 80(4) of the Elections Act and Rule 32 of the Election Petitions Rules: Can this be done summarily, without a Trial?

[26] Counsel submitted that the Judges of Appeal wrongly interpreted Articles 87(1), 105(1) and (3) of the Constitution as read together with Section 80(4) of the Elections Act and Rule 32 of the Election Petition Rules, when they held that a petition filed under Section 80(4) of the Elections Act, and Rule 32 of the Elections Petitions Rules could be disposed *summarily without the benefit of trial,* and that a petitioner need *not lay a basis or give sufficient reason for an order for recount of votes* to issue.

[27] It was counsel's contention that the Court of Appeal adopted a narrow interpretation of Section 80(4) of the Elections Act and Rule 32 of the Election

Petitions Rules, and laid an inappropriate precedent binding on lower Courts, to the effect that a petitioner in an election petition has an *automatic right to recount of votes* under these provisions. Counsel submitted that the Judges of the Court of Appeal misdirected themselves by distinguishing between Rules 32 and 33(4) of the Election Petition Rules and, specifically, when they held that Rule 32 does not require a party to lay a basis for scrutiny and recount, whereas Rule 33(4) does. Counsel submitted that if this argument was correct, then there would be no need to file an *election petition* where one was seeking scrutiny and recount. Counsel urged that had Parliament intended that Rule 32 should confer an automatic right upon a party seeking a recount of votes, this would have negated the case for Court's intervention in election petitions.

[28] Rule 32 of the Election Petition Rules thus provides:

> ***"(1) Where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the Petitioner may apply to the court for an order to recount the votes or examine the tallying.***
>
> ***"(2) The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies."***

[29] And Rule 33(4) provides that:

> ***"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."

[30] Counsel urged that the appellate Court, by its narrow interpretation of Section 80(4)of the Elections Act and Rule 32 of the Election Petition Rules, had disregarded the right to a fair hearing enshrined in Articles 25(c) and 50(1) of the Constitution.

[31] Learned counsel submitted that the findings of the Court of Appeal dispensing with the need to lay a basis for scrutiny and recount, were in disregard of Section 83 of the Elections Act, and against this Court's precedent in the ***Raila Odinga*** case, which held that a petitioner should discharge the *initial burden of proof*.

[32] In response to the 1st respondent's submission that the election petition was based solely on the issue of *counting and tallying of votes*, counsel for the appellant contended that the election petition by the 1st respondent also raised *other issues*. These issues were that: *the appellant's election was not conducted in accordance with the provisions of the Elections Act and Rules, the Regulations thereunder,*

and Articles 38,81 and 82 of the Constitution; the 2nd respondent engaged in conduct whose effect was to prevent the agents of the 1st respondent from effectively participating in the voting process; officials of the 3rd respondent were involved in alterations to Forms 35 from the various polling stations in Narok East Constituency; and there were discrepancies between the results announced at the polling stations and the final results announced in the tallying centres. In effect, it was urged that the 1st respondent ought to have *laid a basis, and led evidence*, before the election Court to merit an order for recount of votes.

(ii) The 2nd and 3rd Respondents' Case

[33] Learned counsel for the 2nd and 3rd respondents, Mr. Karanja argued in support of the appellant's case. He submitted that the entire proceedings before the High Court and the Court of Appeal was a nullity, as the election petition had been filed *out of time*. He relied on the ***Joho*** and ***Mary Wambui*** cases to support his argument.

[34] Counsel submitted that the Court of Appeal had purported to extend the time- limits provided in Article 105 of the Constitution when it made orders directing the High Court to conduct a recount, outside the six month-time limit. Counsel cited the case of ***Ferdinand Waititu v. IEBC & Others*** Civil Application No 137 of 2013; [2013] eKLR in which the Court of Appeal held that the time-limits set out in the Constitution and the Elections Act are neither negotiable nor can they be extended by the Court. Learned counsel found support for this position in a persuasive authority of the Nigerian Supreme Court, ***John Akpanudoedehe & Others v. Godswill Obot Akpabio*** (already cited at para.18), in which it was thus held:

"When the Constitution provided a limitation period for the hearing of a matter, the right to fair hearing is guaranteed by the courts within [that time]. Once elapsed the hearing of the matter fades away along with any right to fair hearing; there is no longer a live petition left. There is nothing to be tried even if a retrial is given. It remains extinguished forever. Put in another way, fair hearing is only applicable when the petition is live. A petitioner who is unable to argue his petition to his satisfaction [within the prescribed time] or finds time too short should approach the National Assembly with an appropriate bill to amend the law. If this court extends the time provided for the hearing of the petition it would amount to judicial legislation which is wrong."

[35] On the issue of *burden of proof*, counsel submitted that for a Court to intervene and reassess the process of vote-counting, a sufficient case must be made before the Court. Counsel submitted that the *IEBC is the constitutional entity mandated to tally, tabulate and announce results*; and hence, the Court of Appeal had misdirected itself when it held that where a party is only seeking an order for scrutiny and recount, he is entitled to the same, as a *matter of right* unless the application is incompetent in the first place.

[36] Counsel submitted that, at the time when an election petition is filed, there is a *presumption* in place, that the results rendered by the 2nd and 3rd respondents are regular, and any petitioner challenging these results must begin by establishing the allegations made. In effect, counsel urged that the Court of Appeal's finding on the burden of proof was contrary to the terms of Article 163(7) of the Constitution, which binds other Courts to the precedents set by the Supreme Court. It was

counsel's contention that the Court of Appeal had overlooked the ***Raila Odinga*** case, which affirmed the principle of *omnia praesumuntur rite et solemniter esse acta,* which holds that all acts are presumed to have been done rightly and regularly, and it behoves the petitioner to set out credible evidence at the start, in challenging the acts of a public authority.

(iii) The 1st Respondent's Case

[37] Learned counsel for the 1st respondent, Mr. Mungai submitted that the appellant had not properly invoked the *jurisdiction of the Supreme Court*, and that he raises no case for the *interpretation or application of the Constitution*; and that the appellant had also not sought the setting aside of the orders of the Court of Appeal relating to the application of the Constitution. Counsel submitted that the kernel of the appellant's case was limited to Rule 32 of the Election Petition Rules.

[38] Counsel submitted that, in the scheme of the electoral law, *two categories* of election petition were possible: first, a petition which sought to *invalidate an election*; and secondly, a petition limited to the issue of *recount of votes*. Counsel submitted that the main difference between these two types of "election petition" was that in the latter, the wrong person had been declared as the winner, even though the election was conducted in accordance with the Constitution and the law. To highlight this difference, counsel cited the case of ***Richard Kalembe Ndile v. IEBC & 3 Others,*** Machakos Election Petition No. 1 of 2013; [2013] eKLR, in which the petitioner only sought an order for recount, while another party sought the invalidation of the election; and *Majanja, J.* consolidated the two applications so as to deal with both issues.

[39] Counsel submitted that an issue on whether an election petition was filed in time was a "competence" issue, and not an issue of *jurisdiction*. He submitted that

in this matter, the appellant was questioning the competence of the 1st respondent's case. Counsel submitted that the issue raised by the appellant went to the validity of documents filed, which could only be raised at the High Court. He urged the essence of this argument to rest on Article 105 of the Constitution, which gives the High Court jurisdiction to deal with such an election issue.

[40] Counsel contended that an issue must be *pleaded* before it is contested in Court. He argued that the appellant had not pleaded the issue of nullity of the proceedings on the basis of the election petition being filed out of time, in his Petition of Appeal. Counsel distinguished the ***Mary Wambui*** case from the instant case, by submitting that the issue of jurisdiction in that case was only raised after the Court had rendered the ***Joho*** decision. Counsel urged that the issue of jurisdiction ought to be raised at the Court in which it arises.

[41] Counsel urged that pleadings, as the foundation of the expression of grievance in a case, are important because they touch on the constitutional right of the parties to equal protection of the law; and that pleadings will ensure that there is justice and equality as between the parties. From this premise, Mr. Mungai urged that if the issue of *nullity and jurisdiction* was not pleaded, then there was no basis for entertaining the same now – and so this appeal has no place before the Supreme Court.

[42] Counsel submitted that the appellant had 30 days within which to amend his pleadings to include the jurisdictional issue, but failed to do so and was now seeking reliance on this Court's decision in the ***Mary Wambui*** case, to fill that omission. He submitted that the appeal was an abuse of the process of Court.

[43] Counsel urged that the legal principle of equality of parties in proceedings, required that those seeking to rely on any principle must *plead it at the start*; but

that in this instance, there was no pleading according to law, and this was an abuse of Court process.

[44] Counsel submitted that this Court, in the ***Mary Wambui*** case, had relied on a South African case, ***The Governor of Arbour Hill Prison,*** where it was held that a declaration of nullity by the Court applies retrospectively. However, in counsel's view, election petitions in Kenya are dissimilar to those in South Africa and other jurisdictions. He argued that the Kenyan Constitution does not require the Courts to apply the law retrospectively. In support of his argument, he relied on: Article 10 of the Constitution which deals with the national values and principles of governance ;Article 27 which guarantees individuals equality before the law, and the right to equal protection and benefit of the law; and Article 50 which deals with the right to fair hearing. Learned counsel urged that the rule of law envisages that the appeal is to deal with the law as it stands today, and not in hindsight.

[45] Counsel argued that it emerges from the ***Mary Wambui*** decision (paragraphs 90 & 91), that this Court did not critically appreciate the consequences of a retrospective application of the law, as the laws made by Parliament are imbued with a broad-based validity that is not reflected in the *ratio decidendi* in that case, when this Court propounds the retrospective application of the law.

[46] Counsel submitted that, pursuant to Article 105 of the Constitution, election petitions must be completed *within six months* of filing the petition; and in this instance the six-month period had lapsed; and since the issue of jurisdiction had not been raised at the trial Court, it could not be raised at this late stage.

[47] Counsel submitted that in the ***Mary Wambui*** case, this Court allowed the appeal to be filed out of time, and this was an illustration of this Court's attitude towards the *set timelines*. He urged that just as timelines could not be elevated

above the values of the Constitution ,just so, should *jurisdiction* be not preferred over the intentions of the electorate of Narok East Constituency.

[48] Counsel, in furtherance of his case, drew analogy with the case of ***Macfoy v. United Africa Co. Ltd.*** [1961] 3 All E.R. in which Lord Denning held that if an act is void then it is a nullity in law. He submitted that in that case, the issue was pending in the Court, and a decision upon it made practical sense, unlike in this case, where the issue of jurisdiction was not raised at the Election Court.

[49] Counsel submitted that the appellant had misinterpreted Article 105(1) and (2) of the Constitution; that Article 105(1) of the Constitution deals with jurisdictional matters, while Article 105(2) strictly deals with timelines; and that *jurisdiction* and *timelines* are to be differentiated. It was submitted that non-adherence to timelines should not be a basis for excluding the jurisdiction of Courts. Counsel urged that there was no justification for nullifying the proceedings before the High Court and the Court of Appeal.

[50] On the issue of the Court of Appeal remitting an election matter to the High Court, counsel submitted that the *Appellate Jurisdiction Act* (Cap. 9, Laws of Kenya)– a statute of broad-based application in civil matters – empowers the Court of Appeal to make such orders, and that this was not restricted under Article 105(1) and (2) of the Constitution.

[51] Counsel referred to Section 80(4) of the Elections Act which states that:

> ***"An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—***

(a) upon recount of the ballots cast, the winner is apparent; and

(b) that winner is found not to have committed an election offence."

He submitted that the foregoing provision means that only an *Election Court* has the jurisdiction to carry out a recount. He urged that the Court of Appeal could not conduct a recount and subsequently issue a certificate to the winner, upon completion of the recount; but that the Court of Appeal could remit the matter to the High Court to make such a determination. Counsel submitted that since the High Court has up to six months to deliver its Judgment, it was logical that the period specified under Article 105(2) of the Constitution relates to the petition proceedings before Judgment, as opposed to the post-Judgment proceedings occasioned by orders of an appellate Court.

[52] Counsel contested the appellant's contention that the High Court became *functus officio* upon rendering its Judgment, and therefore the Court of Appeal could not remit the matter to the High Court for re-determination. He submitted that the High Court did not become *functus officio* and could deal with the "further directions issued by the Court of Appeal."Counsel cited Section 2 of the Elections Act which defines an Election Court as follows:

"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 and the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of this Act."

[53] Counsel submitted that, based on the above provision, the Election Court is the High Court, and the *Judge presiding* in an Election Court is not the Court. Thus, one is not to assume that the Judgment of an Election Court is attributable to a particular Judge. He submitted that the Chief Justice is only mandated to gazette the Judge to sit in the Election Court, and if such Judge is disqualified, the Chief Justice is empowered to issue another gazette notice appointing an alternative Judge.

[54] Counsel raised issue with the appellant's citation of persuasive authorities from the Supreme Court of Nigeria. He argued that the Nigerian Constitution does not have provisions similar to Articles 10, 24, 27, 159 and 259 of the Constitution of Kenya, which bind Courts to adhere to the national values and principles of governance; which provide for limitations to fundamental rights and freedoms; for equality and freedom from discrimination; for judicial authority and the legal system; and for construing the Constitution appropriately.

[55] Counsel drew the Court's attention to the majority decision in the Court of Appeal (rendered by *Musinga JA)* in the instant matter(paragraph 33):

> "***I think a petition brought under*** *Section 80(4)* ***of the*** *Elections Act* ***and*** *rule 32* ***of the*** *Elections Petition Rules* ***only, can be disposed of summarily. In my view, the petitioner has to state in the petition and the affidavit(s) in support thereof as well as the affidavit in support of the application for recount, the basis of his/her belief that they got the highest number of votes and did not commit an election offence…"***

[56] Counsel contended that the summary procedure does not exclude any party from the Court. He urged further, that the appellant had not disputed the essence of

the summary procedure. Consequently, the mode of filing evidence could not come into question.

[57] It was submitted that, pursuant to Article 86 of the Constitution, the IEBC has the duty to ensure that the votes are counted, collated and rendered verifiable. Counsel urged that Section 80(4) of the Elections Act is a means through which the election results are verifiable and, in that regard, the order of the Court of Appeal returning the matter to the High Court for recount would not prejudice the appellant.

[58] Counsel argued that where a party was asking the Court to invalidate the election, Section 83 of the Elections Act was applicable, but in this instance it was not applicable, because the party was *not disputing* the manner in which the election was conducted but *only seeking Orders of recount*. With regard to grounds 7, 8 and 9, counsel submitted that when a party files an election petition under Section 80(4) of the Elections Act, such a party *cannot raise any other issue apart from recount*.

[59] Counsel submitted that Article 50(1) of the Constitution could not be infringed by a *summary process*. He urged that the summary process could not be perceived as an *ex parte* process, as all the parties were accorded an opportunity to present their respective arguments. Therefore, the appellant could not benefit by alleging infringement of Articles 50(1) and 25(c) of the Constitution, as no infringement did arise. Counsel, however, did not consider how the appellant's mere presence during the summary process would enable him to canvass his stand, if no case was stated in support of the vote-recount request.

[60] Counsel submitted that the IEBC (3rd respondent) "could not be genuinely aggrieved by an order seeking scrutiny and recount." He argued that this Court has

no jurisdiction to protect the IEBC from carrying out its "constitutional function". Counsel submitted that according to the Independent Review Committee Report (IREC) (Kriegler Report), one of the highlights of the disreputable 2007 elections was that there was no proper mechanism in place for verification of election results; and hence the call for recount in this instance would serve a beneficent cause.

[61] Counsel submitted that, by Section 3 of the Supreme Court Act, this Court is under duty in the development of constitutional jurisprudence, as that Section thus provides:

> ***"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—***
> ***...***
> ***(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth..."***

[62] Learned counsel urged that Courts should bear in mind the transformative nature of the Constitution and, when applying it, should pay regard to all its provisions, and to the intendment of the framers. In support of this argument he cited the dissenting opinion of *Mutunga, CJ in* ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** Sup. Ct. Advisory Opinion No. 2 of 2012; [2012] eKLR. Counsel further invited the Court to consider how the jurisprudence developed in the electoral case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** S.C. Petition No. 2B of 2014; [2014] eKLR could be extended in a manner that enhances the credibility of the Court. He prayed that the appeal be disallowed with costs.

D. ANALYSIS

[63] Four primary issues have been proposed for determination – these being crystallized from: (i) the petition of appeal; (ii) the responses thereto; and (iii) the written and oral submissions of counsel. These are as follows:

(i) *whether these proceedings were a nullity* ***ab initio,*** *having been premised on a petition filed out of time at the High Court;*

(ii) *whether the Judges of Appeal erred in law, in extending the jurisdiction of the High Court contrary to Articles 105(1) and (2) of the Constitution;*

(iii) *whether the Judges of Appeal erred in law, when they attributed the status of an "Election Court" to any Judge, for purposes of complying with Section 80(4) of the Elections Act; and*

(iv) *whether the Judges of Appeal erred, when they held that a petition filed under Section 80(4) of the Elections Act and Rule 32 of the Election Petition Rules can be disposed of summarily without a trial, thus upholding a position contrary to Articles 25(c) and 50(1) of the Constitution.*

(i) A Triple Question of Jurisdiction: Past Hearings, and the Proceedings in the Supreme Court

[64] The vital, ever-germane issue in all categories of litigation, namely, *jurisdiction*, features in different shades in this appeal, and, in view of its threshold bearing in the judicial process, merits our first attention. As already noted, it was the appellant's case that the original petition in the High Court did not comply with the constitutional timelines, thus taking away that Court's jurisdiction, and with the consequence that the *appellate Court* too, lacked jurisdiction. At the same time, it was the 1st respondent's case that the *Supreme Court* lacked jurisdiction, for the

appellant's lack of the right to come to this Court on further appeal, by virtue of Article 163(4)(a) of the Constitution. The appellant had also urged that the *Court of Appeal l*acked jurisdiction to remit an electoral question to an *Election Court* which had already become *functus officio*, and thus had no further jurisdiction.

[65] Counsel for the appellant submitted that the petition at the High Court was filed and heard without jurisdiction. He urged that the petition at the trial Court was filed 36 days, as opposed to 28 days, following the declaration of election results. It was submitted that the 1st respondent filed the petition on the basis of *Section 76(1)(a)of the Elections Act,* which was declared a nullity by this Court in the ***Joho*** case. Counsel further urged that on the basis of this Court's decision in the ***Mary Wambui*** case, the declaration of invalidity of Section 76(1)(a) of the Elections Act applies as from the date of commencement of the Elections Act, namely *2nd December, 2011*– as that date comes later in time than the date of promulgation of the Constitution.

[66] In response to this submission, counsel for the 1st respondent submitted that the appellant had not raised the issue of nullity of the proceedings at the *trial Court,* and neither had the issue been raised at the *Court of Appeal*. He urged that the submission by the appellant that the petition had been filed out of time, went to the *competence* of the appeal as opposed to the *jurisdiction* of the Court. Counsel submitted that the High Court was the proper forum to impugn the competence of the proceedings. He maintained that an issue of jurisdiction ought to have been raised before the Court in which the matter originated. Counsel urged, besides, that it was imperative to first plead an issue, before a party could canvass the same in a Court of law. The fulfilment of those conditions, counsel urged, was a precondition to realizing *justice and equality* for parties before the Court. It was submitted that to raise the matter of jurisdiction at this juncture, and in submissions, as opposed to pleadings, was an *abuse of Court process*.

[67] Counsel for the 1st respondent also argued that the provisions of Articles 10, 27 and 50(1) of the Constitution did not favour a retrospective application of decisions of this Court as held in the ***Mary Wambui*** Case, which had relied on the persuasive authority of the *ratio decidendi* in the ***Governor of Arbour Hill Prison*** Case [2006] IESC 45; [2006] 4 I.R. 88. Counsel contended that timelines could not be elevated above the *broad values* declared in the Constitution.

[68] In analyzing the issue at hand, we have isolated certain pertinent questions for consideration: (a) *what is the distinction between an issue challenging the* ***competence*** *of a matter before a Court of law, and one challenging* ***jurisdiction****?* (b) *at what point in the resolution of a cause, can an issue of jurisdiction be raised by a party*? (c) *can a Court address itself to an* ***un-pleaded*** *but* ***canvassed*** *issue before it?* and (d) *when can a party be said to be in abuse of Court process?*

[69] We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the *strict adherence to the timelines prescribed by the Constitution and the electoral law*. The jurisdiction of the Court to hear and determine electoral disputes is *inherently tied to the issue of time*, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court. This recognition is already well recorded in this Court's decisions in the ***Joho*** case and the ***Mary Wambui*** case.

[70] As urged by counsel for the 1st respondent, we recognize that there are instances in general litigation, when jurisdiction is not affected by a party's failure to meet the set filing requirements. For example, a Court may in certain instances exercise its discretion to admit a matter for hearing when an argument regarding

proper form is pending before it. The Court's authority under Article 159 of the Constitution remains unfettered, especially where *procedural technicalities* pose an impediment to the administration of justice. However, there are instances when the Constitution links certain vital conditions to the power of the Court to adjudicate a matter. This is particularly true in the context of Kenya's *special electoral dispute-resolution mechanism*. By linking the settlement of electoral disputes to *time,* the Constitution emphasises the principles of efficiency and diligence, in the construction of vital governance agencies. This consideration addresses the historical problem of delayed *electoral justice*, that has plagued this country in the past. This Court recognized this fact in the ***Joho*** case (at paragraph 51):

> *"Kenya today has undergone significant transformations along the paths of democracy and constitutionalism; and, necessarily, the majoritarian expression through electoral practice has had a major role, of which this Court takes cognizance. Thus the Constitution of Kenya, 2010 set out to streamline that electoral system.* ***Part of that streamlining was the clear provisions on the settlement of electoral disputes, the timelines involved and various principles running across the entire span of the Constitution"*** [emphasis supplied].

[71] This Court has recently pronounced itself again, on the issue of *time,* and the importance of adhering to constitutional timelines in electoral disputes, in the ***Munya case.*** The Court held (at paragraph 62) that:

> ***"Article 87 (1) grants Parliament the latitude to enact legislation to provide for 'timely resolution of electoral disputes.' This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election***

petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about 'timelines and timeliness', was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation."

[72] The chain of ideas and principles that underlie this Court's prioritization of timelines in electoral dispute-settlement is clearly depicted in Chief Justice Mutunga's concurring opinion in the ***Munya case*** (paragraph 246):

"Kenya's political history has been characterized by large-scale electoral injustice. Through acts of political zoning, privatization of political parties, manipulation of electoral returns, perpetration of political violence, commercialization of electoral processes, gerrymandering of electoral zones, highly compromised and incompetent electoral officials, and a host of other retrogressive scenarios, the country's electoral experience has subjected our democracy to unbearable pain, and has scarred our body politic. As a result, free choice and fair competition, the holy grail of electoral politics, have been abrogated, and our democratic evolution, so long desired, has staggered and stumbled, indelibly stained by this unhygienic environment in which our politics is played. ***This is the history that our Constitution seeks to correct, through***

elaborate provisions, and the adoption of exemplary standards in our electoral system"[emphasis supplied].

[73] Timeliness is a manifest example of such exemplary standards; and quite appropriately, it is a *precondition* in the prosecution of electoral causes. This is a constitutional requirement that goes to the root of democratic governance.

[74] Efficient and dependable plays and interplays of governance entities, is a fundamental principle underlying Kenya's democratic Constitution of 2010. The vital primary agencies of discharge of the public mandate, must each function within a disciplined time-frame, if they are not to hold up the functioning of a different public agency, with the effect of occasioning immobility in one or more of the governance-units. Only through efficient and responsive functioning, can these agencies operate in synergy, so as to bear out the people's sovereign expression as declared in Article 1(1) and (2), thus:

> ***"(1) All sovereign power belongs to the people of Kenya....***
> ***"(2) The people may exercise their sovereign power either directly or through their democratically elected representatives***."

[75] From the principle set out in the foregoing paragraph, the legitimacy of a challenge to electoral outcomes speaks for itself: it is an avenue for ascertaining the mode of conveying the people's expression of their right of franchise.

[76] The Court, as a device of sanctification of the people's electoral determination, is not an unregulated forum, where so critical a dispute can linger for indeterminate periods of time. Thus, the Supreme Court, in asserting the *authority of the Constitution,* underlines the element of the immanent time-constraint, in the resolution of electoral disputes, throughout the judicial system. The ultimate principle is: while citizens are at liberty to contest electoral outcomes,

they will proceed within prescribed timelines, and in this way help to sustain the due functioning of other constitutional processes.

[77] This gives context and principle to our determination of a central question in this case. We hold, in line with our earlier decision in the ***Mary Wambui*** case (at paragraph 68), that the phenomenon of nullity, in any transaction that bears legal incident, is a pure jurisdictional issue. This issue, particularly in this instance, forms a direct link with the timelines bearing upon the Courts determining electoral disputes, and is a vital element in the relevant constitutional prescriptions. It is, therefore, a question falling under the Supreme Court's jurisdiction, as conferred by Article 163(4)(a) of the Constitution. The issue of nullity is plainly linked to *constitutional timelines,* and to the *jurisdiction of this Court*. In this regard, we would recall our statement in the ***Joho*** case (at paragraph 52):

> ***"[A]ny appeal admissible within the terms of Article 163(4)(a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court, in furtherance of the objects laid out under Section 3 of the Supreme Court Act...."***

[78] We are not, with respect, in agreement with learned counsel for the 1st respondent, that there is any conflict at all in this case, between the electoral requirements of timelines, on the one hand, and the values of the Constitution, on the other hand. It is clear to us that compliance with timelines, is itself a *constitutional principle*, one that reinforces the constitutional values attendant upon the electoral process.

[79] Such a scenario, it is apparent to us, is consistent with the inherent character of the Constitution – especially the manner in which it engages with the people: at

varying removes, bearing *commands, directions, guidance, counsel*. This Constitution allows the fulfilment of individual rights, by laying out accessible procedures to sustain the citizen's stakeholder and nationality-claims; but it concurrently reprobates complacence in the assertion of legitimate claims. It bears an inner entreaty for *predictability, transparency*, and *service-orientation* to the people; but the realization of such values has a *time-element*.

[80] Contrary to the express provisions of the Constitution, Parliament had enacted a Section 76(1)(a) of the Elections Act which stood in contradiction to the governing law on timelines, in the electoral process. It fell to this Court, in the ***Joho*** case, to annul that statutory provision which came in the wake of the date of promulgation of the Constitution, 27th August, 2010 – the annulment *extending back to the date of enactment of the statute.*

[81] Those who filed election petitions outside the 28-day requirement of the Constitution cannot, in our perception, avoid the consequence of their dilatoriness; for it is the prescribed time-frame, that opens the jurisdiction of the Courts. And this being such an elemental constitutional requirement, it stands out by itself, irrespective of the averments made by parties in their *pleadings*. To this question, the general discretion provided for in Article 159 would not apply, as this is not an ordinary issue of procedural compliance.

[82] The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3)(a) of the Constitution, is unlimited. In addition, the High Court has a *special jurisdiction* in electoral matters, conferred by the Constitution, and given effect under the Elections Act: this is the jurisdiction to determine any question as to whether a person has been *validly elected* as a Member of Parliament (Article 105(1)(a) of the Constitution). This jurisdiction is activated upon a *declaration by the authorized electoral body* (IEBC) that a particular person has been returned as

Member of Parliament, *when there is a challenge to that electoral declaration* (Article 87(2) of the Constitution).

[83] By those terms of the Constitution, it is clear that the High Court's special jurisdiction is time-bound. The Court's jurisdiction has practical meaning only in the context of the prescribed timelines.

[84] The very basis of the High Court's jurisdiction in respect of Parliamentary-election disputes, lies in *Articles 87(2) and 105(1)(a) of the Constitution*. We are not, with respect, in agreement with learned counsel for the 1st respondent, that the Supreme Court cannot begin to inquire into such a background to the High Court's jurisdiction, owing to his perception that this is just a bare question of "competence," such as ought to arise only through *formal pleadings*.

[85] Learned counsel, Mr. Mungai urged that the issue herein is not one of jurisdiction, and that if this Court should find that neither the High Court nor the Court of Appeal had the jurisdiction to entertain the case, then it follows that the *Supreme Court* too lacks jurisdiction, and *should down tools and take no decision*.

(ii) The Supreme Court of Kenya: A Substantially-enlarged Jurisdiction under the Constitution of Kenya, 2010

[86] Does the *Supreme Court* have jurisdiction to entertain this matter? Did the High Court have jurisdiction? Did the Court of Appeal have jurisdiction? Whatever the case, *how should the Supreme Court conclude the issues emerging from the full hearing which it has already conducted*?

[87] Hardly any case entailing the issue of jurisdiction, in the superior Courts of this country, has made a step over the last quarter-century, without recourse to the

common wisdom of the Court of Appeal in ***Owners of the Motor Vessel "Lillian S' v. Caltex Oil*** (Kenya) Ltd [1989] KLR 1 in which the late Mr. Justice Nyarangi had applied memorable phraseology, thus:

> ***"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings....A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction****."*

[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)]; it is required to hear and determine as of right, on appeal, "any case involving the interpretation or application of [the] Constitution"; it "may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government" [Article 163(6)].

[89] Such are *new functions*, that were not in contemplation at the time of the decision of the "***Lillian S***" case. The Supreme Court is, besides, not in the more constrained position in which the Court of Appeal had been, at the time of "***Lillian S".*** The Supreme Court is expressly empowered [Article 163(8)] to "*make rules for the exercise of its jurisdiction";* and besides [Article 163(9)], a Parliamentary enactment "may make further provision for the operation of the Supreme Court";

and indeed, the *Supreme Court Act, 2011 (Act No. 7 of 2011)* has been enacted which upholds this Court's standing as the formal custodian of the interpretive process for Constitution, the national *grundnorm*. This is the context in which we will express our understanding, that in the case before us, *it is not possible to detract from the Supreme Court's authority to hear and determine all the relevant questions*.

[90] It is on the basis of the foregoing principle, that the tag of unconstitutionality being attributed to this Court's appellate mandate by learned counsel for the 1st respondent, is to be resolved. This Court's decision in ***Mary Wambui Munene v. Peter Gichuki Kingara and Two Others,*** Sup. Ct. Petition No. 7 of 2014, had touched on the question of jurisdiction; but it is to be appreciated that that case did not entail exactly the issues now coming up. And thus, even though in that case, the Court determined only a limited set of questions, declining to deal with the rest on grounds of jurisdiction, it by no means so interpreted the law of jurisdiction as to cede its *express constitutional mandate*.

[91] In the ***Mary Wambui*** case, it was one question before this Court: whether the proceedings were a nullity *ab initio*, for being premised on a petition filed out of time at the High Court – so that nullity before that Court was also nullity before the Court of Appeal, and nullity too, before the Supreme Court. This Court found it fit to deal with the nullity issue before other issues: and it held the proceedings before the High Court to have been without jurisdiction, a position reflected too in the proceedings before the Court of Appeal. Such a finding resolved the question, in the words of this Court, as follows [paragraph 92]:

> ***"As a result of our conclusion, it is not necessary to consider and determine the other issues presented to us in the Petition of Appeal. We will make the following Orders…***

(2) The Judgment, consequential Orders and the proceedings before the Court of Appeal in Nyeri Civil Appeal No. 31 of 2013 are hereby declared null."

[92] The ***Mary Wambui*** case fell within the principle earlier set out by this Court in ***Hassan Ali Joho and Another v. Suleiman Said Shahbal and Others***, Sup. Ct. Petition No. 10 of 2013: that proceedings emanating from matters that were filed out of time were a nullity *ab initio,* as the High Court lacked jurisdiction to entertain them. This Court, accordingly, annulled the decisions of both the *High Court* and the *Court of Appeal*: and the argument presumptively now being raised by learned counsel for the 1st respondent is that, if in the instant case, the life in the proceedings at both the High Court and the Court of Appeal is extinguished, then no case lies *even at the Supreme Court*, whereupon a determination can be made. The question is *whether this Court may address any issue of merits, once it is acknowledged that the Court of Appeal lacked jurisdiction.*

[93] The Court of Appeal has, since this Court's decision in the ***Joho Case***, declined to hear an election appeal emanating from a matter that was filed outside the time-limit prescribed under Article 87(2) of the Constitution: ***Paul Posh Aborwa v. Independent Electoral and Boundaries Commission and Two Others***, Civil Appeal No. 52 of 2013. Such a position, it is clear to us, is in all respects in line with this Court's binding precedent; and it correctly reflects the position in relation to all Courts below the Supreme Court.

[94] Against this background, it is necessary for us to consider the law relating to the Supreme Court's jurisdiction, and thereafter *conclude the instant matter,* as appropriate.

[95] The special circumstances of a good number of decisions of this Court, while touching on its jurisdiction, did not occasion the kind of explanation of the relevant law to the extent now called for, by virtue of the specific line of submissions taken in the instant case. Relevant cases of such a kind include: (i) the ***Mary Wambui*** Case; (ii) ***Erad Suppliers & General Contractors Limited v. National Cereal & Produce Board,*** Sup. Ct. Pet. No. 5 of 2012; [2012] eKLR; (iii) ***Naomi Wangeci Gitonga & Others v. IEBC and Others,*** Sup. Ct. Civ. Application No. 2 of 2014; [2014] eKLR; (iv) ***Daniel Shumari Njiroine v. Naliaka Maroro***, S.C. Motion No. 5 of 2013; [2014] eKLR; (v) ***Peter Oduor Ngoge v. Francis Ole Kaparo & Five Others,*** Sup. Ct. Petition No. 2 of 2012; [2012] eKLR; (vi) ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd and Another,*** S.C. Petition No. 2 of 2012; [2012] eKLR; (vii) ***The Kenya Section of the International Commission of Jurists v. The Attorney-General& Two Others***, Sup. Ct. Crim. Appeal No. 1 of 2012; [2012] eKLR; (viii) ***Omega Chemical Industries Ltd v. Barclays Bank of Kenya Ltd,*** Sup. Ct. Application No. 6 of 2013; (ix) ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others***, Sup. Ct. Application No. 2 of 2011; (x) ***Jasbir Singh Rai & three Others v. Tarlochan Singh Rai and Four Others,*** Sup. Ct. Petition No. 4 of 2012; (xi) ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone*** Sup. Ct. Application No. 4 of 2012; (xii) ***Shabbir Ali Jusab v. Annar Osman Gamrai & Another,*** Sup. Ct. Petition No. 1 of 2013.

[96] This case provides the first occasion for this Court to examine the full scope of the *Supreme Court's jurisdiction*, and to signal its notable features that stand in contrast to the jurisdictions of the other superior Courts. We had laid the framework for this kind of analysis in ***Peter Ngoge v. Francis Ole Kaparo and Five Others***, Sup. Ct. Petition No. 2 of 2012, [2012] eKLR, when we thus observed:

"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."

[97] From the facts of the instant case, and from the issues it raises, as articulated by learned counsel, it has become evident to us that a proper construction of the respective jurisdictions of the superior Courts, but more particularly, the Supreme Court's overall sphere of competence, is a jurisprudential question of the greatest significance, in precisely the manner contemplated in the ***Ngoge*** Case.

[98] Such a perception is clearly inscribed in this Court's earlier records. Thus the learned Deputy Chief Justice and Vice-President of the Court, K.H. Rawal 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 [at paragraph 135] had made the following observation:

"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 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" [emphasis supplied].

[99] The learned Deputy Chief Justice went on to make a pertinent observation as follows [at paragraph 137]:

"Interpretation, and especially one undertaken by a Court in its appellate form, and steered towards constitutional application and interpretation, is not just a search for meaning. It is an exercise requisite to completing the anchoring pillars of constitutional governance. This Court, therefore, in appropriate cases, ought to rise to the occasion. A question whether a particular Court had the jurisdiction to determine an issue coming up before it, crystallizes in the Supreme Court's jurisdiction under Article 163(4)(a) and/or (b). The Supreme Court is, thus, required to delve into issues of application or interpretation of the Constitution and, indeed, those of general public importance. Therefore, the Supreme Court cannot close its mind to the evaluation of even a single provision of the law or the Constitution."

[100] In every respect consistent with the foregoing standpoints is the concurring opinion of Ojwang, SCJ in the ***Lisamula*** Case [at paragraph 147]:

"...the inherently enlarged competence of the Supreme Court is at once apparent – an element not shared with any of the lower Courts. 'Interpretation and application of the Constitution', subject only to objective and rational judgment in proper context, is an inherently open-ended phenomenon; much like the

determination that a particular question falls within the category of 'matters of general public importance', and therefore falling to the jurisdiction of the Supreme Court."

[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 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 the Court of Appeal's 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.

[103] Besides the special jurisdictional competence of the Supreme Court, arising directly from the Constitution, we would illuminate such span of jurisdiction from comparative judicial experience. We take note of the United States Supreme Court decision, ***Bender v. Williamsport Area School District***, 475 U.S. 534, 541

(1986), in which it was held that a superior appellate Court carried both the *substantive jurisdiction and a residual jurisdiction*. The relevant passage thus reads:

> *"…every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review; even though the parties are prepared to concede it….*
>
> *"And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] [lacks] jurisdiction, we have jurisdiction on appeal**, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit"***[emphasis supplied].

[104] The foregoing example can only be *additional* to the jurisdictional competence of *this* Supreme Court. As already noted, Article 163(7) of the Constitution has specially empowered this Court to give stewardship to the terms of the Constitution, in particular that charter's safeguards for *individual rights*, and for the scheme of *just redress to all matters in dispute*. The Constitution's prescription is carried further in the Supreme Court Act, 2011 which requires this Court to *"assert the supremacy of the Constitution and the sovereignty of the people of Kenya"* [Section 3(a)]; to *"provide authoritative and impartial interpretation of the Constitution*" [Section 3(b)]; and to *"develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth*" [Section 3(c)].

[105] The Constitution, by Article 259(1)(c), requires such interpretation of it as "permits the development of the law." The Supreme Court's unconstrained mandate, no doubt, will provide the requisite condition for such interpretation.

[106] Quite clearly, the foregoing provisions affirm that the Supreme Court, as the guardian of the Constitution, and the final arbiter on constitutional dispute-situations, has been entrusted with the mandate to ensure the effectiveness of the binding constitutional norm. Thus, the decisions emanating from this Court have a binding effect on all subsequent determinations of related matters by other Courts in the judicial set-up.

[107] The Supreme Court's special jurisdiction merits express recognition. The Constitution's paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its declared principles. The Court's mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, such questions as come up in the course of dispute settlement (which, itself, is a constitutional phenomenon), especially those related to *governance,* are intrinsically issues importing the obligation *to interpret or apply the Constitution* – and consequently, issues falling squarely within the Supreme Court's mandate under Article 163(4)(1)(a), as well as within the juridical mandate of the Court as prescribed in Article 259(1)(c) of the Constitution, and in Section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011).

[108] The principle thus stated has already emerged clearly in a number of decisions emanating from this Court. We may recall in this context, the remarks made by the Supreme Court in the ***Jasbir Singh Rai*** Case [[paragraphs [60] and [61]]:

> ***"The emerging lesson is that the decisions of Kenya's Supreme Court, which ought always to be arrived at only after the most conscientious and detailed consideration, will stand as the binding reference-point in the norms governing the judicial process. Such a position is vital for the maintenance of the certainty, predictability, and jurisprudential standards that***

sustain the principles of the Constitution, and the rights and duties flowing from the legal set-up, and which provide sanctity for the legitimate actions of the people.

"As times, values, perceptions, and yardsticks of legitimacy and right keep evolving, however, the Supreme Court retains a competence and discretion, when properly moved, and on weighty grounds, to reconsider its precedents, and to vary them as may be appropriate."

[109] The principle that this Supreme Court's jurisdiction flows from the Constitution, and is *not restricted by long-standing conventions*, emerges in the ***Jasbir Singh Rai*** case, so clearly from the concurring opinion of Mutunga, C.J. & P. [paragraph 81]:

"...I suggest that...it will be good practice for this Court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it."

[110] The learned Chief Justice restated the same principle with still greater focus, in ***Re The Speaker of the Senate & Another v. Attorney-General & Four Others***, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR [paragraph 156]:

"Each matter that comes [up] before the Court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents.... [Constitution-making] does not end with its promulgation; it continues with its interpretation. It is

the duty of the Court to illuminate legal penumbras that constitutions borne out of long-drawn compromises, such as ours, tend to create."

[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.*

[112] Against the foregoing background the question may be asked whether, within the *special jurisdictional competence of this Supreme Court* beyond the ***"Lillian S"*** case – a decision of the last quarter-century – it is open to the Court to consider such issues of merit as may have come up before lower Courts that lacked jurisdiction? The language of the Constitution of Kenya, 2010, the purpose and principles of that Constitution, and the broad terms in which the Supreme Court's jurisdiction has been conferred by both the Constitution and the organic law made under it, give the clear message that such issues of merit are not beyond this Court's jurisdiction.

[113] For it is a logical premise that any matter coming up before this Court by proper motion, or proper invocation of jurisdiction, and all that such matter may entail – such as the submissions of counsel; matters of judicial notice; or any issue of relevance and of significance to this Court – will squarely fall within the principle elaborated by Mutunga, C.J. & P. in the ***Jasbir Singh Rai*** case [paragraph 81]:

> ***"[I]t will be good practice for this Court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it."***

[114] By the precedent of this Court, the electoral questions canvassed before us are in a fundamental sense, constitutional ones, in respect of which jurisdiction lies, by virtue of Article 163(4)(a) of the Constitution of Kenya. The relevant pronouncement is found in ***Gatirau Peter Munya v. Dickson Mwanda Kithinji and Two Others***, Sup. Ct. Application No. 5 of 2014 [paragraph 77]:

> ***"While we agree with [learned counsel], regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the 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 cannot disengage from the Constitution."***

[115] This confirms our position, that this Supreme Court, by virtue of its broad competence in determining questions that entail the interpretation and application of the Constitution, has the unrestricted latitude to determine issues whether of form or merit, brought up by the instant cause: so that, whether or not the Court determines a particular issue, is a matter of discretion, exercised by reference to considerations of practical purpose.

[116] And, on a lower level, it is to be recognized that this Court, as an ultimate Court, whenever it makes any determination at all, be it one of merits, or even a residual one, has an inherent obligation annexed to the disposal of matters in

contention, of *concluding the contest by determining the deserts of the parties in the form of costs, or related elements.*

[117] Somewhat akin to the foregoing category is the situation in which, even when this Court declines to exercise jurisdiction on the merits, as regards certain issues, it may find such issues of merits to be integrally linked to a question of *jurisdiction*. In this class of matters, this Court has had examples: ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others,*** Sup. Ct. Application No. 2 of 2011; and ***Jasbir Singh Rai and Three Others v. Tarlochan Singh Rai and four Others,*** Sup. Ct. Petition No. 4 of 2012. In the two cases, the substantive question as to the constitutionality of Section 14 of the Supreme Court Act was integrally linked with the Supreme Court's jurisdiction to entertain issues on their merits. The Court proceeded to resolve the essential issues without being unduly constrained.

[118] The essential setting of issues thus mutually related, and especially in the context of the relevant constitutional provisions, will dictate that this Court should not abnegate its obligation to provide overall direction in the interpretation and application of the law. Further light is shed on this perception by Evan Tsen Lee's learned article, "The Dubious concept of Jurisdiction", 54 ***Hastings Law Journal*** (2003) 1613 (at p.1631):

> *"It is never a question of whether the court can rule on the merits, but whether the court should rule on the merits…. [The] court must, of course, seriously consider whether it is supposed to rule on the merits, as indicated by the law of jurisdiction….Concededly, the absence of jurisdiction would be a strong reason to vacate the judgment, but that reason would certainly be outweighed by the need to protect reliance interests and by the need for social stability."*

[119] Even before the Constitution of Kenya, 2010 vested this Supreme Court with such a distinct, enlarged jurisdiction for the ultimate determination of matters of law, the special standing of Supreme Court determinations had already been acknowledged in comparative judicial experience. Thus in ***County of Fresno v. Superior Court***, 82 Cal. App., 3d 191, 194 (1978), American's Court of Appeals of California, Fifth District had thus observed:

> *"Dicta* ***are not to be ignored.*** *Dicta* ***may be highly persuasive, particularly where made by the Supreme Court after that Court has considered the issue and deliberately made pronouncements thereon intended for guidance of the lower court upon further proceedings."***

[120] Such an enhanced standing of Supreme Court determinations is, similarly, signalled in a decision of Canada's Provincial Court of Alberta, ***R v. Macleod***, 2001 ABPC7 (paragraph 41):

> ***"In my view, the law is that any*** *obiter dicta* ***comments of the Supreme Court should be accorded deference unless there are any compelling reasons not to do so....The practical reasons for preferring the remarks of the Supreme court are self-evident: (1) the Supreme Court is the highest Court in Canada; (2) the Supreme Court always gives great deference to judgments from their own court****."*

[121] It is clear that the Supreme Court is required to proceed independently and to evaluate the circumstances of each case, to determine whether a term of the Bill of Rights [Article 20(3)] has been compromised by a lower Court in its adjudication. Even outside the domain of the Bill of Rights, the Supreme Court, by virtue of its status as the ultimate Court in the settlement of the course of jurisprudence, holds a

crucial place in the determination of questions of 'pure law' bearing on matters of public interest. And, just as is already clear from this Court's case-law record (as is shown, for instance, in ***Jasbir Singh Rai and Three Others v. Tarlochan Singh Rai and Four Others,*** Sup. Ct. Petition No. 4 of 2012), the scope for a constructive interpretation of the Constitution as a whole, is to be consistently safeguarded. Such a perception would certainly grasp the Supreme Court's determinative voice in relation to electoral disputes – which have been held to arise as a direct derivative of the constitutional norm [***Gatirau Peter Munya v. Dickson Mwenda Kithinji and Three Others,*** Sup. Ct. Application No. 5 of 2014].

[122] A more general perception of the Supreme Court's jurisdiction has been recorded in the American experience. The principle was clearly expressed by Chief Justice Marshall of the United States of America, in ***Cohens v. Virginia,*** 19 U.S. 264 (1821):

> *"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may,* ***avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution.*** *Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty*" [emphasis supplied].

[123] A Court dealing with a question of procedure, where jurisdiction is not expressly limited in scope – as in the case of Articles 87(2) and 105(1)(a) of the

Constitution – may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. 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 an exercise of discretion in matters of a technical character.

[124] In the instant case, the jurisdictional issue involved is one that turns on the interpretation and application of the Constitution. The special design and character of the Constitution of Kenya, 2010 would not, in our view, favour the rule historically associated with the common law tradition, that the contest to jurisdiction should have its origin at the trial Court. This is not, however, to water down the distinct merits of the orderly approach at common law, which sustains the principle that a cause before the Court is established through pleadings.

(ii) The High Court and the Court of Appeal: The Question of Jurisdiction

[125] It emerges that jurisdiction is, ordinarily, a prior question linked to the constitutional competence of a Court to resolve a particular contested matter: save that the Supreme Court's jurisdiction is broader than that of the other Courts. For the other Courts, the span of applicable jurisdiction is more narrowly defined and, at all times, the competence of these Courts springs from the clear terms of their jurisdictional empowerment.

[126] On the basis of the foregoing principle, this Court's priority in the instant case is to ascertain the extent of the jurisdiction of the other Courts, at the time they

made their determinations; and if they lacked jurisdiction, then their decisions would be null: and consequently it would not be necessary for this Court to examine such other questions as may have been the subject of the Orders of those Courts.

[127] One of the issues in the appeal is that the Court of Appeal had exceeded its own jurisdiction by purporting to extend the High Court's jurisdiction contrary to Articles 105(1) and (2) of the Constitution.

[128] The relevant act of the Court of Appeal is embodied in its decree of 28th March, 2014, as follows:

> *"(b) The recount shall be carried out in the High Court of Kenya at Nakuru where the petition had been filed. The exercise shall be supervised by the Court's Deputy Registrar and the results thereof shall be forwarded to any Judge in that station, except Emukule, J. for declaration in terms of Section 80(4) of the Elections Act."*

[129] The appellant's position, as well as that of the 2nd and 3rd respondents, was that the appellate Court had purported to enlarge the High Court's jurisdiction contrary to Article 105 of the Constitution, by ordering the High Court to recount the votes for the 69 polling stations of Narok East Constituency; and that the Court also erred by delegating to the High Court which had become *functus officio*, the task of hearing and determining the appeal – contrary to Article 87(1) of the Constitution and Section 85A of the Elections Act.

[130] Counsel for the appellant submitted that the 1st respondent had filed the election petition at the High Court on 10th April, 2013 and the Election Court had rendered its decision on *5th September, 2013*. He urged that in terms of Article 105(1) and (2) of the Constitution, the jurisdiction of the High Court was already

extinguished, because that Court had rendered its decision *at the end of the constitutionally mandated period of six months*. Thus, the Court of Appeal order directing the High Court to recount votes in Narok East Constituency purported to *extend the constitutional timelines bearing upon the jurisdiction of the High Court*. Conversely, counsel for the 1st respondent urged that Article 105(2) of the Constitution only deals with *timelines,* whereas Article 105(1) deals with *jurisdiction*. He submitted that since the Court of Appeal has six months within which to deliver its Judgment, the period specified in Article 105(2) of the Constitution relates to the petition proceedings before Judgment, as opposed to the post-Judgment proceedings occasioned by orders of an appellate Court. In rebuttal, counsel for the appellant contended that the word 'shall' as applied under Article 105(2), creates mandatory timelines, and this goes to the heart of the jurisdiction of the Court.

[131] Article 105(1) and (2) of the Constitution thus provides:

> "*(1) The High Court shall hear and determine any question whether –*
>
> *(a) a person has been validly elected as a member of Parliament; or*
>
> *(b) the seat of a member has become vacant.*
>
> ***(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition"*** [emphasis supplied].

[132] In essence, counsel for the appellant and for 2nd and 3rd respondents are arguing that the effect of the order of the Court of Appeal, with regard to vote-recount, fell outside the jurisdiction of the High Court. Jurisdiction, as we have held, is a vital substantive question affecting a Court's lawful mandate. In the ***Re The Matter of the Interim Independent Electoral Commission,*** S.C. Constitutional Application No. 2 of 2011; [2011] eKLR, and the ***S.K. Macharia***

case, we held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. In the first of those two cases (at paragraph 30) we thus stated:

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

[133] We restated that position in the ***S.K. Macharia*** case, noting that the jurisdiction of a Court is not a fluid phenomenon, as it is regulated by the Constitution and cannot, therefore, be extended through judicial craft or innovation (at paragraph 68):

> ***"Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation…."***

[134] The critical question, clearly, rests on the relationship between timelines as laid down in the electoral law, and the issue of jurisdiction. In our Ruling in the ***Raila Odinga*** case, on 3rd April, 2013 we expunged a new affidavit from the record, for non-compliance with timelines, in these terms:

> ***"…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."

[135] We underlined the special significance of timelines, yet again, in the ***Joho*** case (at paragraph 51):

"Kenya today has undergone significant transformations along the paths of democracy and constitutionalism; and, necessarily, the majoritarian expression through electoral practice has had a major role, of which this Court takes cognizance. ***Thus the Constitution of Kenya, 2010 set out to streamline that electoral system. Part of that streamlining was the clear provisions on the settlement of electoral disputes, the timelines involved and various principles running across the entire span of the Constitution****. In defending he Constitution and the aspirations of the Kenyan people, this Court must always be forward-looking, bearing in mind the consequences of legal uncertainty upon the enforcement of any provision of the Constitution"* [emphasis supplied].

[136] And we returned to the timelines theme in the recent ***Munya*** case (at paragraph 62):

"Fresh in the memories of the electorate are those times of the past, ***when election petitions took as long as five years to resolve, making a complete mockery of he people's franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about 'timelines and timeliness', was intended to redress this aberration in the democratic process.*** *The country's electoral cycle is five years. It is now* ***a constitutional imperative that the electorate should***

know with finality, *and within reasonable time, who their representatives are.* ***The people's will, in name of which elections are decreed and conducted, should not be held captive to endless litigation****"* [emphasis supplied].

[137] We have noted the submissions on this issue of timelines by counsel for the appellant, who referred to the Supreme Court of Nigeria decision in ***Senator John Akpanudoedehe & Others v. Godswill Obot Akpabio & Others,*** S.C. of Nigeria Appeal No. 154 of 2014, in support of the argument that once the time granted by the Constitution to hear an election petition lapsed, there was no longer a live petition and, therefore, nothing upon which a retrial order could be given. It was urged that an extension of time for hearing the petition, in those circumstances, would amount to judicial legislation which would not be well-founded in law (see the passage in that case, set out at paragraph 18 of this Judgment).

[138] The Nigerian Supreme Court dealt with the subject of lapse of constitutional timelines also in the case of ***Chief Doctor Felix Amadi & Anor v. Independent National Electoral Commission (INEC) & Others*** S.C. of Nigeria Appeal No. 476 of 2011, holding that:

*"There is no room for the exercise of any discretion in relation to the allotted time. Everything needed to deliver the judgment must be done and the judgment delivered within sixty (60) days of the date of delivery of judgment on appeal…The appeal in question has lapsed by one day as at 7th December 2011 when the same was listed for hearing****. That means that as at that date the appeal had ceased to exist in law and could therefore not have been heard – it was dead in the eyes of the law and the Constitution"*** [emphasis supplied].

[139] The burden of the argument, founded upon the Constitution and the law as these stand; upon the lines of conviction in counsel submissions; and upon the relevant comparative judicial experience, in our perception, does not stand in favour of the 1st respondent. We would not agree with the opinion of counsel for the 1st respondent that the Appellate Jurisdiction Act (Cap. 9, Laws of Kenya) confers *jurisdiction* upon the Court of Appeal to remit an *electoral-dispute matter* back to the High Court after the six-month limit set out in Article 105(1) and (2) of the Constitution has lapsed. The Constitution and the Elections Act, which are the foundation of a special electoral-dispute regime, confer upon the High Court the power to determine electoral disputes *within six months;* and the appellate Court cannot confer upon itself powers to resurrect the jurisdiction of Election Courts, after such jurisdiction is exhausted under the law.

[140] It is a commonplace that the Constitution is the supreme law of the land, in the terms of its Article 2(1), which binds all persons and State organs. It follows that the Constitution is sovereign, and holds a place of superiority over any orders and decrees of a Court. Accordingly, the Court of Appeal could not confer jurisdiction upon the High Court to conduct a recount, as the jurisdiction of the High Court under Article 105(1) and (2) of the Constitution, was in the first place contestable on the ground of expired timelines, and would in any case have been already exhausted.

[141] As to learned counsel for the 1st appellant's argument that this Court should not rely on cases from the Nigerian Supreme Court, because of variations in constitutional profile between the two countries, we affirm that any reference to foreign case law is merely for persuasive effect, in respect of broad lines of reasoning – and certainly *not for a binding mode of resolution to the case before this Court*, which must rest on its unique facts and circumstances. This position is well reflected in the concurring Judgment of Rawal DCJ & VP in the case of

George Mike Wanjohi v. Steven Kariuki & 2 Others Petition No. 2A of 2014 (at paragraph 149):

> *"...Electoral disputes in Kenya are resolved with particular reference to constitutional values and principles which should be emphasized and, as demonstrated by this Court,* ***upheld and interpreted in the manner required by the Constitution****"* [emphasis supplied].

[142] We are, with respect, of a different view from that of learned counsel for the 1st respondent, on the question whether Article 105(2) of the Constitution deals merely with *timelines,* and not the *jurisdiction* of the Court. We agree with counsel for the appellant, who submitted that Article 105(2) of the Constitution is concerned with mandatory timelines that embody jurisdictional requirement. ***Black's Law Dictionary,*** 9th Ed. (at page 929) defines jurisdiction as:

> ***"a court's authority to hear a wide range of cases, civil or criminal that arise in its geographical area."***

[143] There is no standard mode of delineating a Court's jurisdiction. In this instance, the Constitution is clear in its wording in Articles 105(1) and (2), that the High Court has the power to hear and determine electoral disputes relating to membership of Parliament, and this power must be exercised within a *six-month period*. The clear import of the prescribed timelines, within which to determine electoral disputes, is that they inherently and compellingly subsume jurisdiction.

[144] It is thus clear to us that the Court of Appeal had disregarded the constitutionally-set, six-month timeline for determining a parliamentary-membership electoral dispute; and it had attempted to confer upon the High Court extended jurisdiction for carrying out a vote-recount.

[145] Did the Court of Appeal misinterpret the provisions of Article 87(1) of the Constitution and Section 85A of the Elections Act, when it "delegated the duty of determining the appeal" to the High Court which, as we have found, would have been *functus officio* – if it had jurisdiction in the first place? Counsel for the appellant and for the 2nd and 3rd respondents urged that the Judges of Appeal had erred in law, when they failed to hear and determine the appeal before them, and instead issued an order delegating to the High Court the task of *determining an appellate question*. According to the **Black's *Law Dictionary,*** 9th ed. (page 514), "determination" means:

> ***"a final decision by a Court or an administrative agency – 'the Court's determination on the issue'."***

From a reading of the Judgment of the Court of Appeal, it is clear that the Court *heard the submissions of the parties* in relation to five grounds of appeal, and *issued orders* – without regard to the question of jurisdiction as it applied in relation to the High Court.

[146] Article 87(1) of the Constitution requires Parliament to enact legislation for the *timely resolution of electoral disputes*. The primary legislation which Parliament enacted, dealing with electoral processes and disputes, is the Elections Act. Section 85A of this Act is the provision which deals with appeals on electoral disputes, at the Court of Appeal. It thus provides:

> ***"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be –***
>
> ***(a) filed within thirty days of the decision of the High Court; and***

(b) heard and determined within six months of the filing of the appeal."

[147] In the ***Munya*** case, this Court pronounced itself clearly on the nexus between Article 87(1) of the Constitution, and Section 85A of the Elections Act, as follows:

> ***"[62] The Constitutional sensitivity about 'timelines and timeliness', was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation.***
>
> ***"[63] Herein lies the nexus between Article 87(1) of the Constitution and Section 85A of the Elections Act. Election petitions, not surprisingly, come up for special legislation that prescribes the procedures and scope within which Courts of law have to resolve disputes. Thus, judicial resources should be utilized efficiently, effectively and prudently. By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.***
>
> ***"[64] Section 85A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says: 'limit your appeals to the Court of Appeal to matters of law only.'"***

[148] The factor of time and timelines, at the very beginning in the High Court, when the 1st respondent filed his petition on 10th April, 2013 – 36 days rather than

28 after final declaration of results on 4th March 2013 – goes to jurisdiction.

[149] By the principles considered in this Judgment, and by the settled authorities of the Court, the High Court lacked jurisdiction to entertain the 1st respondent's petition. Similarly, the Court of Appeal lacked jurisdiction – in several respects, as already noted. Consequently, the determinations made in both superior Courts were null. We would dispose of this cause on the basis of the law of jurisdiction.

E. THE COURT'S MAIN FINDINGS: A SUMMARY

[150] The beginning of this matter goes back to the High Court, in its capacity as "Election Court" determining the original petition on 5th September, 2013, and dismissing it. Consequently, the respondent in that petition, who is the appellant herein, was affirmed as the candidate entitled to occupy the seat of Member of Parliament for Narok East Constituency.

[151] Were the original proceedings before the High Court, as "Election Court", invalid, *having been filed 36 days – instead of the prescribed 28 – after the declaration of election outcome by the 3rd respondent herein?*

[152] If the High Court proceedings were invalid, what was the status in law of the appeal taken before the Court of Appeal?

[153] Does the factor of prescribed timelines in the conduct of an election petition, have any bearing on the *jurisdiction* of the Court entertaining the matter? How does this affect the position of the High Court and the Court of Appeal in this matter? And what are the implications for the jurisdiction of the Supreme Court, as the ultimate appellate Court?

[154] Upon an extensive consideration of the factor of timelines in the processing of electoral disputes, under the Constitution and the statute law, this Court has come to the conclusion that the jurisdiction of the Election Court is *linked to timelines*. Consequently, the trial Court *lacked jurisdiction* to entertain the electoral question remitted by the Court of Appeal, once its six-month mandate had lapsed. Indeed, even at the very beginning, *the High Court had lacked jurisdiction* to entertain the case, as the petition had been filed belatedly by as much as eight days.

[155] Just as the High Court lacked jurisdiction to entertain the original petition, on the grounds of breached timelines, so had the Court of Appeal no jurisdiction to entertain the matter.

[156] However, the law of jurisdiction does not apply in the same way for the three superior Courts: the competence of both the High Court and the Court of Appeal being more definitively regulated, whereas that of the Supreme Court flows from broader empowerment, for general oversight of the interpretation and application of the Constitution, and of the matters of law of general public importance.

F. THE DISSENTING OPINION OF MOHAMMED IBRAHIM, SCJ

[157] I have extensively read the majority decision of the Court and I am unable to agree with it in totality. The factual rendition of this matter is well captured in the majority decision of the Court. Four issues for determination have been delimited and as the first issue deals with a question bordering on jurisdiction, I proceed to consider it first.

[158] In answering the question whether the proceedings before the High Court were void *ab initio*, two pertinent aspect of the issue crystallizes for determination

as raised by the 1st respondent: when can a question of jurisdiction be raised; and whether parties are bound by their pleadings when raising a question of jurisdiction.

[159] Whether the petition at the High Court was filed out of time is not in contention. It is common ground that indeed it was filed 36 days after declaration of results by the IEBC. The Constitutional principle for timely disposal of electoral disputes has been severally reiterated by this Court in its various recent decisions. This principle springs from Article 87(1) of the Constitution which provides:

> **"Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes".**

[160] The Constitution sets the tone of this principle when it provides the time within which to lodge an election dispute in both a presidential and a non-presidential election.
Article 140 provides:

> **(1) A person may file a petition in the Supreme Court to challenge the election of the President-elected <u>within seven days after the date of the declaration of the results</u> of the presidential election.**

Article 87(2 provide:

> **Petitions concerning an election, other than a presidential election, <u>shall be filed within twenty-eight days after the declaration of the election results</u> by the Independent Electoral and Boundaries Commission.**

[161] In drafting Article 87 of the Constitution, the drafters were informed by the dark election petition history in our country where petitions could drag on into the

next electoral cycle. This was captured by this Court in the case of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji,*** Petition No. 2B of 2014 (***Munya*** case) at paragraph 62 thus:

> **"[62]Article 87 (1) grants Parliament the latitude to enact legislation to provide for "timely resolution of electoral disputes." This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about "timelines and timeliness", was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in name of which elections are decreed and conducted, should not be held captive to endless litigation."**

[162] This principle of timely disposal of election disputes informed parliament in the enactment of Section 76(1)(a) of the Elections Act. However, this section was declared unconstitutional by this Court in the ***Joho*** case, for having anchored the 28 days within which one is to file a petition challenging election results in an election other than a presidential election on the publication of the results and not the declaration of results as provided for in the Constitution.

[163] The retrospective application of the declaration of section 76(1)(a) of the Elections Act was endorsed by both the Court of Appeal and this Honourable Court. Recently, in the case of ***Anami Silverse Lisamula v. The Independent Electoral and boundaries Commission & 2 Others***, Petition No. 9 of 2014 (***Lisamula*** case), this Court quashed the proceedings of the superior courts after a

finding that the petition was filed 35 days after declaration of results. The Court held as follows [at paragraph 124]:

> **"On the basis of the foregoing considerations, we find that the petition in the High Court, which was filed 35 days after the date of final declaration of results by the Returning Officer, fell outside the 28 days prescribed by the Constitution; and thus, all the proceedings ensuing from such declaration of results, at the High Court and the Court of Appeal, were a nullity. Neither of the two Courts had the jurisdiction to hear and determine questions founded upon such election results."**

[164] In the ***Lisamula*** case, this Court traced how the jurisprudence was developing from the Court of Appeal to this Court on the retrospective application of the declaration in the ***Joho*** case. The Court of Appeal had applied it in ***Suleiman Said Shahbal v. The Independent Electoral and Boundaries Commission and 3 Others***, Civil Appeal No. 42 of 2013; and in ***Paul Posh Aborwa v. Independent Electoral and Boundaries Commission and two others***, Civil Appeal No. 52 of 2013. It was also noted that this jurisprudence had been buttressed by the Supreme Court in the ***Mary Wambui*** case.

[165] Consequently, conscious of its fidelity to its mandate as provided in section 3 of the Supreme Court Act, 2011, the Court ruled that departing from such an emerging jurisprudence without any course for such a fundamental shift will be throwing Kenya's jurisprudence into disarray. It held as follows [at paragraphs 119-120]:

> **"Hence, in the *Wambui* Case this Court concurred with the Court of Appeal on how the declaration of the unconstitutionality of section 76(1) (a) of the Elections Act should be applied. In taking a**

common position, the two superior Courts had set a steady jurisprudential foundation on this question.

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 ofour jurisprudence under the new constitutional dispensation.

[166] Counsel for the 1st respondent has urged that the Court distinguish the ***Mary Wambui*** case from the current case. His main argument is that there was no pleading filed on this issue and neither was a prayer sought for striking out the petition contrary to the position in the ***Mary Wambui*** case. Counsel's submissions border on this Court being called upon to depart from its earlier decision. The question then is whether a case has been sufficiently made for the Court to depart from its earlier decision.

[167] In ***Jasbir Singh Rai and three others vs Tarlochan Singh Rai and four others,*** Petition No. 4 of 2012 (***Jasbir*** case), this Court considered whether and when it can depart from its earlier decision. Adopting the dictum in **The Bengal Immunity company Limited v. The State of Bihar and Others** [1954] INSC 120, it held:

"[43] 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.

[44] Such a latitude for departure from precedent exists not only in principle, and from well-recorded common law experience, but

also by virtue of the express provision of the Constitution. 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."*

[168] The Court then laid down principles to be considered in departing from its decision thus:

> **"61] As times, values, perceptions, and yardsticks of legitimacy and right, keep evolving, however, the Supreme Court retains a competence and discretion, when properly moved, and on weighty grounds, to reconsider its precedents, and to vary them as may be appropriate.**
>
> **[62] Subject to that broad principle, certain directions may, on this occasion, be laid down:**
>
> ***(i) where there are conflicting past decisions of the Court, it may opt to sustain and to apply one of them;***
> ***(ii) the Court may disregard a previous decision if it is shown that such decision was given per incuriam;***
> ***(iii) a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion;***
> ***(iv) the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness."***

[169] I dissented in this case but added further principles for departing from a previous decision thus:

"[136] Therefore, the Court should, in addition, take into account the following principles, when considering whether to depart from its precedents:

i) A decision that is manifestly wrong on the face of it will occasion a departure by the Court. What is manifestly wrong will depend on a conscientious determination by the Court, and will vary from case to case.

ii) Whether a decision is erroneous, and severely affects the lives of people, and impacts negatively on the general welfare of the public.

iii) Upon consideration of such elements, the Court will be ready and willing to depart from an erroneous decision, where the decision is a recent one and the decision has not as yet created property rights around which individuals' interests have vested.

[170] The 1st respondent urges the Court to depart from the ***Mary Wambui*** case, but has a sufficient basis been laid? Has any of the foregoing principle been met? Counsel contended that the ***Mary Wambui*** case was decided on the basis of unique facts before the Court and that the present case raises a different scenario. I do not agree with counsel. This Court's decisions are binding as provided by Article 163(7) of the Constitution. Consequently, this Court cannot make decisions just to fit a particular case. Its decisions are arrived at after detailed consideration and are meant to finally settle legal controversies and shape the Country's jurisprudence. This was stated in ***Jasbir*** thus:

"[60] The emerging lesson is that the decisions of Kenya's Supreme Court, which ought always to be arrived at only after the most conscientious and detailed consideration, will stand as the

binding reference-point in the norms governing the judicial process. Such a position is vital for the maintenance of the certainty, predictability, and jurisprudential standards that sustain the principles of the Constitution, and the rights and duties flowing from the legal set-up, and which provide sanctity for the legitimate actions of the people."

[171] Suffice it to state that a decision of this Court is always intended to settle a fundamental question of law and has to be departed from only after a sufficient ground has been established. In the present case, I do not think that the 1st respondent has put forward a compelling case to justify the Court not following the ***Mary Wambui*** decision.

[172] Further, counsel for the 1st respondent contended that parties are bound by their pleadings and the appellant had not pleaded this ground. I agree with counsel that indeed the correct legal position is that a party who comes to court to seek redress is bound by his pleadings. Counsel cited ***Ferdinard Ndung'u Waititu vs Independent Electoral & Boundaries Commission & 8 Others*** (2013) eKLR in support of his submissions. In that case, Justice R. M. Mwongo, PJ held:

"The third principle is that, as in all litigation, a petitioner is bound by his pleadings. It is common that a petitioner will file a petition and will in the course of the proceedings veer away from the initial track. This puts the opponents into a difficult position in knowing what the real case they must answer is, and what it is the court must determine. The point was well put by Justice kimaru in MAHAMUD MUHUMED SIRAT V ALI HASSAN ABDIRAHMAN AND 2 OTHERS NAIROBI PETITION NO. 15 OF 2008 [2008] eKLR where he stated that:

> **"From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he has not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This Court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he has filed in court, and in particular, the petition."**

[173] The honourable Judge of the High Court is right and I am not about to depart from this legal principle. The Court of Appeal in ***Independent Electoral and Boundaries Commission & another v. Stephen Ndambuki Muli & 3 others***, Elections Petition No. 2/2013 reiterated this position citing and endorsing the dictum of Lord Denning in **JONES Vs. NATIONAL COAL BOARD** [1957]2 QB 55 that;

> ***"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."***

[174] *While this is the case though, I would like to state that this principle refers to issues as framed by parties and reliefs that border on the rights and obligations*

as between parties. However, a question of nullity of proceedings that borders on jurisdiction does not qualify as settling or calling for a determination as regards rights and obligations as between parties in litigation. It is a legal question. This is why it can be raised at any time, by any party and even by the court itself.

[175] *Commenting on Nigerian jurisprudence,* **Akintunde Esan**, in his paper, ***The Principles of Law on the Jurisdiction of Courts of Law in Nigeria*** writes:

> **"The jurisdiction of a court of law is a very hard matter of law which is donated by the Constitution and the enabling statute. A court cannot confer or vest in itself jurisdiction not specifically conferred on it by a statute or the Constitution".**

Mr. Akintunde continues and emphasis the centrality of jurisdiction in litigation citing Nigerian case law thus:

> *"In* ***Nasir v. Kano State Civil Service Commission****, per* ***Ogbuagu, JSC*** *in his concurring judgement held as follows:*
>
> > *It is now firmly settled that issue of jurisdiction or competence of a court to entertain or deal with a matter before it, is very fundamental. <u>It is a point of law and therefore, a rule of court, cannot dictate when and how, such point of law can be raised. Being fundamental and threshold issue of jurisdiction, it can be raised at any stage of the proceedings in any court including this Court".</u>* ***(Emphasis provided)***

[176] *Consequently, where such a jurisdictional question is raised, a challenge of parties being bound by their proceedings cannot rightly lie. The law is the preserve of the courts which courts take judicial notice of. A party does not have a 'monopoly' of the law. The court does have this monopoly as it* applies *the law to a set of facts in reaching its decision. Hence, a court of law can rightly raise a legal question of jurisdiction even where no party raises such a question. Recently, the*

Court of Appeal did this in ***Ferdinard Ndungu Waititu v. The Independent Electoral and Boundaries Commission and eight others****, Civil Appeal No. 324 of 2013, in which Kiage, JA observed with regard to the competency of the appeal thus:*

> ***"When the appeal first came for hearing before us, we raised*** *suo motu,* ***a question on the competence aspect (sic) in light of section 85A of the Elections Act and invited the parties to address us on the same. We in particular drew the attention of the parties to the decision of this Court in PATRICK NGETA KIMANZI VS MARCUS MUTUA MULUVI & OTHERS, CIVIL APPEAL NO. 191 OF 2013…All counsel expressed the view that the question was an important one on which they needed time before addressing us.***
>
> ***…***
>
> ***As I have previously mentioned this was not an issue raised by any of the respondents. It is the Court itself that sought the parties' views on the matter since it goes to the very foundation of the appeal."***

[177] In **Ocheja Emmanuel Dangana v Hon. Atai aidoko Aliusman & 4 Others, SC. 11/2012 (The Dangana case)** Judge Bode Rhodes-Vivour, JSC said thus:

> **"A successful preliminary objection terminates the hearing of the appeal…Jurisdiction has always been a threshold issue. It must be decided once it is raised and quickly too. A trial or a hearing conducted without jurisdiction amounts to a wasted effort, a complete nullity no matter how well the matter was decided. <u>That explains why the issue of jurisdiction can be raised at any time, in the trial court, on appeal, or in the Supreme Court for the first time.</u>" (Emphasis provided).**

[178] Consequently while in agreement with counsel for the 1st respondent that a party is bound by his pleadings, I hasten to add that a question of competence of proceedings which borders on jurisdiction of the court to admit such proceedings does not fall to be left to the discretion of parties' pleadings as the same is a matter that can be taken up by the Court *suo motu*. It is true that the appellant in this matter did not plead for dismissal of the appeal on the ground of nullity but raised it in submissions. However, I have no doubt in my mind that the record of appeal having been filed in this Court, the Court will have perused the same on its own accord and upon establishing the time question, raised it with the parties. A court is bound to always satisfy itself whether or not it has jurisdiction to hear and determine a matter before it; and to also warn itself that the matter before it is one which it should admit under its jurisdiction for consideration.

[179] I reiterate this Court's noble but sacred mandate under section 3 of the Supreme Court Act, 2011, to establish a pragmatic indigenous jurisprudence founded on good governance and the rule of law. Such jurisprudence cannot be founded on divergent decisions in cases where the facts are similar. Consequently, I am satisfied that this matter was filed outside the 28 days required by the law. This is a fact which as I have already stated, was not disputed by the respondents. The challenge that this issue was not pleaded does not hold given the holding of the majority and my holding herein.

[180] The question which this Court ruled on in ***Mary Wambui*** case and in the ***Lisamula*** case is one and clear: the petition at the High Court was filed out of time. This is the same question that we are called upon to rule on in this case. The common-law doctrine of precedent stipulates that it will be for the good of all that similar cases in facts are determined in a similar manner. This is what this Court addressed in the ***Lisamula*** case when it emphasised the need for coherence of this Court's decisions thus [at paragraph 123]:

"The instant matter was pending in the Court of Appeal, and thus, the finality clause does not apply; the matter falls for determination squarely on the precedent set in the *Mary Wambui* Case. Just as in the *Jasbir Rai* Case, this Court has recently affirmed the need for *certainty in the interpretation and application of constitutional provisions*. That principle should be upheld in the application of judicial precedents. The learned Chief Justice in his concurring opinion, in *the Gatirau Peter Munya* Case*, Petition No. 2B of 2014*, thus observed (paragraph 233):

> **"*Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of the various interpretative frameworks duly authorized. The overall objective of the interpretive theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya"* [emphasis supplied]."**

[181] The upshot of the foregoing is that I agree with the majority finding that the petition at the High Court in this matter was filed outside the constitutional timelines of 28 days after the declaration of results.

[182] Hence, all the proceedings at the High Court and the Court of Appeal that sprung from a petition that was a nullity are also null and void. Hence this Court does not have jurisdiction to entertain this appeal. I refer to the recent findings in the ***Lisamula*** case which this Court held that [at paragraph 125-126]:

"Further, having found that these proceedings were a nullity, we hold that we have no jurisdiction. This Court cannot entertain a

matter that is null and void *ab initio* as a court of law cannot legitimately consider an issue in which it has already declared that it has no jurisdiction. We have severally cited the dictum of Nyarangi, JA in the *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 that jurisdiction is everything and where a court of law holds it has no jurisdiction, it should down its tools. In the *Mary Wambui* case that was the legitimate route that this Court took once it found that the proceedings were a nullity and it had no jurisdiction. Such a pragmatic approach cannot be departed from in this matter.

Consequently this Court's pen rests".

[183] For the foregoing reasons, I concur with the majority that the proceedings in the High Court were a nullity *ab initio*, having been premised on a petition filed out of time. On the basis of the ***"Lillian S"*** case, this Court should have downed its tools and not delve into any other question on their merits. With much respect and deference, I would disagree with my brothers and sisters in the majority when they did not rest the matter at this point and went ahead to entertain consideration of other issues on merit.

[184] In my view, the decision of the majority with regard to not downing their pens upon making a determination that the High Court proceedings were a nullity, and delving into other questions of merit, is a departure from the ***Mary Wambui*** case and the ***Lisamula*** case. While this Court has the jurisdiction and discretion to depart from its past decision, as I have already discussed in this opinion, there is no justification to do so in this case. Both in the ***Mary Wambui*** case and the ***Lisamula*** case, there were other questions which this Honourable Court identified as falling for determination. All those questions had a 'great constitutional' bearing as the Supreme Court is bestowed with jurisdiction and the mandate under section

3 of the Supreme Court Act, No. 7 of 2011 to settle constitutional questions with finality. However, this Court held, and rightly so, that having found that the proceedings in the two cases were a nullity *abi initio*, the Court will down its tools; and it did not proceed to determine the other framed issues.

[185] My brothers and sisters in the majority have cited with approval the sentiment of Mutunga, C.J. & P. in the ***Jasbir Singh Rai*** case [paragraph 81]:

> ***"[I]t will be good practice for this Court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it."***

While I agree with the general principle enunciated by the Honourable Chief Justice that the Supreme Court should be ready to pronounce itself on the interpretation of a constitutional issue, I do not humbly think that the context of this present case do give rise to a constitutional moment for the Court to seize and go into any other issues after making a finding that the petition was a nullity *ab initio* and that the Court of Appeal and the High court lacked jurisdiction to hear it.

[186] With tremendous respect to my brothers and sisters, it is my opinion that such a constitutional moment as contemplated by the Honourable Chief Justice can only arise where the Court is satisfied that it has jurisdiction. Jurisdiction is everything and as I held in the ***Jasbir Singh Rai*** case, such a moment will only arise where the matter is rightly before the Court: the matter should be substantively brought before the Court and not tangentially.

[187] Hence, it is my opinion that the Court should have stopped upon making the finding it made on this first issue alone. As I have agreed with the majority only in

respect to the issue of nullity, I endorse all the final orders proposed by the majority as the orders of the Court.

G. COURT ORDERS

[188] This case has given occasion for this Court to illuminate the nature of its jurisdiction, as provided for in Article 163 of the Constitution, in the Supreme Court Act, 2011 (Act No. 7 of 2011) [Section 3], and as construed in case law; and to examine the jurisdiction of both the High Court and the Court of Appeal in electoral dispute-settlement.

[189] Such focus upon the primary jurisdictional question implicitly resolves other issues raised by the parties; and in our opinion, no rational cause will be served by formally determining most of the remaining questions.

[190] Our final Orders are as follows:

(a) The appellate Court's Judgment of 28th March, 2014 is annulled.

(b) The 3rd respondent's *Gazette Notice* ***No. 3155 of 15th March, 2014 declaring the appellant herein as the duly-elected Member of Parliament for Narok East, is reinstated and sustained.***

(c) At all stages of the cause – in the High Court, the Court of Appeal and the Supreme Court – each party shall bear his or its own costs.

DATED and **DELIVERED** at **NAIROBI** this 6th day of August, 2014.

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

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA